# FAIR EMPLOYMENT TRIBUNAL

**CASE REFS: 49/18FET**
**5663/18**
**54/18FET**
**5709/18**
**10/19FET**
**967/19**

**CLAIMANT:** **Kevin Murphy**

**RESPONDENT:** **Home Office**

## DECISION ON A PRE-HEARING REVIEW

The decision of the Tribunal is that the claimant's claims against the respondent of unlawful sex discrimination and against the respondent in respect of the acts of the claimant's trade union and/or trade union representatives are struck out as having no reasonable prospect of success. The claimant's application to amend his claims 49/18FET, 5663/18, 54/18FET and 5709/18 to include claims of sex discrimination and claims against the respondent arising from the conduct of his trade union representatives is refused for the reasons set out in this decision. The claimant's claims of unlawful sex discrimination against the respondent comprised in claim 10/19FET and 967/19 are struck out as an abuse of process and for want of jurisdiction. The Tribunal refuses the claimant's application to join PCS as a respondent for the further reasons set out in the decision.

**Constitution of Tribunal:**

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

**Appearances:**

**The claimant did not appear and was not represented.**

**The respondent was represented by Mr J Kennedy of Counsel, instructed by the Crown Solicitor's Office.**

**Background**

1. The claimant is a passport officer within the respondent organisation, having been employed since 4 January 2016.

2. The claimant has presented a number of claims to the Industrial Tribunal. The history of the filing of his claims can be summarised as follows. On 5 April 2018 the claimant presented two claim forms electronically, which were registered as a single claim reference 49/18FET and 5663/18IT. The first claim of these claim forms ran

to 15 pages and the second of these claim forms ran to 18 pages. The content of the first of these was identical to the content of the second, although the second included additional material that the claimant believed had not copied across successfully when he electronically submitted the first claim form. Both of these claim forms made claims of unlawful disability discrimination and unlawful discrimination on grounds of religious belief/political opinion. The claimant presented a further claim to the industrial tribunal on 17 April 2018. This claim, registered as claim reference 54/18FET and 5709/18IT ran to 21 pages and made claims of unlawful disability discrimination and unlawful discrimination on grounds of religious belief/political opinion. This claim repeated the allegations in the first claim forms and included additional allegations. It also purported to add a label of disability discrimination to acts which had been presented as acts of religious discrimination in the description section of the first claim reference 49/18FET and 5663/18IT. These claim forms were narrative in form and did not properly particularise/categorise the type of discrimination alleged. The sole respondent named in the claim forms was the Home Office.

3. On 26 May 2018 the claimant wrote to the Tribunal forwarding an email which appeared to set forth new factual matters, and potentially introduced new heads of claim, in respect of unlawful discrimination on grounds of sex and perceived sexual orientation. The claimant's email was comprised of 59 paragraphs. All of these paragraphs were in the form of a question, with the first commencing with "Please explain" and the next 58 paragraphs commenced with "Why?" These questions seemed to include matters which lay outside the scope of his claims 49/18FET, 5663/18IT, 54/18FET and 5709/18IT.

4. The claimant's claims were subject to Case Management on 22 August 2018. The Employment Judge listed a Pre-Hearing Review "*to consider and determine whether the claimant requires to amend his claim form to include all or any of the matters set out in the claimant's email of 26 May 2018; and if he requires to do so, whether the tribunal should grant leave to the claimant to amend his said claim forms in relation to all or any of the said matters set out in the claimant's email of 26 May 2018."*

5. The Pre-Hearing Review was listed for hearing on 25 October 2018. The claimant attended the hearing and was represented by Counsel, instructed by the claimant's then solicitor, who was also present at the hearing. At the outset of the hearing, the claimant's Counsel was asked to confirm whether the claimant was pursuing an amendment application. It was confirmed that the application was being pursued. The claimant's Counsel was reminded of the need to properly set out and particularise the nature of the amendment being pursued. Despite the fact that the claimant was represented by experienced Counsel, the amendment application was pursued on the basis of the email of 26 May 2018, which did not properly set out and particularise the nature of the amendment sought.

6. In advance of that Pre-Hearing Review, the respondent's representative had prepared a table which set out each of the 59 paragraphs in the email, along with the respondent's contentions in respect of same. Before the hearing had commenced, there had been engagement between the parties' representatives and as a result agreement on certain matters had been reached. The claimant's Counsel informed the Tribunal that he had consulted with the claimant, using the tabular document which had been prepared by the respondent's representative. Further, he advised the Tribunal that, as a result of that consultation, the claimant

had consented to remove from that document allegations against his trade union and allegations of unlawful sex discrimination. The party's representatives had exchanged a further version of the document between themselves to reflect this, and this revised document was provided to the Tribunal. This document showed those paragraphs of the email which were no longer being pursued as an amendment application "struck through".

7. The claimant's representative informed the Tribunal that those paragraphs which remained in the revised document, and which were not "struck through", represented the extent of the claimant's amendment application. The claimant's representative acknowledged that some of the material which remained was already included within the claim forms which had been presented to the Tribunal by the claimant. The claimant's representative informed the Tribunal that it was his understanding that the remaining matters did not constitute any new claim, but merely consisted of additional material in respect of the existing claims, which he confirmed were claims brought under the Fair Employment and Treatment (Northern Ireland) Order 1998 and the Disability Discrimination Act 1995. No application was pursued to join any additional respondent at that hearing.

8. As the Tribunal proceeded to consider some of the further matters which were not "struck through", the claimant's representative confirmed that *"LM EO not disciplining WW when saying to females in the substantial team he was a pussy magnet"* and *"Why acting EO SM didn't discipline WW when I made her aware of a sectarian image he had circulated on his social media account?"* were not being proceeded with. In respect of the latter allegation, this was on the basis that same was already set out in the claim. The claimant's decision to not pursue these claims in the amendment application was recorded in the Record of Proceedings. The Tribunal did not issue an order dismissing these claims at that time, as no leave to amend the claims had been given, and until such leave was granted, no such claims, capable of being the subject of a dismissal order, were before the Tribunal.

9. The Tribunal rose during the Pre-Hearing Review to allow the parties the opportunity for further discussion, to clarify the extent of the application being pursued and to confirm whether this was opposed. Following this time, and at the request of the parties, the Tribunal adjourned the hearing and gave further directions. Regrettably, these directions were not complied with by the claimant, who became unrepresented shortly after the hearing. The claimant's claims were therefore subject to further case management on 28 November 2018, to assess progress in complying with directions which had been given. At this Case Management Discussion, voluminous correspondence which the claimant had directed to the tribunal office was reviewed and further directions were given to the claimant. The Pre-Hearing Review was reconvened to take place on 29 January 2019. The issue of the potential need for a ground rules hearing in accordance with **Galo v Bombardier Aerospace UK [2016] NICA 25** was raised by the respondent's representative. The Tribunal directed the claimant to make any application for adjustments to the Tribunal and to provide supporting medical evidence, as appropriate.

10. On 15 December 2018, the Tribunal received a further claim from the claimant which was registered as 10/19FET and 967/19IT. This claim was a claim of unlawful discrimination on grounds of disability, religious/political view and gender. The only respondent named by the claimant was the Home Office. This further claim ran to 40 pages and appeared to be a composite restatement of all of the

allegations which had previously been made and also included claims of sex discrimination and allegations regarding the claimant's trade union, PCS. However, further allegations were included, which predated the submission of the original claim, and which were not included in the email of 26 May 2018 or raised at the Pre-Hearing Review on 25 October 2018, for example allegations that he had been subject to sexual advances from female staff. The further claim also purported to attribute the additional label of sex discrimination to matters raised in earlier claims, as well as raise additional factual allegations supporting his other discrimination claims. Further, the claim form included further issues and commentary which post-dated the application to amend, extending in time until December 2018. The claimant also set out details of the adjustments he would need to allow him to effectively participate in the substantive hearing in the claim form lodged on 15 December 2018. At a Case Management Discussion on 11 January 2019, it was ordered that this additional claim be considered with and heard together with the earlier claims. When asked why the claims against his trade union and in respect of sex discrimination had been repeated in the further claim form, despite those claims having been abandoned at the earlier Pre-Hearing Review on 25 October 2018, the claimant replied that he had left them in by mistake. The respondent entered a response, and the outstanding issues as to the scope of the claim were to be reserved as questions to be determined at the main hearing. Further, the claimant's application for reasonable adjustments at the hearing was considered in accordance with the guidance from the Northern Ireland Court of Appeal in Galo. The adjustments which were put in place, with the agreement of the parties, are recorded at paragraphs 10ff of the Record of Proceedings which issued following that Case Management Discussion. Further directions to allow medical evidence to be obtained and considered and to facilitate the listing of the case were given and a further Case Management Discussion was scheduled to take place on 7 June 2019, when it was anticipated that the medical evidence would be available. The Tribunal recognised the need to keep the adjustments which had been put in place under review, as recorded in the Record of Proceedings which issued to the parties. In addition, given that the claimant's correspondence of 26 May 2018 presented a series of questions, it was agreed that the respondent would also consider this correspondence as a request for information in relation to the claims which were before the Tribunal. Thereafter, it was necessary to convene a further Case Management Discussion on 22 February 2019 to consider further directions in relation to the provision of medical evidence and medical examination on behalf of the respondent. The claimant provided a copy of a medical report by Dr Doherty to the Tribunal on 5 April 2019, which was considered. A further Case Management Discussion was convened on 11 April 2019 to consider correspondence from the claimant dated 24 March 2019 in respect of the issue of discovery. This did not take place following a late adjournment application by the claimant. When the vouching medical evidence was received, the claimant's GP recorded that the claimant felt unable to attend. The Case management Discussion was rescheduled for 1 May 2019.

11. On 17 April 2019, the claimant wrote to the Tribunal stating that he had placed himself under house arrest due to his fears for his life and false allegations made against him.

12. On 24 April 2019, the claimant wrote to the Tribunal, formally requesting that his Union PCS be joined to the proceedings. He included a link to an online article published by the Department for Economy about trade union members' rights, namely the right to complain to a tribunal about unlawful detriment and/or dismissal

on grounds of trade union membership/activities. He quoted a small section of this article (but without attributing the quotation to this article) which related to pressure exerted by a trade union in an unfair dismissal case. The claimant remains an employee of the respondent, and has not, to date, been dismissed.

13. On 30 April 2019, the Tribunal received an email from the claimant asking for the Case Management Discussion to be further postponed, referring to threats on his life, and his being unable to leave his home until his bullet proof vest arrives. The claimant was advised by email dated 30 April 2019 that in the absence of written confirmation from PSNI of a verified threat to the claimant's life, the Case Management Discussion would proceed as scheduled. The email of 30 April 2019 also made reference to the claimant having been summoned to a sickness absence meeting by his employer, as well as his needing to prove that he had engaged in *"protected activities"* and *"whistleblowing statutory rights",* as well as *"filing a lawsuit for retaliation".*

14. The claimant attended the Case Management Discussion, which had been rescheduled from 11 April 2019 to 1 May 2019, when issues regarding discovery, arising from correspondence between the parties following the claimant's email dated 24 March 2019, were considered. The Tribunal was also provided with the report of Dr Daly, which the Tribunal rose to consider. The Record of Proceedings, which issued to the parties, records that: *"The tribunal was satisfied, and the parties agreed, that the reasonable adjustments put in place by the tribunal remain appropriate."* In addition the respondent's representative indicated that he was considering making an application for a Pre-Hearing Review for strike out/payment of a deposit. At this Case Management Discussion, the claimant's correspondence dated 3 April 2019 was also considered, in which he asserted that his previous representatives *"didn't follow his orders"*, that his former Counsel had agreed with the respondent's representative to remove his Union complaint when he asserted that he had not been present, as he was in a separate room with his solicitor. The claimant confirmed that he had been present at the Pre-Hearing Review when his representative informed the Tribunal as set out at paragraphs 7 and 8 above. At a further Case Management Discussion on 5 June 2019, which was convened to consider any application by the respondent to seek a Pre-Hearing Review and to consider the listing of the matter, the respondent's representative indicated that he had been unable to prepare an application for a Pre-Hearing Review as the claimant's claim was not adequately particularised. Accordingly, he had served a Notice for Additional Information. In accordance with the overriding objective, the Tribunal explained to the claimant why the information was being sought by the respondent in order to assist the claimant to properly particularise and categorise his claims of sex discrimination, religious discrimination and disability discrimination. The Tribunal also listed the substantive hearing of the case from 25 November 2019 to 6 December 2019.

15. The Tribunal acknowledges that the claimant appears to have devoted considerable time to completing this exercise of particularising his complaints. However, in completing this exercise, the claimant has generated a further 50 pages of A3 paper. In particular, the claimant seems to have had particular difficulty in identifying and articulating the relevant circumstances and identity of any comparator. The Tribunal does not consider it necessary for the purposes of this hearing to consider the replies which have been provided by the claimant in this respect. The Tribunal's interest in this document is in relation to the protected characteristic which the claimant has identified in respect of each allegation, the

type of discrimination asserted by him and the date of the relevant incident. It does not accord with the overriding objective for the Tribunal to closely consider the voluminous information, commentary and contentions contained within this document, which was provided to inform the respondent's decision whether to apply for a Pre-Hearing Review.

16. A further Case Management Discussion was convened on 5 July 2019 to consider the respondent's application for a Pre-Hearing Review. Following careful consideration of the respondent's application and the authorities of **Stadnik-Borowiec v Southern Health & Social Care Trust [2014] NICA 53** and **Peifer v Castlederg High School and Western Education and Library Board [2008] NICA 49**, the respondent's request for a Pre-Hearing Review was acceded to. It was acknowledged that, subject to the outcome of the arguments on the point, the Tribunal may be required to dispose of the part heard Amendment application. Further directions were given including the provision of a skeleton argument to the claimant, the provision of the relevant authorities to the claimant and, pursuant to the claimant's requirement for a reasonable adjustments, the provision of a written statement of evidence by the claimant in advance of the Pre-Hearing Review.

17. The Tribunal, at that Case Management Discussion, also acknowledged the possibility that the claimant had sought to further amend his claims by means of the replies referred to at paragraph 15 above. In these circumstances, the claimant was directed that if he was pursuing an amendment application to include new matters not within his previous claim, he must provide a document setting out in bullet point form what the new allegation was and what the type of discrimination being relied upon was. He was informed that only matters set out in the replies document referred to at paragraph 15 and in the email of 24 May 2018 which was the basis for the previous amendment application would be considered.

18. The Pre-Hearing Review was listed for Monday 5 August 2019 at 10am. At 08:54am the Tribunal acknowledged receipt of the claimant's email sent on Saturday 3 August 2019 requesting a postponement of the "meeting" as he would be unable to attend. He asserted he was unhappy to leave his home without having security measures which he had purchased installed. He advised that he was having a new front door fitted on "Tuesday or Wednesday". At 09:58 the claimant was advised by email that his application to adjourn had been declined and that the hearing would proceed. The hearing time was put back to 11.00am and the Tribunal waited until 11:15am to commence the hearing. The Tribunal clerk also attempted to contact the claimant on the telephone number provided at the time the email was sent, but was unable to contact him.

19. The claimant did lodge a written submission entitled "Application to extend Time Limit & include PCS & Sex Discrimination in proceedings" with the tribunal office on 25 July 2019 and the Tribunal has had regard to this document in making its determination. The claimant had also provided communications between himself and his former legal representatives to the respondent and the Tribunal in support of his application.

## ISSUES FOR THE TRIBUNAL

20. (i) Whether the claimant's claims of sex discrimination in claim reference numbers 10/19FET and 967/19 should be struck out on grounds that they have no reasonable prospect of success;

(ii) whether the claimant's claims against the respondent for the actions of the claimant's trade union representative and/or the trade union should be struck out on the grounds that they have no reasonable prospect of success; (These claims are also referred to as "the impugned claims" in this decision.)

(iii) whether the claimant's claims 49/18FET, 5663/18, 54/18FET and 5709/18 should be amended to include claims of sex discrimination; and

(iv) whether PCS trade union should be added as a respondent to claim references 49/18FET, 5663/18, 54/18FET, 5709/18, 10/19FET and 967/19.

21. The following arguments have been advanced in support of the application to strike out the claimant's claims of unlawful sex discrimination and factual allegations regarding the conduct of the claimant's trade union, PCS:

a. that the claimant's application to amend his claims before the Tribunal to include claims of sex discrimination and the allegations against the claimant's trade union was abandoned/withdrawn at the Pre-Hearing Review on 25 October 2018;

b. that the claimant's claims registered as 49/18FET, 5663/18, 54/18FET and 5709/18 did not include claims of sex discrimination, and therefore the claimant requires leave to amend his claim to include sex discrimination;

c. that neither 49/18FET, 5663/18, 54/18FET, 5709/18 nor 10/19FET and 967/19 named the claimant's trade union, PCS, as a respondent and therefore the claimant therefore requires leave to amend his claim to join PCS;

d. that in light of (a) above, the pursuit of the amendment application and the claim of sex discrimination and allegations against the claimant's trade union contained in the claimant's claim registered 10/19 FET and 967/19 are an abuse of process;

e. that, in the absence of leave to amend the earlier claims, any claim of sex discrimination brought in the claimant's claim registered 10/19FET and 967/19 has been brought outside the requisite time limit, and unless time is extended by the Tribunal, must fail for want of jurisdiction; and

f. that the Tribunal has no jurisdiction to entertain any claims which the claimant would seek to bring against the claimant's trade union, PCS, (by adding it as a respondent) under the Fair Employment and Treatment (Northern Ireland) Order 1998.

**RELEVANT LAW**

22. The Industrial Tribunal (Constitution and Rules of Procedure) Regulations (Northern Ireland) 2005 (as amended) provide:

*"18 (1) Pre-hearing reviews are interim hearings and shall be conducted by a Chairman unless the circumstances in paragraph (3) are applicable. Subject to rule 16, they shall take place in public.*

*(2) At a pre-hearing review the Chairman may carry out a preliminary consideration of the proceedings and he may –*

*(a) Determine any interim or preliminary matter relating to the proceedings;*

*(b) Issue any order in accordance with rule 10 or do anything else which may be done at a case management discussion;*

*(c) Order that a deposit be paid in accordance with rule 20 without hearing evidence;*

*(d) Consider any oral or written representations or evidence;*

*(e) Deal with an application for interim relief made under Article 163 of the Employment Rights Order.*

*(3) Pre-hearing reviews shall be conducted by a Tribunal composed in accordance with Article 6(1) and (2) of the Industrial Tribunals Order if –*

*(a) A party has made a request in writing not less than ten days before the date on which the pre-hearing review is due to take place. That the pre-hearing review be conducted by a Tribunal instead of a Chairman; and*

*(b) The Chairman considers that one or more substantive issues of fact are likely to be determined at the pre-hearing review, that it would be desirable for the pre-hearing review to be conducted by a Tribunal and he has issued an order that the pre-hearing review be conducted by a Tribunal.*

*(4) If an order is made under paragraph (3), any reference to a Chairman in relation to prehearing review shall be read as a reference to a Tribunal.*

*(5) Notwithstanding the preliminary or interim nature of a pre-hearing review, at a pre-hearing review the Chairman may make a decision on any preliminary issue of substance relating to the proceedings. Orders made at a pre-hearing review may result in the proceedings being struck out or dismissed or otherwise determined with a result that a hearing under rule 26 is no longer necessary in those proceedings.*

*(6) Before an order listed in paragraph (7) is made, notice must be given in accordance with rule 19. The orders list in paragraph*

*(7) may be made at a pre-hearing review or a hearing under rule 26 if one of the parties has so requested. If no such request has been made such orders may be made in the absence of the parties.*

*(7) Subject to paragraph (6), a Chairman or Tribunal may make an order –*

*(a) As to the entitlement of any party to bring to contest particular proceedings;*

*(b) Striking out or amending all or part of any claim or response on the grounds that it is scandalous, vexatious or misconceived;*

*(c) Striking out any claim or response (or part of one) on the grounds that manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious; …*

*(8) A claim or response or any part of one may be struck out under these rules only on the grounds stated in paragraph (7)(b) to (f) …*

***Rule 25 – Right to withdraw proceedings***

*(1) A claimant may withdraw all or part of his claim at any time. This may be done either orally at a hearing or in writing in accordance with paragraph (2) …*

*(4) Where the whole or part of the claim is withdrawn, the proceedings or the relevant part of the proceedings so withdrawn are brought to an end against the respondent on that date and the tribunal or chairman shall dismiss the proceedings or the relevant part of the proceedings so withdrawn. [The claimant may not commence a further claim against the respondent for the same, or substantially the same, cause of action in the tribunal (unless the decision to dismiss is successfully reviewed or appealed).]"*

**Case Management Powers**

23. In **Stadnik-Borowiec v Southern Health & Social Care Trust [2014] NICA 53**, Coghlin LJ stated:

*"[22] We consider that these cases should now be remitted to a new Tribunal for the purposes of case management. That Tribunal should be free to give consideration to the most practically effective means of dealing with these cases consistent with the interests of justice. In so doing, the Tribunal should have regard to the overriding objectives contained in Regulation 3 of the Industrial Tribunals (Constitution and Rules of Procedure) Regulations (Northern Ireland) 2005 and to the following observations made by Girvan LJ*

*when delivering the judgment in Jason Veitch v Red Sky Group Limited [2010] NICA 39 at paragraph [21]:*

> *"Faced with the need for a rehearing of the remitted issues the respondent expressed concern at the length of the proceedings to date and the likelihood of a further protracted hearing on the disability issues. Counsel stated that the proceedings had lasted 16 days in the Tribunal. In Peifer v Castlederg High School and Western Education & Library Board [2008] NICA 49 this court has drawn attention to the undesirable length that some Tribunal hearings appear to take. In SCA Packaging v Boyle [2009] UKHL 37 the House of Lords similarly expressed concerns at the protracted length of proceedings. There may be many reasons why this happens, for example, a lack of focus on relevancy, a desire by a Tribunal to give parties, particularly unrepresented parties, a full opportunity to make all their points, or a fear that a robust approach to the management of the case might draw criticism or complaint from the parties. The duty of the Tribunal is to ensure reasonable expedition and due diligence on the part of the parties to identify and properly pursue relevant points only and to exercise leadership in the proper management of the case. In Peifer it was pointed out that tribunals should not be discouraged from exercising proper control of proceedings to secure the overriding objectives in Regulation 3 of the Industrial Tribunals (Constitution and Rules of Procedure) Regulations (Northern Ireland) 2005 through a fear of being criticised by a higher court which must give proper respect to the tribunal's margin of appreciation in the exercise of its powers in respect of proper management of the proceedings to ensure justice, expedition and the saving of cost.""*

24. In **Peifer v Castlederg High School and Western Education and Library Board [2008] NICA 49**, Girvan LJ stated:

> *"[3] Regulation 3 of the Industrial Tribunals (Constitutional Rules of Procedure) Regulations (Northern Ireland) 2005 ("the Rules of Procedure") is based on the provisions of Order 1 Rule 1A of the Rules of the Supreme Court. The provisions of Order 1 Rule 1A and Regulation 3 were intended to be exactly what they are described as being, namely overriding objectives. The full implications of those rules identifying the overriding objectives have not been fully appreciated by courts, tribunals or practitioners. These overriding objectives should inform the court and the tribunals in the proper conduct of proceedings. Dealing with cases justly involves dealing with cases in ways which are proportionate to the complexity and importance of the issues ensuring that the case is dealt with expeditiously and fairly and the saving of expense. Parties and practitioners are bound to conduct themselves in a way which furthers those overriding objectives. Having regard to the imperative nature of the overriding objectives tribunals should strive to avoid time wasting and repetition. Parties should be required to concentrate on relevant issues and the pursuit of irrelevant issues and questions should be strongly discouraged. Our system of justice properly regards cross examination as a valuable tool in the pursuit of justice but that tool must not be abused. Tribunals must ensure proper focus on the relevant issues and ensure that time taken in cross examination is usefully spent. The overriding objectives, which are, of course, always intended to ensure*

*that justice is done, impel a tribunal to exercise its control over the litigation before it robustly but fairly. Tribunals can expect the appellate and supervisory courts to give proper and due weight to the tribunals' decisions made in the fulfilment of their duty to ensure the overriding objectives. Tribunals should not be discouraged from exercising proper control of proceedings to secure those objectives through fear of being criticised by a higher court which must itself give proper respect to the tribunal's margin of appreciation in the exercise of its powers in relation to the proper management of the proceedings to ensure justice, expedition and the saving of cost. Tribunals should be encouraged to use their increased costs powers set out in Regulations 38 et seq of the Rules of Procedure to penalise time wasting or the pursuit of cases in a way which unduly and unfairly increases the costs falling on opponents. Tribunals should feel encouraged to set time limits and time tables to keep the proceedings within a sensible time frame.*

*[4] When parties before the tribunal appear in person without the benefit of legal representation the lack of legal experience on the part of the unrepresented party may lead to the pursuit of irrelevancies and unnecessary length of proceedings. While tribunals must give some latitude to personal litigants who may be struggling in a complex field they must also be aware that the other parties will suffer from delay, incur increased costs and be exposed to unstructured and at times irrelevant cross examination. While one must have sympathy for a tribunal faced with such a situation the tribunal remains under the same duty to ensure that the overriding objectives in Regulation 3 are pursued."*

**Authority of legal representatives**

25. Valentine in All Laws of Northern Ireland, dealing with the legal profession states:

***"Lawyer's authority to bind client***

*In proceedings*

*After proceedings commence, a solicitor on record for a party (by having issued a writ, entered an appearance or otherwise) has implied authority to accept service of documents, to make formal or informal admissions or to conclude a compromise, if it is reasonable, bona fide and not contrary to express instructions, and he has implied authority to receive money for the client who is not under disability.*

*He has ostensible authority to bind the client against the other party by a compromise, even if it is unreasonable or contrary to express instruction or subsequently repudiated. Such compromise is not binding if it purports to be agreed by the party personally:* ***Gethings v Cloney (1914) 48 ILTR 55****, or if it involves matters not connected to the subject of the litigation:* ***Barrett v WJ Lenehan [1981] ILRM 207****. The client is bound by a compromise reached by his counsel instructed by the solicitor even if the solicitor was not personally involved in the compromise:* ***Knipe v Bamford (White third party) [2008] NIQB 4 [2008] 5 BNIL 84*** *(Treacy J) … If there is an issue of the authority for a solicitor to compromise proceedings, or abandon them, but the dispute is brought to the attention of the court before any order of the court has been made the purported compromise does not bind the client:*

***Shepherd v Robinson [1919] 1 KB 474: Swift Advances PLC v McKay [2011] NI Ch 2 [2011] 3 BNIL 7*** *(Deeny J) … Counsel has implied and ostensible authority over the conduct of the proceedings, to make admissions and to compromise, in the same way as a solicitor (see* ***Knipe v Bamford (White third party) [2008] NIQB 4 [2008] 5 BNIL 84*** *(Treacy J)).”*

**Withdrawal of claims**

26. In **Verdin v Harrods Ltd [2006] IRLR 339** the EAT considered the distinction between when proceedings are withdrawn and when they are discontinued to allow a further claim. This case involved the consideration of a procedural rule which differed from the Rule currently in effect in Northern Ireland and which required an application to be made for a Dismissal order, rather than, as is the case in this jurisdiction as a result of the 2011 amendment, a withdrawal automatically giving rise to a Dismissal order. Nevertheless, the EAT's analysis of withdrawal and its consequences, which are set out below, is helpful.

> ***“35*** *… Withdrawal does not depend on any decision by the tribunal. The consent of the opposite party is not required. All that is required is that the opposite party is notified. If the withdrawal is given orally at a hearing, withdrawal takes effect when the tribunal receives notice of it. Again withdrawal does not depend on any decision by the tribunal. The consent of the opposite party is not required …*
>
> ***39*** *So a party who receives a notification of withdrawal of the whole proceedings, and wishes to establish once and for all that there is to be no further litigation on the same questions, may apply for dismissal. The subsequent hearing will then concentrate on the question, which Mummery LJ identified in* Ako*. Is the withdrawing party intending to abandon the claim? If the withdrawing party is intending to resurrect the claim in fresh proceedings, would it be an abuse of the process to allow that to occur? If the answer to either of these questions is yes, then it will be just to dismiss the proceedings. If the answer to both these questions is no, it will be unjust to dismiss the proceedings.*
>
> ***40*** *I agree with a submission made by Mr Nicholls, that where one party withdraws the other party will generally be entitled to have the proceedings dismissed. This is because the party who withdraws will generally have no intention of resurrecting the claim again, or if he does will generally have no good reason for doing so.”*

27. In the case of **Khan v Heywood and Middleton Primary Care Trust [2006] IRLR 793** the Court of Appeal in England and Wales considered whether a withdrawn claim which had not been the subject of a Dismissal Order could be revived. This judgment considered the effect of the provisions of the 2004 Rules concerning withdrawal of claims and held that there was no power under the Rules for a tribunal to revive a withdrawn claim. The Court of Appeal endorsed *“the well established distinction between a claim which has been withdrawn, but on which there is no judicial determination, and a claim which has been dismissed by means of a judicial act. The first does not, of itself, create either issue or cause of action estoppel: the latter does.”*

28. The case of **Barber v Staffordshire County Council [1996] ICR 379** is authority for a Dismissal Order being a decision for the purposes of res judicata doctrines.

29. The tenor of these authorities can be summarised as follows: an oral withdrawal takes effect when given at a hearing; once a claimant has withdrawn the claim, he cannot normally change his mind and ask for it to be reinstated, even if there has been no order; and a withdrawal, in the absence of a judicial decision, cannot give rise to issue estoppel or cause of action estoppel.

**Res Judicata and Abuse of Process**

30. In **Divine-Bortey v London Borough of Brent [1998] IRLR 525** Simon Brown LJ summarised what was encompassed in a plea of res judicata as *"three types of estoppel: cause of action estoppel, issue estoppel in the strict sense, and issue estoppel in the wider sense – the sense that ordinarily precludes a person from bringing fresh proceedings in respect of a matter which could and should have been litigated in earlier proceedings. This wider form of issue estoppel has its origins in the judgment of Wigram V-C in* ***Henderson v Henderson [1843] 3 Hare 100****".* He held that:-

> *"46 The basis of the rule in* ***Henderson v Henderson*** *is the avoidance of multiplicity of litigation in relation to a particular subject or set of circumstances in order to avoid the prejudice to a defendant which inevitably results in terms of wasted time and cost, duplication of effort, dispersal of evidence and risk of inconsistent findings which are involved if different courts at different times are obliged to examine the same substratum of fact which gives rise to the subject of litigation. The rule is justifiable and justified as a matter both of common sense and common justice between the parties and it is the aspects of prejudice which I have mentioned which will usually render a second bite of the cherry worthy of the description 'abuse of process'. They are essentially objective considerations to which the particular circumstances of the parties will generally be irrelevant; hence the need for special circumstances if the full rigour of the rule is to be alleviated."*

31. In **Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd - [2013] 4 All ER 715** the Supreme Court reviewed and summarised the general principles of res judicata. Lord Sumption added that, finally, there is *'the more general procedural rule against abusive proceedings, which may be regarded as the policy underlying all of the above principles'."* He then drew attention to the distinction between res judicata and abuse of process:-

> *"25. …Res judicata and abuse of process are juridically very different. Res judicata is a rule of substantive law, while abuse of process is a concept which informs the exercise of the court's procedural powers. In my view, they are distinct although overlapping legal principles with the common underlying purpose of limiting abusive and duplicative litigation. That purpose makes it necessary to qualify the absolute character of both cause of action estoppel and issue estoppel where the conduct is not abusive. As Lord Keith put it in* ***Arnold v National Westminster Bank plc [1991] 2 AC 93, 110G****, "estoppel per rem judicatam, whether cause of action estoppel or issue estoppel, is essentially concerned with preventing abuse of process".*

32. In **Johnson v Gore Wood [2002] 2 AC 1 HL** Lord Millett stated the inherent power of any court to prevent misuse of its procedures: "*The rule of law depends upon the existence and availability of courts and tribunals to which citizens may resort for the determination of differences between them which they cannot otherwise resolve. Litigants are not without scrupulous examination of all the circumstances to be denied the right to bring a genuine subject of litigation before the court (**Yat Tung Investment Co. Ltd. v. Dao Heng Bank Ltd. [1975] A.C. 581 at 590** per Lord Kilbrandon, giving the advice of the Judicial Committee; **Brisbane City Council v. Attorney-General for Queensland [1979] A.C. 411 at 425** per Lord Wilberforce, giving the advice of the Judicial Committee). This does not however mean that the court must hear in full and rule on the merits of any claim or defence which a party to litigation may choose to put forward. For there is, as Lord Diplock said at the outset of his speech in **Hunter v. Chief Constable of the West Midlands Police [1982] A.C. 529 at 536**, an "inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people. The circumstances in which abuse of process can arise are very varied; those which give rise to the instant appeal must surely be unique. It would, in my view, be most unwise if this House were to use this occasion to say anything that might be taken as limiting to fixed categories the kinds of circumstances in which the court has a duty (I disavow the word discretion) to exercise this salutary power."*"

33. In the judgment, Lord Bingham stated:-

> *"While the result may often be the same, it is in my view preferable to ask whether in all the circumstances a party's conduct is an abuse than to ask whether the conduct is an abuse and then, if it is, to ask whether the abuse is excused or justified by special circumstances. Properly applied, and whatever the legitimacy of its descent, the rule has in my view a valuable part to play in protecting the interests of justice."*

**The bringing of claims**

34. In **Chandhok & Anor v Tirkey UKEAT/0190/14/KN,** Langstaff J stated:

> *"16*
>
> *I do not think that the case should have been presented to him in this way or that it should have formed part of his determination. That is because such an approach too easily forgets why there is a formal claim, which must be set out in an ET1. The claim, as set out in the ET1, is not something just to set the ball rolling, as an initial document necessary to comply with time limits but which is otherwise free to be augmented by whatever the parties choose to add or subtract merely upon their say so. Instead, it serves not only a useful but a necessary function. It sets out the essential case. It is that to which a respondent is required to respond. A respondent is not required to answer a witness statement, nor a document, but the claims made – meaning, under the Rules of Procedure 2013 (SI 2013/1237), the claim as set out in the ET1.*
>
> *17 … However, all that said, the starting point is that the parties must set out the essence of their respective cases on paper in respectively the ET1 and*

*the answer to it. If it were not so, then there would be no obvious principle by which reference to any further document (witness statement, or the like) could be restricted. Such restriction is needed to keep litigation within sensible bounds, and to ensure that a degree of informality does not become unbridled licence. The ET1 and ET3 have an important function in ensuring that a claim is brought, and responded to, within stringent time limits. If a 'claim' or a 'case' is to be understood as being far wider than that which is set out in the ET1 or ET3, it would be open to a litigant after the expiry of any relevant time limit to assert that the case now put had all along been made, because it was 'their case', and in order to argue that the time limit had no application to that case could point to other documents or statements, not contained within the claim form. Such an approach defeats the purpose of permitting or denying amendments; it allows issues to be based on shifting sands; it ultimately denies that which clear-headed justice most needs, which is focus. It is an enemy of identifying, and in the light of the identification resolving, the central issues in dispute."*

**Amendment of claims**

35. In **British Gas Services Ltd v Basra UKEAT/0194/14DM**, the EAT held:-

> *"[48] It is essential before allowing an amendment that it must be properly formulated, sufficiently particularised, so the Respondent can make submissions and know the case it is required to meet."*

36. In **Selkent Bus Co Ltd, t/a Stagecoach Selkent v Moore 1996 UKEAT 151** guidance was provided on the consideration of amendment applications.

> *"**Procedure and Practice for Amendments***
>
> *The rival submissions of the parties state the position at opposite extremes. Before we state our conclusions on this appeal, it may be helpful to summarise our understanding of the procedure and practice governing amendments in the Industrial Tribunal.*
>
> *(1) The discretion of a Tribunal to regulate its procedure includes a discretion to grant leave for the amendment of the originating application and/or notice of appearance: Regulation 13. See **Cocking v Sandhurst Ltd [1974] ICR 650 at 656G - 657D.** That discretion is usually exercised on application to a Chairman alone prior to the substantive hearing by the Tribunal.*
>
> *(2) There is no express obligation in the Industrial Tribunal Rules of Procedure requiring a Tribunal (or the Chairman of a Tribunal) to seek or consider written or oral representations from each side before deciding whether to grant or refuse an application for leave to amend. It is, however, common ground that the discretion to grant leave is a judicial discretion to be exercised in a judicial manner ie, in a manner which satisfies the requirements of relevance, reason, justice and fairness inherent in all judicial discretions.*
>
> *(3) Consistently with those principles, a chairman or a tribunal may exercise the discretion on an application for leave to amend in a number of ways:*

*(a) It may be a proper exercise of discretion to refuse an application for leave to amend without seeking or considering representations from the other side. For example, it may be obvious on the face of the application and/or in the circumstances in which it is made that it is hopeless and should be refused. If the tribunal forms that view that is the end of the matter, subject to any appeal. On an appeal from such a refusal, the appellant would have a heavy burden to discharge. He would have to convince the appeal tribunal that the industrial tribunal had erred in legal principle in the exercise of the discretion, or had failed to take into account relevant considerations or had taken irrelevant factors into account, or that no reasonable tribunal, properly directing itself, could have refused the amendment. See* ***Adams v West Sussex County Council [1990] IRLR 215.***

*(b) If, however, the amendment sought is arguable and is one of substance which the tribunal considers could reasonably be opposed by the other side, the tribunal may then ask the other party whether they consent to the amendment or whether they oppose it and, if they oppose it, to state the grounds of opposition. In those cases the tribunal would make a decision on the question of amendment after hearing both sides. The party disappointed with the result might then appeal to this tribunal on one or more of the limited grounds mentioned in (a) above.*

*(c) In other cases an industrial tribunal may reasonably take the view that the proposed amendment is not sufficiently substantial or controversial to justify seeking representations from the other side and may order the amendment ex parte without doing so. If that course is adopted and the other side then objects, the industrial tribunal should consider those objections and decide whether to affirm, rescind or vary the order which has been made. The disappointed party may then appeal to this tribunal on one or more of the limited grounds mentioned in (b) above.*

*(4) 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.*

*(5) What are the relevant circumstances? It is impossible and undesirable to attempt to list them exhaustively, but the following are certainly relevant:*

(a) *The nature of the amendment*

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

(b) *The applicability of time limits*

*If a new complaint or cause of action is proposed to be added by way of amendment, it is essential for the tribunal to consider whether that complaint is out of time and, if so, whether the time limit should be extended under the applicable statutory provisions, eg, in the case of unfair dismissal, s.67 of the 1978 Act.*

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

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

*(25) … The question is whether the application for amendment, at the time when it was made, should have been granted or should have been refused."*

**Tribunal jurisdiction regarding claims against the trade union**

37. **Disability Discrimination Act 1995**

**Section 13. Trade organisations: discrimination and harassment**

*"(1) It is unlawful for a trade organisation to discriminate against a disabled person –*

*(a) …*

*(2) It is unlawful for a trade organisation, in the case of a disabled person who is a member of the organisation, to discriminate against him –*

*(a) in the way it affords him access to any benefits or by refusing or deliberately omitting to afford him access to them;*

*(b) by depriving him of membership, or varying the terms on which he is a member; or*

*(c) by subjecting him to any other detriment.*

*(3) It is also unlawful for a trade organisation, in relation to membership of that organisation, to subject to harassment a disabled person who –*

*(a) is a member of the organisation; or*

*(b) has applied for membership of the organisation.*

*(4) In this section and section 14 "trade organisation" means –*

*(a) an organisation of workers;*

*(b) an organisation of employers; or*

*(c) any other organisation whose members carry on a particular profession or trade for the purposes of which the organisation exists."*

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

**Section 23. Vocational organisations**

*"(1) It is unlawful for a vocational organisation to discriminate against a person—*

*(a) …*

*(b) who is a member of the organisation—*

*(i) in the way it affords him access to any benefits or by refusing or deliberately omitting to afford him access to them; or*

*(ii) by depriving him of membership, or varying the terms on which he is a member; or*

*(iii) by subjecting him to any other detriment.*

*(2) It is unlawful for a vocational organisation, in relation to a person's membership or application for membership of that organisation, to subject that person to harassment."*

**Time Limits**

39. **Disability Discrimination Act 1995**

**Period within which proceedings must be brought**

*"3(1) An employment tribunal shall not consider a complaint under section 17A or 25(8) unless it is presented before the end of the period of three months beginning when the act complained of was done.*

*(2) A tribunal may consider any such complaint which is out of time if, in all the circumstances of the case, it considers that it is just and equitable to do so.*

*(3) For the purposes of sub-paragraph (1)—*

*(a) where an unlawful act is attributable to a term in a contract, that act is to be treated as extending throughout the duration of the contract;*

*(b) any act extending over a period shall be treated as done at the end of that period; and*

*(c) a deliberate omission shall be treated as done when the person in question decided upon it.*

*(4) In the absence of evidence establishing the contrary, a person shall be taken for the purposes of this paragraph to decide upon an omission—*

*(a) when he does an act inconsistent with doing the omitted act; or*

*(b) if he has done no such inconsistent act, when the period expires within which he might reasonably have been expected to do the omitted act if it was to be done."*

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

*"46(1) Subject to paragraph (5) to Article 46A, and to any regulations under Article 22 of the Employment (Northern Ireland) Order 2003, the Tribunal shall not consider a complaint under Article 38 unless it is brought before whichever is the earlier of—*

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

*(b) the end of the period of 6 months beginning with the day on which the act was done.*

*…*

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

**Whether Just and Equitable to Extend Time**

40. The power of the Tribunal to grant an extension where it is considered just and equitable to do so provides a wide discretion, wider than that available in respect of other claims where the 'not reasonably practicable formula' is used. As set out in **Harvey** on **Industrial Relations and Employment Law** Division PI paragraph 277, it is for the claimant to convince the Tribunal that it is just and equitable to extend time and that the exercise of discretion is the exception rather than the rule ***(*Robertson v Bexley Community Centre [2003] EWCA Civ 576, [2003] IRLR 434, at para 25*, *per Auld LJ);*** **Department of Constitutional Affairs v Jones [2007] EWCA Civ 894*, [2008] IRLR 128, at paras 14–15,*** per Pill LJ**).** In **Pathan v South London Islamic Centre UKEAT/0312/13** (14 May 2014, unreported) HHJ Shanks held that 'it does not require exceptional circumstances: what is required is that an extension of time should be just and equitable'.

41. The so-called **Keeble** checklist provides that in considering an extension the court or tribunal can consider the prejudice which each party would suffer as a result of granting or refusing an extension, and to have regard to all the other circumstances, in particular:

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

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

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

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

(e) the steps taken by the claimant to obtain appropriate professional advice once he or she knew of the possibility of taking action. **(*British Coal Corpn v Keeble* [1997] IRLR 336)**

42. There is no legal requirement on the Tribunal to go through such a list in every case provided that no significant factor has been left out from consideration in the exercise of the discretion.

**Claimant's arguments**

43. The claimant sent a prolix document to the Tribunal on 25 July entitled "Application to extend Time Limit & include PCS & Sex Discrimination in proceedings", which was considered at the hearing, supported by various documents which were provided to the Tribunal. The claimant's document made submissions about a delay in lodging his initial claims (which was not the issue being considered by the Tribunal). The document stated that he had wanted to lodge a claim in January 2018, but had not been in the right mind frame to have done so and further that he was unaware of the employment tribunals or what they did. It confirmed that he had taken legal advice in February 2018. He referred to having lodged discrimination papers with the Equality Commission on 10 March 2018, on the advice of the solicitor he had consulted. Having been warned about time limits, he described having rashly submitted his claim form. He then stated *"I believe an extension should be granted by the tribunal in my religious & sex discrimination claims & against my union, on the grounds of the conduct of the legally trained respondent who deliberately withheld evidence. I also believe an extension should be granted on the length of delay since lodging my ET case on 10/04/2018. I do not believe the psychiatrist reports were valid reasons for this unnecessary delay. The hearing could have been listed whilst awaiting the psychiatrist reports."* The claimant asserted that the delay in the case proceeding to a full hearing has been detrimental to his health, both mentally and physically. Further he asserted that the delay in the matter proceeding to full hearing had affected the cogency of evidence.

44. The document further referred to the claimant's *"previous legal representamen (sic) deliberately ignoring my orders & being uninterested and not including vital evidence on my case despite its significance to it."* He stated that he hoped leniency could be shown to him "*due to [his] disability preventing [him] in lodging [his] case & being unfamiliar in law & needing time to learn how [he] lodged [his] case."* He recounted that he had been *"blackballed by solicitors with political beliefs in [his] area".* He recounted that his legal representative had given *"advice to clearly weaken [his] case",* that he had been advised that he would have to attend a different court to pursue the claim against his trade union and that as representatives had refused to use concrete evidence or *"the document I sent with ALL my evidence".*

45. The claimant then set out a number of allegations which he refers to as *"evidence grounds to maintain claims against [his] trade union and sex discrimination".* This document included further new allegations which have never been advanced in any claim or amend the application. One such allegation consisted of the recount of a conversation with a female colleague about the contents of her lunch, when he asked her whether her husband had made her lunch. The claimant recounted that this colleague informed him that her lunch was made from Quorn, that she didn't like meat, and that she had a wife. The claimant stated in the document *"I was shocked as I wasn't aware that [colleague's name] was in the LGBT. I was more shocked as I fancied [colleague's name] and never said anything in work and my shock wasn't the being gay …".* The claimant recounted joking regularly with this colleague, relating the incident to other colleagues, alleging that some other female colleagues tried "*to make it into a storm in a teacup"* before concluding that this was females trying to attack a male.

46. In relation to the application to join his trade union, PCS, as a respondent, the document stated that his allegations against the trade union ranged back to when he started with the respondent in 2016. He asserted that local union representatives had refused to support him or attend his serious injuries. He referred to them "*defacing medical documents and telling [him] he was faking mental health"* and to them refusing to help him as a member *"based on friendships and breaching policy and supporting a member by discriminating against [him]"* (Tribunal's emphasis)

47. The claimant had also provided correspondence with his former solicitor, sent on 25 October 2018 following the Pre-Hearing Review. This document stated that he would like his solicitor to "*express his wishes to legal challenge (sic) my treatment at work on grounds of gender discrimination."* On the following day his solicitor recorded that the claimant had already instructed him and Counsel to advise the Tribunal that he was not seeking to add new grounds. The email advised that Counsel would not be able to continue to represent him as there must be an understanding between the client and their legal representatives based on trust in the client's instructions and faith in the legal representatives following those instructions. The email warned the claimant that *"given your contradictory instructions if you continue you will prejudice your case before the tribunal."* The email further confirmed that the solicitor was unable to continue to represent him and advised him to seek other solicitors if he wished to take forward his case. The claimant replied to him at 11:43 stating, amongst other things, *"I only agreed to not press ahead with gender discrimination due to yourself & Michael [the claimant's Counsel] telling me not to."* (Tribunal's emphasis.)

**Respondent's arguments**

48. The respondent lodged a written skeleton argument and further oral submissions were made at the hearing. The respondent's representative contended that the claimant should be bound by the abandonment/withdrawal of the claims in accordance with what had been represented to the Tribunal by his former legal representative, who had authority to bind in accordance with the extract from **Valentine** at paragraph 25 above. The respondent's representative was asked to consider his submissions on whether this abandonment/withdrawal could be binding in the absence of a final order. The respondent's representative contended that the

claimant's conduct in attempting to reintroduce these claims amounted to a more general abuse of process, as per Lord Sumption's description in **Virgin**.

49. If this argument was rejected, the respondent's representative opposed any grant of leave to amend the claimant's claims on the following grounds:

    a. the last act of discrimination which was disclosed in the replies referred to at paragraph 15 above was dated 14 February 2018 and accordingly, as at the date when the amendment application was brought forward, namely 26 May 2018, the claim was out of time;

    b. the claimant had had the benefit of representation from his trade union since at least September 2016, that he had made a decision to bring a claim in January 2018, that before he had brought his claim he had had the benefit of advice from a solicitor and had been in contact with the Equality Commission for Northern Ireland;

    c. that no reason had been advanced by the claimant to explain the delay in pursuing an amendment application until 26 May 2018; and

    d. that the amendment application when analysed in accordance with **Selkent Bus** disclosed new causes of action based upon new facts.

50. The respondent's representative also made submissions on the application of the balance of injustice test propounded in **Selkent Bus**. The respondent's representative also referred the Tribunal to **Harvey**, Division PI, Section 1, Part (I), Sub section 5 at Paragraph 313, which confirms the applicability of the injustice//hardship test in **Selkent Bus** to applications to join an additional respondent.

51. He contended that the balance of injustice test should result in the amendment not being permitted for the following reasons:

    a. that if the amendments were permitted and PCS was joined as a respondent there would be a further delay in the listing of the case. The respondent's representative argued that this delay would cause hardship and injustice to all of the parties including the claimant;

    b. that the claimant should not be permitted to reintroduce matters which had been abandoned/withdrawn at the earlier hearing convened for the sole purpose of considering them as to do so would amount to an abuse of process;

    c. that as a general rule time limits should be strictly enforced and the amended claims were out of time when brought;

    d. that the factual basis for some of the allegations within the amendment application date as far back as September 2016 and therefore would have been within the claimant's knowledge when he brought his claims in April 2018;

    e. that notwithstanding having knowledge of these matters and the benefit of advice, he had omitted to include PCS as a respondent and

had omitted complaints under the Sex Discrimination (Northern Ireland) Order 1976;

f. that if these matters had been important to the claimant they would have been included in his original claim;

g. that a number of employees no longer work for the respondent and therefore the respondent would be prejudiced in defending the claims;

h. that the quality of evidence which could be adduced could be affected by the delay;

i. that the length of the hearing would be substantially extended if the sex discrimination allegations were permitted. The respondent's representative noted that the respondent will be calling in the region of 18 to 20 witnesses to respond to the wide-ranging allegations of discrimination put forward in the claims which were brought in April 2018. He estimated that if the other allegations of sex discrimination were permitted, he would need to call an additional 12 witnesses with the consequent effect on the respondent's resources to allow all of those staff to prepare witness statements in advance of the hearing (probably during working time) and time out of the office to attend the hearing. He estimated that the hearing length would need to be extended from two weeks up to four weeks;

j. that the complaints taken at the height consisted of office banter of a non-discriminatory nature between co-workers, which had not been directed at the claimant but which were now being recast as discrimination;

k. that allowing the amendment would cause hardship to the claimant, as a litigant in person with a disability, and that he would struggle to cope with presenting numerous claims; and

l. that the claimant would still have the opportunity to pursue his other claims before the Tribunal.

52. In relation to the application to join PCS as a respondent, the respondent's representative asserted at the Pre Hearing Review that the Tribunal had no jurisdiction to consider claims against a trade union brought under the Fair Employment and Treatment (Northern Ireland) Order 1998. Even when the claimant brought his further claim reference 10/19FET and 967/19 in December 2018, he did not name PCS as a respondent to his claim. The joining of PCS as a respondent will further delay a final hearing in relation to the claimant's claims and this is not in the interests of the claimant.

53. The respondent's representative acknowledged that even if the amendment application was declined, claim reference 10/19FET and 967/19 included the impugned claims and contended that in the absence of any extension of time, these were grossly out of time. He argued that the Tribunal should not be persuaded to exercise its discretion to extend time using the **Keeble** checklist for the reasons set out below.

a. **The length of the delay and the reasons for the delay.** The respondent's representative asserted that the claimant had been given the opportunity to amend his claim at the Pre-Hearing Review held on 25 October 2018. At that hearing, he withdrew his application to amend his claims to include the impugned claims. He then included the impugned claims in his further claim to the Fair Employment Tribunal and Industrial Tribunal dated 15 December 2018. Using the dates provided by the claimant in the replies referred to at paragraph 15 above, the date of the last allegation of sex discrimination is 14 February 2018. Accordingly, as at 15 December 2018, even if all of the allegations were treated as a series of acts, the claimant's claims of sex discrimination were brought seven months beyond the relevant time-limit. The respondent's representative contended that the claimant had failed to provide any satisfactory explanation for the delay in bringing the claims of sex discrimination or against his trade union, PCS.

b. **The extent to which the cogency of the evidence is likely to be affected by the delay.** The respondent's representative contended that the delay will have prejudiced the cogency of the evidence which could be presented as some persons named in the allegations no longer work for the respondent and with the passage of time recollections will have faded.

c. **The extent to which the party sued had co-operated with any requests for information.** The respondent's representative noted that there had been no allegation by the claimant that the respondent had acted to disrupt the claimant in bringing proceedings.

d. **The promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action**. The respondent's representative noted that the claimant had direct knowledge of the matters relied upon by him to ground his claims of sex discrimination in February 2018, as a result of hearing comments, witnessing the alleged incidents directly and as a result of attending meetings. Accordingly, the respondent representative contended that these were matters which could have and should have been included in his earlier claims.

e. **The steps taken by the claimant to obtain appropriate professional advice once he or she knew of the possibility of taking action.** The respondent's representative drew the Tribunal's attention to the fact that the claimant had received advice and representation at meetings within his employment from PCS. He then sought advice from a solicitor in January 2018. He sought and obtained advices from the Equality Commission and finally instructed the solicitor and counsel who represented him in the Pre-Hearing Review on 25 October 2018. This further supported the respondent's representative's contention that these were matters which could have and should have been included in his earlier claims.

## RELEVANT FINDINGS OF FACTS AND CONCLUSIONS

54. The Tribunal finds that the claimant's claims against the claimant's trade union and the claimant's claims under the Sex Discrimination (Northern Ireland) Order 1976 were abandoned/withdrawn at the amendment hearing on 25 October 2018 by the claimant's Counsel. The Tribunal for this hearing is identically constituted as the Tribunal for the hearing on 25 October 2018. The claimant's Counsel, at the hearing of 25 October 2018, informed the Tribunal that he had consulted with the claimant and that the claimant had consented to not pursuing the impugned claims. The claimant was present in the tribunal room when the Tribunal was so informed and the claims were abandoned/withdrawn, as was the claimant's solicitor. It was apparent to the Tribunal at that hearing that the claimant's Counsel was acting with considerable care in not exceeding the terms of his authority. The Tribunal rose to facilitate further progress between the parties. If the claimant had believed that his instructions had been exceeded, he could have made known this belief to the Tribunal following that break. He did not do so. Further, the Tribunal finds that the claimant's former Counsel acted with the claimant's authority as recorded by the claimant in his email at 11:43 on 26 October 2018 quoted at paragraph 47 above in which the claimant accepted that he had agreed not to press ahead with the gender discrimination claims. It was not necessary (or technically possible) for the Tribunal to issue a dismissal order in respect of those claims which were withdrawn (as these did not form part of the claims before the Tribunal, nor had leave to amend been granted).

55. The Tribunal finds that the claimant's conduct in variously seeking to reintroduce these claims offends against *"the more general procedural rule against abusive proceedings"* described by Lord Sumption in **Virgin.** Accordingly, in striking out the impugned claims, the Tribunal is exercising its inherent power to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute, as per **Johnson.**

56. In case the Tribunal has erred in holding that the claimant is bound by the withdrawal/abandonment and that any conduct contrary to this withdrawal/abandonment amounts to an abuse of the tribunal process, the Tribunal has proceeded to determine the outcome of the claimant's amendment application, which was part heard on 25 October 2018.

57. Accordingly, the Tribunal has considered whether the claimant's claims referenced 49/18FET, 5663/18IT, 54/18FET and 5709/18IT should be amended to include the claims under the Sex Discrimination (NI) Order 1976 and the claims against PCS. In accordance with the principles elucidated in **Selkent,** the Tribunal finds that the risk of hardship and injustice is greater if the application is granted than if it is refused. If the amendment were granted, a new party would have to be joined, with the consequent delay in the matter proceeding to hearing. New causes of action would have to be entertained with further witnesses having to give evidence. Given that this aspect of the application to amend was abandoned in clear and unambiguous terms by the claimant's Counsel in the presence of the claimant on 25 October 2018, upon the claimant's authority, as confirmed at paragraph 47 above, it is not unjust to strike out these claims, whereas it will cause hardship if these allegations are entertained afresh. The Tribunal recognises the public interest in the finality of concessions made during the course of litigation. This

decision still leaves many of the claimant's claims intact and to be pursued by him at a full hearing. The case is already listed for two weeks. If leave were granted, the hearing would be delayed and the length of the hearing would increase substantially. Accordingly, leave is not granted for the amendment of the claim to amend the claims referenced 49/18FET, 5663/18IT, 54/18FET and 5709/18IT to include claims under the Sex Discrimination (NI) Order 1976 or to add PCS as a respondent to those claims (pursuant to the claimant's application of 29 April 2019).

58. In light of the finding at paragraph 54 above, the impugned claims comprised within claim reference 10/19FET and 967/19IT (which were registered by the tribunal secretariat acting administratively, but exercising no judicial function), offend against the more general procedural rule against abusive proceedings as per **Virgin**. Further, the bringing of these matters in a further claim reference 10/19FET and 967/19IT on 15 December 2018 offends against the rule in **Henderson v Henderson** (see paragraph 30 above)**.**

59. If the Tribunal has erred in making the finding set out above, the Tribunal further finds that the impugned claims as included in claim reference 10/19FET and 967/19IT brought on 15 December 2018 should be struck out in any event for the following reasons:

    a. the Tribunal accepts the submission by the respondent's representative that the last act which can be categorised as sex discrimination occurred on 14 February 2018;

    b. claim reference 10/19FET and 967/19IT was not brought until 15 December 2018 and was therefore not brought within the statutory time limit for sex discrimination claims;

    c. the Tribunal accepts the submissions of the respondent's representative set out at paragraph 53 above and accordingly declines to extend time in respect of the allegations of unlawful sex discrimination.

60. The Home Office can have no liability in respect of any of the allegations comprised within claim references 49/18FET, 5663/18IT, 54/18FET, 5709/18IT, 10/19FET and 967/19IT regarding the advice or representation provided by the claimant's trade union. These claims therefore have no reasonable prospect of success against the respondent named in the proceedings, the Home Office, and are therefore struck out.

61. The claimant did not name any person from PCS or the union itself as a respondent in any of his claims, including claim reference 10/19FET or 967/19IT. The claimant would therefore still require leave to amend his claim 10/19FET and 967/19IT to add his trade union and/or trade union representatives as a respondent(s). A formal application was made on 24 April 2019 to add PCS as a respondent. The email appeared to suggest that the claimant wished to add PCS as a respondent so that he could pursue a claim of having been subject to unlawful detriment or unfairly dismissed on trade union grounds. Such a claim is incoherent and is manifestly hopeless.

62. Contrary to the submission of Counsel at the Hearing, in respect of the claims against the claimant's trade union and/or trade union representatives of unlawful

religious discrimination, the tribunal would appear to have statutory jurisdiction to consider such claims. The tribunal also has jurisdiction, under the Disability Discrimination Act 1995, to consider the claimant's claim of unlawful disability discrimination regarding the interactions between him and his union representative(s). However, the tribunal declines to join PCS as a respondent in respect of this claim, as no application was received to join PCS as a respondent until 24 April 2019. Applying the balance of injustice/hardship test propounded by **Selkent**, the tribunal finds that balance is in favour of not joining PCS, given the further delays that will be caused in bringing the claimant's claims to a conclusion through an expeditious hearing. The hearing length would also be extended. This decision does not prevent the claimant proceeding to a full hearing in respect of his other claims against the Home Office. In any event, the claimant has not at any stage provided the tribunal with the details necessary for the registration of a claim against PCS, pursuant to rule 3 of the Industrial Tribunal (Constitution and Rules of Procedure) Regulations (Northern Ireland) 2005, as amended.

63. The tribunal wishes to place on record its concern that in the preparation of the replies document referred to at paragraph 15 above and of his written submission entitled "Application to extend Time Limit & include PCS & Sex Discrimination in proceedings", the claimant was still making new factual allegations, despite having presented claims to the tribunal on three previous occasions. The claimant seems to seek to augment his claims with new allegations and information on a very regular basis, contrary to the principle espoused in **Tirkey** (see paragraph 34 above). This is not how a claim should be pursued. The claimant's conduct in this regard is unreasonable and must cease, as it is causing delay and increasing the costs burden on the respondent. The tribunal in making this decision is mindful of the guidance provided in **Peifer**, set out at paragraph 24 of this decision, namely the need to "*exercise… its powers in respect of proper management of the proceedings to ensure justice, expedition and the saving of cost."*

**Employment Judge:**

**Date and place of hearing:** **05 August 2019, Belfast.**

**Date decision recorded in register and issued to parties:**