THE INDUSTRIAL TRIBUNALS

CASE REFS: 583/16
1156/16

CLAIMANT: **Eamonn McGrath**

RESPONDENT: **Southern Health & Social Care Trust**

DECISION ON A PRE-HEARING REVIEW

The decision of the tribunal is that the claimant's claim registered under claim reference number 583/16 comprises a valid unfair dismissal claim, lodged within the relevant three months' time limit.

Constitution of Tribunal:

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

Appearances:

The claimant was represented by Mr M Quigley, Barrister-at-Law instructed by McCartan Turkington Breen Solicitors.

The respondent was represented by Ms C Tiffney, Solicitor of the Directorate of Legal Services.

ISSUES

1. At a Case Management Discussion held on 12 August 2016, the following issues were agreed for the Pre-Hearing Review hearing as follows:-

   (1) Whether the claimant's claim registered under claim reference number 583/16 comprises amongst other things a valid unfair dismissal claim, lodged within the relevant three month time-limit?

   (2) If not, whether the claimant's claim of unfair dismissal lodged under claim reference number 1156/16 was lodged within the relevant three month time-limit? If not, should time be extended on the basis that it was not reasonably

practicable for the claimant to lodge his claim in time?

2. At the Pre-Hearing Review it was agreed that an additional issue should be added as follows:-

Should leave be granted to amend claim reference 583/16?

SOURCES OF EVIDENCE

3. The tribunal heard evidence from Thomas Brownlee from NIPSA on behalf of the claimant. The tribunal was assisted by helpful written submissions from both sides and oral submissions on 14 October 2016. Copies of the written submissions are appended to this decision.

FINDINGS OF FACT

4. Having considered the oral and documentary evidence before it, the tribunal made the following findings of fact, on the balance of probabilities:-

(i) It was common case that the claimant was one of a number of claimants involved in a multiple case (1976/15) involving claims against various health trusts in relation to the Working Time Regulations and Unauthorised Deductions from Wages.

(ii) The claimant presented a claim to the tribunal on 26 February 2016 which was registered as a claim for unauthorised deduction from wages and the right to be paid annual leave under the Working Time Regulations. Paragraph 7.1(a) was ticked in relation to an unfair dismissal claim. This was done by Mr Brownlee. His evidence was that he did not complete Page 5 which included a reference to Kevin McCabe as the claimant's representative, and not Mr Brownlee. Apparently there was confusion within NIPSA as to the correct representative. Kevin McCabe was involved in the multiple cases. Mr Brownlee completed Pages 6 and 7 of the claim form, but the remainder of Page 8 (except for the tick box for unfair dismissal), was not completed by him, but by a secretary within NIPSA. Thomas Brownlee was present when the claimant signed the claim form on 3 February 2016. He claimed that he did not see the attachment to the claim presented to the tribunal on 26 February 2016. However he claimed that he had attached the details of the unfair dismissal claim to the claim form but that the secretary had left these details out of the form when it was presented to the tribunal office. The attachment to the claim form actually presented to the tribunal contained absolutely no reference to an unfair dismissal claim.

(iii) Upon receipt of the claim form, the tribunal administration registered the claim under unauthorised deductions from wages and unpaid leave under the Working Time Regulations, but did not register a claim for unfair dismissal. This meant that Kevin McCabe was sent a standard letter by the tribunal acknowledging receipt of the claim. The claimant contended that there was nothing in the letter to alert the claimant that an unfair dismissal claim had been rejected. The respondent received the standard correspondence from the tribunal on the same date indicating that a response was to be received by 5 April 2016. The response was emailed to the tribunal office at 4.10 pm on 1 April 2016. A copy of the response was sent to Kevin McCabe on 7 April 2016. The response, which did not make reference to an unfair

dismissal claim, referred to amending claim ref. 1976/15 (the multiple) rather than submitting a new claim. This apparently alerted Thomas Brownlee to the fact that the response did not correspond to an unfair dismissal claim having been presented to the tribunal. He then went to the central file which contained the application in the multiple cases. At this stage it appears that Thomas Brownlee took legal advice from McCartan Turkington Breen Solicitors. A further claim (1156/16) was presented to the tribunal office by courier service on 11 April 2016 containing an unfair dismissal claim and including the attachment which, according to the claimant's case, ought to have been presented as part of case reference 583/16.

(iv) It was common case that the effective date of termination of the claimant's employment was 8 December 2015. Mr McGuigan relied on both the tribunal correspondence, (which the claimant claimed meant that an unfair dismissal claim had been accepted in the first place in connection with case reference 583/16), and the administrative error made by NIPSA in completing the first claim correctly. The amendment application made on behalf of the claimant was, in effect, to include in the first claim (583/16) the unfair dismissal details contained in the second claim. The Case Management Discussion on 12 August 2016 was held on the same date on which a Pre-Hearing Review was listed to consider the issue as to whether the claimant's claim of unfair dismissal was in time and, if not, whether time should be extended. This issue arose out of a Case Management Discussion held on 5 July 2016 by teleconference. The claimant's representative did not appear and offered no explanation for his absence. The claimant was contacted and represented himself. Ms Tiffney represented the respondent. Shortly before the Pre-Hearing Review on 12 August 2016, Ms Tiffney was alerted to the additional issue which now comprises the first issue before the tribunal.

(v) The tribunal also made the parties aware of Rule 3 of the Industrial Tribunals Rules of Procedure 2005 (as amended) and in particular paragraph (8) which states:-

> "A decision to accept or not to accept a claim or part of one shall not bind any future tribunal or Employment Judge where any of the issues listed in paragraph (1) fall to be determined later in the proceedings".

Paragraph (1) states:-

> "The Secretary shall not accept or register the claim (or a relevant part of it) if it is clear to him that one or more of the following circumstances applies –
>
> (a) the claim does not include all the relevant required information;
>
> (b) the tribunal does not have power to consider the claim (or that relevant part of it) ..."

(vi) After an initial administrative difficulty regarding the address for the respondent, the claim form in the second case (1156/16) was forwarded to the respondent on 10 May 2016. A detailed response was lodged with the tribunal. Paragraph 27 alerted the claimant to the respondent's argument that the claim was out-of-time. By this time Thomas Brownlee was fully engaged in correspondence with the tribunal. A copy of the response was

forwarded to him on 13 June 2016. Thomas Brownlee was aware that a PHR was scheduled to take place on 12 August 2016 when he returned from leave towards the end of July 2016. When challenged in cross-examination as to why he had not alerted the respondent to the first issue before the tribunal, his explanation was that he went through the tribunal form and it came to light that a box had been ticked in relation to unfair dismissal. He then needed to take legal advice. Due to what appears to be a mix-up within NIPSA, the claimant was not represented at the Case Management Discussion held on 5 July 2016. Thomas Brownlee claimed that he left a colleague to take calls in his absence on leave. However he failed to notify the tribunal that this was the case. In general, it seems that the handling of this matter by NIPSA internally was most unsatisfactory, even with the benefit of legal advice.

THE LAW

5. The Procedural Rules

(i) The procedural rules are contained in Schedule 1 to the Industrial Tribunals (Constitution and Rules of Procedure) Regulations (Northern Ireland) 2005 known as the Industrial Tribunals Rules of Procedure.

Rule 1(1) provides –

> "1.—(1) A claim shall be brought before an industrial tribunal by the claimant presenting to the Office of the Tribunals the details of the claim in writing. Those details must include all the relevant required information (subject to [...](a) rule 53).
>
> (2) Subject to paragraph (3), unless it is a claim in proceedings described in regulation 10(3), a claim which is presented on or after 1st October 2005 must be presented on a claim form which has been prescribed by the Department in accordance with regulation 10.
>
> (3) Where a claim described in paragraph (2) has not been presented using the prescribed form but the Secretary is satisfied that –
>
> (a) the information provided in the claim is substantially the same as the information which would have been provided had the prescribed form been used; and
>
> (b) the form in which the claim is presented is not calculated to mislead,
>
> that claim shall be taken to have been presented on a claim form prescribed by the Department in accordance with regulation 10.
>
> (4) Subject to paragraph [...](b) rule 53, the required information in relation to the claim is –
>
> (a) each claimant's name;
>
> (b) each claimant's gender;

(c) each claimant's date of birth;

(d) each claimant's address;

(e) the name of each person against whom the claim is made ("the respondent");

(f) each respondent's address;

(g) details of the claim;[and](c)

(h) whether or not the claimant is or was an employee of the respondent [.](d)

(i) [...

(j)

(k) ...](e)[

(5) [...

(6) ...](f)

(7) Two or more claimants may present their claims in the same document if their claims arise out of the same set of facts.[

(8) ...](g)

What the tribunal does after receiving the claim

2.—(1) On receiving the claim the Secretary shall consider whether the claim or part of it should be accepted in accordance with rule 3. If a claim or part of one is not accepted the tribunal shall not proceed to deal with any part which has not been accepted (unless it is accepted at a later date). If no part of a claim is accepted the claim shall not be copied to the respondent.

(2) If the Secretary accepts the claim or part of it, he shall –

(a) send a copy of the claim to each respondent and record in writing the date on which it was sent;

(b) inform the parties in writing of the case number of the claim (which must from then on be referred to in all correspondence relating to the claim) and the address to which notices and other communications to the Office of the Tribunals must be sent;

(c) inform the respondent in writing about how to present a response to the claim, the time limit for doing so, what may happen if a response is not entered within the time limit and that the respondent has a right to receive a copy of any decision disposing of the claim;

(d) when any statutory provision relevant to the claim provides for conciliation, notify the parties that the services of a conciliation officer are available to them;[

(e) ...](a)

(f) if only part of the claim has been accepted, inform the claimant and any respondent which parts of the claim have not been accepted and that the tribunal shall not proceed to deal with those parts unless they are accepted at a later date; [and] (b)

(g) enter the following details of the claim in the Register (subject to rule 49) –

(i) the case number;

(ii) the date the Secretary received the claim (on this occasion);

(iii) the name of each claimant;

(iv) the name of each respondent;

(v) the type of claim brought in general terms without reference to detail.

When the claim will not be accepted by the Secretary

3.—(1) The Secretary shall not accept or register the claim (or a relevant part of it) if it is clear to him that one or more of the following circumstances applies –

(a) the claim does not include all the relevant required information; [or](c)

(b) the tribunal does not have power to consider the claim (or that relevant part of it) [.](d)[

(c) ...](e)

(2) If the Secretary decides not to accept a claim or part of one for any of the reasons in paragraph (1), he shall refer the claim together with a statement of his reasons for not accepting it to a chairman. The chairman shall decide in accordance with the criteria in paragraph (1) whether the claim or part of it should be accepted and allowed to proceed.

(3) If the chairman decides that the claim or part of it should be accepted he shall inform the Secretary in writing and the Secretary shall accept the relevant part of the claim and then proceed to deal with it in accordance with rule 2(2).

(4) If the chairman decides that the claim or part of it should not be accepted he shall record his decision together with the reasons for it in writing in a document signed by him. The Secretary shall as soon as is reasonably practicable inform the claimant of that decision and the reasons for it in writing together with information on how that decision may be reviewed or appealed. [

(5) ...](f)

(6) Except for the purposes of [paragraphs (7)](a) or any appeal, where a chairman has decided that a claim or part of one should not be accepted such a claim (or the relevant part of it) is to be treated as if it had not been received by the Secretary on that occasion.

(7) Any decision by a chairman not to accept a claim or part of one may be reviewed in accordance with rules 34 to 36. If the result of such review is that any parts of the claim should have been accepted, then paragraph (6) shall not apply to the relevant parts of that claim and the Secretary shall then accept such parts and proceed to deal with it in accordance with rule 2(2).

(8) A decision to accept or not to accept a claim or part of one shall not bind any future tribunal or chairman where any of the issues listed in paragraph (1) fall to be determined later in the proceedings".

(ii) The relevant law is set out in the written submissions appended to this decision.

SUBMISSIONS

6. The tribunal was assisted by lengthy and helpful written submissions from both parties which are annexed to this decision. Mr Quigley and Ms Tiffney made further oral submissions on 14 October 2016. Mr Quigley contended that, under the Rules, the Secretary had either to accept or reject a claim. He reiterated his submission that the claimant had ticked a box claiming unfair dismissal and that (if not accepted as a claim), the unfair dismissal aspect should have been specifically rejected by the tribunal following determination by an Employment Judge, and the claimant notified accordingly. He further submitted, that the claim had in fact been accepted in the first place, and an amendment should be allowed not to add a claim of unfair dismissal to the first claim but to amplify the details of the claim already made. In the alternative, and in the context of the second claim, he relied on the case of **Adams v British Telecommunications PLC UKEAT/0342/15/LA** referred to in his written submissions to substantiate his argument that the claimant and his representative had a genuine mistaken belief that the claim had been accepted in the first place (in that case, the claim had been rejected by the tribunal). Ms Tiffney, on the other hand, reiterated the argument presented in her written submissions that the claim did not get "off the ground", that the issue of acceptance or rejection did not arise under the Rules, and that Rule 3 was not triggered. She further submitted that an unfair dismissal claim had not been registered in the first claim and it was reasonably practicable in the sense of being reasonably feasible for the claimant to have presented a claim of unfair dismissal within three months from the effective date of termination of his employment on 8 December 2015. Ms Tiffney conceded that although the claimant and Mr Brownlee may have had a

mistaken belief, it was not a genuine mistaken belief, as reference would otherwise have been made to it in the second claim and certainly before 11 August 2016 when Mr Brownlee raised the matter referred to in the first issue before the tribunal.

CONCLUSIONS

7. Having considered the evidence insofar as relevant to the issues before it, together with the principles of law and the submissions, the tribunal concludes as follows:-

(1) In this jurisdiction the tribunal is satisfied that the case of **Grimmer v KLM City Hopper UK (2005) IRLR 596,** has been followed. An example of this is in the case of **Fay v An Termann Project Ltd and Anor (2006) NIIT 273/06** where the Employment Judge found that the statement, "I also believe my employer was in breach of the Working Time Regulations" was sufficient to accept such a claim.

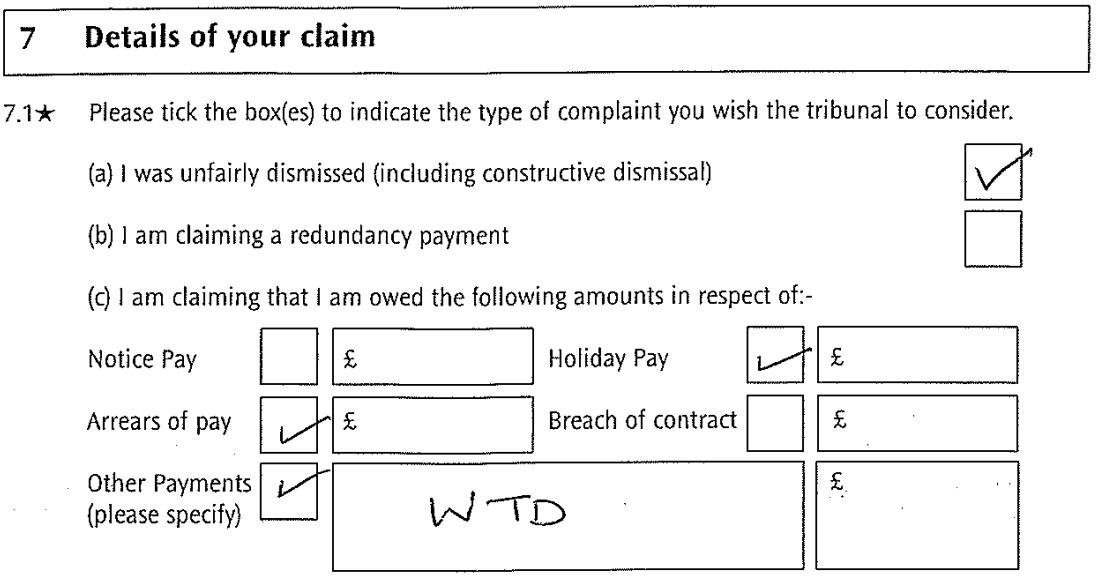
(2) In **Grimmer**, the Employment Appeal Tribunal (Judge Prophet) pointed out that it is a vital principle that the Rules of Procedures cannot cut down on an Employment Tribunal's jurisdiction to entertain a complaint which the primary legislation providing an employment right empowers it to determine. If there is a conflict, the Rules must give way. That principle, which accords with the interests of justice, can be applied generally to Rules 1-3 [of the then 2004 Regulations in the English jurisdiction]. What might have been regarded as a mandatory requirement should not be taken to the point of denying the claimant access to the Employment Tribunal system. In deciding whether the requirements of the Rules have been met, the (Employment Judge) as an independent judicial person, has to do more than merely run down a check list. Judge Prophet also referred to the fact that it is a very serious step to deny a claimant the opportunity of having an employment rights issue resolved by an Employment Tribunal. In the interests of justice the threshold for access, should be kept low. In paragraph 15 of his judgement, Judge Prophet went on to state as follows:-

> "The test for "details of the claim" emerges as being whether it can be discerned from the claim as presented that the claimant is complaining of an alleged breach of an employment right which falls within the jurisdiction of the employment tribunal. It follows that, if that test is met there is not scope for either the Secretary or (an Employment Judge) interpreting "details of the claim" as being "sufficient particulars of the claim". If it becomes necessary, as a case proceeds through the system, for further information or further particulars to be obtained, eg, to clarify the issues, that can be done, either on the application of a party or by (an Employment Judge) on his or her own initiative, under Rule 10 (Case Management)".

(3) In **Grimmer** the claimant had clearly indicated in her claim that she wished to pursue a complaint in respect of flexible working. She had ticked the relevant box and, when asked for details of her complaint, had attached a statement which said:-

> "The Company's business argument for refusing my application is based upon their assumption that, if they concede to my request, others would be requesting similar/same working arrangements".

(4) In the case before this tribunal, paragraph 5 of the claim form clearly states that the claimant was an employee under a contract of employment and that his employment began on 3 June 1991 and ended on 8 December 2015. In paragraph 7 under the heading of **"Details of your claim"** the following appears on the claim form:-



7 Details of your claim

7.1★ Please tick the box(es) to indicate the type of complaint you wish the tribunal to consider.

(a) I was unfairly dismissed (including constructive dismissal) ☑

(b) I am claiming a redundancy payment ☐

(c) I am claiming that I am owed the following amounts in respect of:-

Notice Pay	☐	£	Holiday Pay	☑	£
Arrears of pay	☑	£	Breach of contract	☐	£
Other Payments (please specify)	☑	WTD			£

(5) The Rules provide that if part of a claim is being rejected, it must be referred to an Employment Judge for determination. Had this occurred the claimant would have had the opportunity of seeking a review of the decision not to accept an unfair dismissal claim. The tribunal is satisfied, consistent with the principles in **Grimmer** and its overriding objective, that the unfair dismissal claim must be considered, in the absence of any evidence of rejection, as having been accepted by the tribunal, and it ought to be registered accordingly.

(6) The tribunal is therefore satisfied that the answer to issue (1) is in the affirmative and that the claimant's claim registered under claim reference 583/16 comprises, amongst other things, a valid unfair dismissal claim, lodged within the relevant three month time-limit. The tribunal also considers it appropriate and consistent with its overriding objective, to give leave to the claimant to amend his claim to include details of the alleged unfair dismissal and also to give leave to the respondent to amend its response within 14 days from the date of issue of this decision. It follows, therefore, that issue 2 does not arise for further consideration.

Employment Judge:

Date and place of hearing: **2 September and 14 October 2016, Belfast.**

Date decision recorded in register and issued to parties:

Case Ref No: 582/16IT

IN THE OFFICE OF THE INDUSTRIAL TRIBUNALS
AND THE FAIR EMPLOYMENT TRIBUNAL

BETWEEN:

EAMONN MCGRATH

CLAIMANT

AND

SOUTHERN HEALTH & SOCIAL CARE TRUST

RESPONDENT

WRITTEN SUBMISSIONS ON BEHALF OF THE CLAIMANT

INTRODUCTION

[1] It is the Claimant's respectful submission that the ET1 dated the 3rd of February 2016 contains a claim for Unfair Dismissal. The Claimant further submits that, under Schedule 1 of The Industrial Tribunals (Constitution and Rules of Procedure) Regulations (Northern Ireland) 2005 (The "2005 Regulations), the ET1 was accepted, in the letter dated the 8th of March 2016, by the Secretary for the Tribunals in its entirety. Therefore, this ET1 contains a valid unfair dismissal claim lodged within the three-month time limit.

[2] On the 8th of December 2015, the Claimant was dismissed by the Respondent; on foot of this dismissal an ET1 Claim Form, assigned Case Reference Number 582/16IT, was drafted and submitted to the Office of the Industrial Tribunal on the 3rd of February 2016. The ET1, at Section 7.1, contains the affirmatively marked statement "I was unfairly dismissed" and the date of dismissal is set out at Section 5.2. However, due to an administrative error the written statement attached to the ET1 was missing the section particularising the claim for unfair dismissal.

[3] The ET1 was accepted and sent to the Respondent who duly submitted a response. Upon discovering the omission, The Claimant submitted a further claim form, with the written statement concerning unfair dismissal attached, and this was also sent to the Respondent who submitted a response in turn.

RELEVANT LEGAL PRINCIPLES AND RULES OF PROCEDURE

[4] The Rules of Procedure which govern proceedings before the Industrial Tribunal are contained in Schedule 1 of The Industrial Tribunals (Constitution and Rules of Procedure) Regulations (Northern Ireland) 2005. This differs from the position in England and Wales where Schedule 1 of The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 govern procedure (the "2013 Regulations"). These regulations differ substantially in how a claim is processed, the grounds for rejection, and who may make the decision to reject. This therefore limits the applicability of post-2013 Regulations case law from that jurisdiction as opposed to case law applying The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004 which are almost identical to the 2005 regulations which govern this jurisdiction.

The Claim

[5] All claims being brought before the Industrial Tribunal must be made in writing using the proscribed form: Rule 1(1) of Schedule 1 of the 2005 Regulations. The Employment Appeal's Tribunal case of *Baker* v *Commissioner of the Police of the Metropolis* [UKEAT/0201/09] makes it clear that, when determining whether a claim is contained within an ET1, the Tribunal must consider the form as a whole; see also *Thompson* v *Nicolas McKenna & Company T/A The Galgorm Group* [2010] NIIT 6815/09IT.

[6] The procedure for lodging a claim with the Industrial Tribunal is contained within Rule 1 of Schedule 1 of the 2005 Regulations. Under Rule 1(4) a valid claim must contain:

> "(a) each claimant's name;
>
> (b) each claimant's gender;
>
> (c) each claimant's date of birth;
>
> (d) each claimant's address;
>
> (e) the name of each person against whom the claim is made ("the respondent");
>
> (f) each respondent's address;
>
> (g) details of the claim;
>
> (h) whether or not the claimant is or was an employee of the respondent;"

[7] Once a claim is submitted to the Industrial Tribunal the Secretary for the Tribunal scrutinises the claim to determine whether or not it, or any part of it, shall be accepted. A claim will not be accepted by the Secretary if under Rule 3(1):

> "(a) the claim does not include all the relevant required information;

(b) the tribunal does not have power to consider the claim (or that relevant part of it); or

(c) Article 19 of the Employment Order (complaints about grievances: industrial tribunals) applies to the claim or part of it and the claim has been presented to the tribunal in breach of paragraphs (2) to (4) of that Article"

[8] If a claim is accepted by, either the Secretary or an Employment Judge, the Secretary shall, under Rule 2(2);

"(a) send a copy of the claim to each respondent and record in writing the date on which it was sent;

....

(c) inform the respondent in writing about how to present a response to the claim, the time limit for doing so, what may happen if a response is not entered within the time limit and that the respondent has a right to receive a copy of any decision disposing of the claim;

....

(f) if only part of the claim has been accepted, inform the claimant and any respondent which parts of the claim have not been accepted and that the tribunal shall not proceed to deal with those parts unless they are accepted at a later date;

(g) enter the following details of the claim in the Register (subject to rule 49) –

(i) the case number;

(ii) the date the Secretary received the claim (on this occasion);

(iii) the name of each claimant;

(iv) the name of each respondent;

(v) the type of claim brought in general terms without reference to detail."

[9] If a claim is not accepted by the Secretary, they shall, under Rule 3(2), refer the claim, with a statement of their reasons for rejecting, to an Employment Judge who makes a finding as to whether or not the claim shall be accepted. Therefore, under the rules a claim may only be rejected by the Employment Judge after having the matter referred to him by the Secretary. The purpose of this is to provide a "double-check" as to whether there has in fact been any omission; *Hamling* v *Coxlease School Ltd* [2007] IRLR 8 at [35]. However, it is more than this as the role of the Employment Judge is to make a judicial decision as to whether or not to reject a

claim. Judge Prophet in the case of *Grimmer* v *KLM City Hopper* [2005] IRLR 596 set out at [8]:

> "The chairman, unlike the secretary whose functions are administrative has, as an independent judicial person, to do more than merely run down a checklist. He or she must have in mind the overall interests of justice. It is a very serious step to deny a claimant or for that matter a respondent the opportunity of having an employment rights issue resolved by an independent judicial body ie an employment tribunal. Most chairmen would not wish to feel forced to do so without there being a very good reason."

[10] The 2013 Regulations in England and Wales contain different tests for rejection set out in Rules 10-12. These have not been introduced into the rules which govern procedure before the Tribunal in this Jurisdiction and so their differing standards are of no relevance in the present issue.

[11] Under Rule 3(4), if a claim is rejected by the Employment Judge, the Secretary "shall as soon as is reasonably practicable inform the claimant of that decision and the reasons for it in writing together with information on how that decision may be reviewed or appealed."

[12] The rejection of a claim or part thereof is therefore a positive act which must carried out by the Secretary and an Employment Judge. There is no scope within the rules for an implied rejection of a claim; it must be express and in writing.

Grounds for Rejection

[13] The only applicable ground for rejection in this case is that of Rule 3(1)(a); that it does not contain all the required relevant information in that it lacks sufficient details of claim as required by Rule 1(4)(g).

[14] The Employment Appeal's Tribunal case of *Grimmer* v *KLM City Hopper* [2005] IRLR 596 is the leading authority in determining the question as to whether an ET1 contains sufficient information to meet the requirements of Rule 1(4)(g). Though not binding, the test it sets forth has been applied in this jurisdiction on numerous occasions: see *Moore* v *Peninsula Business Services* Ltd [2009] NIIT 921/08IT, and *Fay* v *An Tearmann Project Ltd & Anor* [2006] NIIT 273/06.

[15] Judge Prophet set out the following in *Grimmer* on determining whether there are sufficient "details of claim" within an ET1

> "The test for 'details of the claim' emerges as being whether it can be discerned from the claim as presented that the claimant is complaining of an alleged breach of an employment right which falls within the jurisdiction of the employment tribunal. It follows that if that test is met there is no scope for

either the Secretary or a chairman interpreting 'details of the claim' as being 'sufficient particulars of the claim'. If it becomes necessary, as a case proceeds through the system, for further information or further particulars to be obtained eg to clarify the issues, that can be done, either on the application of a party or by a chairman on his or her own initiative, under rule 10 (case management)." – at paragraph [15].

CLAIMANT'S SUBMISSION

[16] The Claimant's submission is set out below and can be summarised as:

a. The first ET1 claim form contains a claim of unfair dismissal

b. The Secretary accepted this ET1 claim form in its entirety, as evidenced by correspondence, and as such accepted the claim of unfair dismissal.

c. The Secretary did not reject the unfair dismissal claim and followed none of the procedures to do so if they had such intent.

d. In any event, the Secretary does not have the power to reject the claim form and so no action they took could reject said claim.

e. No Employment Judge considered or rejected said claim as is required.

f. Even if an Employment Judge had considered it, the test set out in *Grimmer* is clear that the claim would have been accepted.

[17] Applying the case of *Baker*, Section 7.1 must be considered when determining the claims contained within the claim form. Therefore, as Section 7.1 contains the affirmatively marked statement "I was unfairly dismissed", there is clearly a claim for unfair dismissal within the ET1 to be considered by the Secretary in processing the ET1.

[18] The only correspondence received by the Claimant from the Office of the Industrial Tribunal is that dated the 8th of March 2016. This comes from the Secretary of the Tribunal and states that the Claim has been registered and a copy has been sent to the Respondent. It is the Claimant's submission that this is evidence of the Secretary applying the procedure for accepting a claim as set out in Rule 2(2). The assumption must be that the entire claim was accepted as Rule 2(2)(f) requires it to be expressly stated within the March 8th letter if any part of the claim was rejected. The only step of Rule 2(2) not followed by the Secretary is that "Unfair Dismissal" was not entered into the register, as required by Rule 2(2)(g)(v), as one of the types of claim. This is simply a clerical error which can be administratively amended; it does not constitute a rejection of the claim and the overriding objective to deal with cases justly (Regulation 3 of the 2005 Regulations) would be frustrated if this was allowed to prevent a claim of unfair dismissal.

[19] Furthermore, the Secretary does not have the power to reject a claim; they can only refer a claim to an Employment Judge to determine whether or not to accept it. As such, no action of the Secretary can serve to reject a claim; the decision to reject is a judicial decision taken by the Employment Judge and no other and so omission from the Tribunal register has no effect upon validity.

[20] Applying the 2005 Regulations to the facts; the ET1 contained a claim for unfair dismissal as Section 7.1 must be considered by the Secretary under *Baker*. The Secretary then processed that claim, in its entirety, in line with the procedure for acceptance set out in Rule 2(2). At no stage was the procedure for rejection in Rule 3 applied and the Claim was never referred to an Employment Judge who is, under the 2005 Regulations, the only person who can reject a claim. Therefore, the claim for lodged by the Claimant on the 3rd of February 2016 contains a valid claim for unfair dismissal lodged within the required three-month time limit.

[21] Furthermore, even if the claim had been referred to an Employment Judge for determination, of which there is no evidence, it is submitted that the only action which could have been taken was full acceptance of all claims within the ET1. The case of *Grimmer*, which is the test applied in this jurisdiction, makes it clear that if it can be discerned that the Claimant is complaining of an alleged breach of an employment right that constitutes sufficient details of claim under Rule 1(4)(g).

[22] The claim form contains the following relevant information related to a claim of unfair dismissal:

a. Section 2 identifies the Claimant's employer as the SHSCT which stands for the Southern Health and Social Care Trust
b. At Section 5 the Claimant states that he is an employee of the Respondent and that he was employed as a "Senior Support Worker".
c. Section 5 also sets out that his employment was terminated on the 8th of December 2015.
d. In Section 7.1 the Claimant asserts "I was unfairly dismissed".

[23] This information more than satisfies the test laid out in *Grimmer* and so there existed no scope for an Employment Judge to reject a claim for unfair dismissal if it had been referred to the to consider.

AMENDING THE CLAIM

[24] If the Tribunal decides that there was in fact no such claim, which the Claimant strongly rejects, it is submitted that the Tribunal should nevertheless exercise its power under Rule 10(2)(q) to amend the 3rd of February ET1 to include the attached written statement from the ET1 dated the 8th of April 2016.

[25] It is submitted that even if the Tribunal defines this matter as a Category (III) type amendment (see Harvey on Industrial Relations and Employment Law Section PI [311]) it should nevertheless be granted on the balance of the hardship which would be suffered by the parties. See *Selkent Bus Co Ltd* v *Moore* [1996] IRLR 661 at 664.

[26] Employment Judge Greene, in *McKee* v *NSL Limited* [2012] NIIT 00104/12IT, summarised the elements, set out in *Selkent*, which are to be considered in determining the potential hardship to each part:

> "(i) the length of and reasons for the delay,
>
> (ii) the extent to which the cogency of the evidence is likely to be affected by the delay,
>
> (iii) the extent to which the parties should have co-operated with any requests for information,
>
> (iv) the promptness with which the claimant acted once he knew of the facts giving rise to the cause of action, and
>
> (v) the steps taken by the claimant to obtain the appropriate professional advice once she knew the possibility of taking action."

[27] The Claimant responded immediately upon discovering the error; completing the second claim only seven days after the Respondent lodged their response and only a single month after the expiration of the three-month time limit. Therefore, it is submitted that the short delay, coupled with the fact that the Respondent has already fully responded to the unfair dismissal claim, indicates that the potential hardship to the Respondent if any amendment was allowed is greatly outweighed by that to the Claimant if refused. If refused, the Claimant will be prevented from pursuing a substantial aspect of his claim against the Respondent.

[28] It is submitted that for the above reasons, if the Tribunal determines that there is no claim for unfair dismissal in the original ET1, leave to amend said claim to include the written statement dealing with unfair dismissal should nevertheless be granted.

CONCLUSION

[29] The overriding objective requiring the Tribunal to deal with cases "justly" necessitates that the Claimant be allowed to proceed with a claim for unfair dismissal. A simple error occurred in that the written statement particularising said claim was omitted from the initial form; an error which the Claimant attempted to resolve as soon as they became aware of it.

[30] Upon a full reading of the claim form there clearly exists a claim of unfair dismissal contained in Section 7.1. It would not be in line with the overriding objective to hold that said claim was rejected when none of the procedural requirements for rejection were followed and the matter was never referred to an Employment Judge for consideration. The claim was dealt with by the Secretary only which, the Claimant submits, proves that the unfair dismissal claim was accepted for two reasons. Firstly, they accepted the ET1 claim in its entirety and so the unfair dismissal claim contained within was accepted. Secondly, the Secretary has no power to reject a claim for unfair dismissal; merely refer claims to an Employment Judge to determine the issue. Therefore, the fact that unfair dismissal was left off the register, which is the only action taken that does not comply with Rule 2(2), not only is not a rejection of the claim, it cannot be a rejection under the 2005 Regulations.

[31] The Claimant respectfully submits that under the rules contained within Schedule 1, the unfair dismissal claim was not and cannot have been rejected. Furthermore, rejection of this claim would not be in line with the overriding objective when an application of the *Grimmer* test, which is applied in this jurisdiction, clearly shows that, had an Employment Judge considered whether to accept the claim they would have been required to do so. If this submission is rejected, the claim should nevertheless be amended to include the written statement as the injustice which would be suffered if prevented heavily outweighs that towards the Respondent if allowed.

Michael Quigley BL

Counsel for the Claimant

INDUSTRIAL TRIBUNAL S (CONSTITUTION AND RULES OF PROCEDURE) (REGULATIONS) (NORTHERN IRELAND) ORDER 2005

BETWEEN:

EAMONN MC GRATH

Claimant

AND

SOUTHERN HEALTH AND SOCIAL CARE TRUST

Respondent

Written submissions on behalf of the Respondent

Introduction

1. There are three issues before the Tribunal to be addressed in the following order;
   I) Whether the claimant's claim 582/16 IT (referred to herein as "Claim 1") includes a valid unfair dismissal claim?
   II) If not, whether the claimant's claim of unfair dismissal 1156/16 IT (referred to herein as "Claim 2") was lodged within the relevant three month time limit? If not, should time be extended on the basis that it was not reasonably practicable to present this claim in time and it was presented within a reasonable period of time thereafter?
   III) If not, should the Tribunal grant the claimant's application to amend Claim 1 to include the written statement appended to Claim 2?

The circumstances leading to the identification of these three issues is factually complex. A chronology of key events is appended to this submission at Annex A.

Key Facts

2. The claimant's employment with the respondent ended with effect from 8th December 2015.

3. In evidence, the claimant's trade union representative Mr Brownlee explained that he completed the ET1 form. Mr Brownlee only ticked one box in section 7.1 - box 7.1(a) indicating that the claimant wished to bring a claim of unfair

dismissal. Pages 9 & 10 of the ET1 were left blank. The ET1 was checked and signed by the claimant on 3rd February 2016. At a later date Mr Brownlee appended a typed document to this ET1 which set out the details of the claim of unfair dismissal. This was not checked by the claimant. Mr Brownlee's secretary was on leave so he asked another secretary to submit the claim form to the Tribunal. The secretary wrongly surmised that the claim was a working time claim, part of the "sleep in" multiple. She ticked the arrears of pay, holiday pay and other payments boxes in section 7.1(c) of the ET1, added the text "WTD". The secretary also removed the details of claim regarding the claim of unfair dismissal and replaced it with the standard "sleep in" details of claim. She then submitted the claim to the Tribunal.

4. The Tribunal accepted the claim and assigned it the case reference number 582/16 IT. However the claim of unfair dismissal was not registered; only the working time and related arrears of pay complaints were registered.

5. Mr Brownlee did not check the ET1 after it was submitted. He only realised that administrative errors had been made to the ET1 when he read the respondent's ET3 on 8th April 2016. He was alerted to the error by virtue of the reference in section 6.2 of the ET3 to the fact that the claimant has already lodged a sleep in claim. On realising the error Mr Brownlee took legal advice and lodged a new unfair dismissal claim, Claim 2. This was couriered to the Tribunal on 11 April 2016. This claim makes no reference to Claim 1. At this point the normal time limit for bringing a claim of unfair dismissal had past. It expired on 8th March 2016, a fact which Mr Brownlee in evidence confirmed he was aware of.

6. The Respondent raised the time point in its ET3 for Claim 2 and sought a pre-hearing review (PHR). The Tribunal grants this request and a PHR is listed for 12th August. The existence of Claim 1 and its purported inclusion of a claim of unfair dismissal is first raised on 11th August, the day before the PHR.

Issue 1 - Whether Claim 1 includes a valid unfair dismissal claim?

The Law

7. The Industrial Tribunal s (NI) Order 1996 ("the ITO") is the current primary legislation conferring jurisdiction on the Tribunal. Article 4 states that the Tribunal shall exercise the jurisdiction conferred on them by virtue of the ITO and any other statutory provision. Article 9 (2) provides that;

   "proceedings before industrial Tribunal s ***shall be*** *instituted in accordance with industrial Tribunal procedure regulations*". (my emphasis).

8. The applicable procedure regulations are laid down in Schedule 1 to the Industrial Tribunal s (Constitution and Rules of Procedure) Regulations (NI) 2005 ("the Rules").

Bringing a Claim

9. Rule 1(1) of the Rules provides –
"*A claim shall be brought before an industrial Tribunal by the claimant presenting to the Office of the Tribunal s the details of claim in writing. Those details* ***must*** *include* ***all*** *the relevant required information*" (my emphasis) subject to a few exceptions which are not applicable.

10. Rule 1(4) sets out the information which must be included in the claim form. The relevant entry for this claim is Rule 1(4) (g) "*details of the claim*".

Examination of the Claim

11. Upon receipt of a claim form Rule 2 (1) provides that the Secretary to the Tribunal must consider the claim to see "*whether the claim or part of it should be accepted in accordance with rule 3*". Rule 3(1) provides that the Secretary "***shall not*** *accept or register the claim*" (my emphasis) or part of if it is clear that the claim does not include all of the relevant required information set out in Rule 1(4) which is the only applicable ground that the relevant claim in this case would not be accepted.

When a claim is not accepted.

12. If the Secretary takes such a decision then Rule 3(2) provides that the matter must be referred to an Employment Judge who shall decide whether it agrees with the decision of the Secretary or whether the claim or part of it which has not been accepted or registered by the Secretary should be allowed to proceed. If the Employment Judge agrees with the Secretary he shall record his decision and the reasons for it in writing and same should be forwarded to the claimant in writing by the Secretary as soon as is reasonably practicable along with information as to how the decision may be reviewed or appealed (Rule 3(4)).

13. Rule 3(8) makes it clear that any decision to accept or reject a claim under the process outlined above does not bind any future Tribunal or Employment Judge were any of these issues fall to be determined in later proceedings.

Case Law

14. There are a number of EAT decisions which consider the test to be applied by Tribunal s in relation to Rules 1(1) and 1(4) and specifically as to whether the information provided in an ET1 regarding a claim meets the requirements and whether the claim should be accepted or rejected by the Tribunal . These decisions relate to the old 2004 Rules of Procedure in England and Wales which mirror our 2005 Rules. Two key decisions are that of **Grimmer v KLM City Hopper UK (2005) IRLR 595** and **Hamling v Coxlease School Limited (2007) IRLR 8.**

15. HHJ Prophet at paragraph 15 of his decision in **Grimmer** laid down the following test:-

> *"The test for "details of the claim" emerges as being whether it can be discerned from the claim as presented that the claimant is complaining of an alleged breach of an employment right which falls within the jurisdiction of the employment Tribunal".*

16. Essentially according to the **Grimmer** test once it is clear from the details provided in a claim form that a complaint is being made then there is no scope for the Tribunal to reject the complaint on the grounds of insufficient details.

17. In this case the claimant presented a claim form in which she made a complaint for flexible working. She ticked the relevant box and attached a brief statement setting out her reasoning as to why her employer had rejected her complaint. A Tribunal Judge rejected her claim as it failed to set out "details of the claim" but the EAT overturned this decision.

18. The test in **Hamling** is twofold; is the omission relevant and is it material? If the Tribunal follows this test and the answer to both is yet then according to **Hamling** the complaint cannot be validly accepted. See paragraphs 35-39 of the decision which set out Mr Recorder Luba QC's reasoning.

19. In this case the claimant presented a number of complaints and provided details of these claims. However she did not provide her address. Applying Rule 1 the claim form was rejected by a Tribunal Judge in light of this omission but the decision was overturned on appeal.

20. It is fair to say that the test in **Hamling** is more stringent than in **Grimmer** and as such they are incompatible. Although they are of equal authority the respondent submits that the test in **Hamling** should be followed because the test in **Grimmer** does not allow for the exercise of judgment on the part of the Employment Judge in determining whether a claim has been properly presented in accordance with the Rules of Procedure and if not whether all or part of it should be rejected. The decision in **Grimmer** was criticised by **Harvey on Industrial Relations and Employment Law at Division T paragraph 305**. The primary criticism related to the proposition laid down by HHJ Prophet in **Grimmer** that in principle the Rules of Procedure cannot cut down a Tribunal's jurisdiction to entertain a complaint which the primary legislation empowers it to determine. HHJ Prophet noted in **Grimmer** "*if there is conflict the Rules must give way*".

21. This proposition was recently criticised by HHJ Laing in the EAT decision of **The Trustees of the William Jone's School's Foundation v Parry EAT/0088/16.** Part of this decision concerned the scope of the Tribunal 's power to reject a claim. This case concerns the new 2013 Rules of Procedure in England and Wales which do not apply in this jurisdiction and are not identical to our rules. However within her discussion on this point HHJ Laing references the pre-2013 positon and the authorities referenced above. In

doing so HHJ Laing notes that the extent to which the authorities can help her was limited by the different wording used by the two sets of Rules but she observes that the primary limitation was the fact that;

> *"they are based on the misapprehension that a failure to comply with prescriptive procedure Rules made in delegated legislation cannot take away a right to make a claim which is conferred by primary legislation".*

22. HHJ Laing goes on to note that the provision of Section 7(2) of the Employment Tribunal s Act which is replicated in our legislation by Article 9(2) of the ITO *"is highly significant"*. She notes at paragraph 33 that it authorises the cutting down of employment rights in primary legislation to the extent that those rights are not exercised in accordance with the Tribunal Rules of Procedure.

23. Reference is also made in this decision to the case of **Fairbank v Care Management Group UKEAT/0139/12** a case which pre dates the new 2013 rules and in which Slade J at paragraph 13 sets out what he deems to be the essentials in a claim form, notably *"the basis for the claims advanced in law..second, when the act occurred, third who carried out the act, fourth what the act was and fifth, if relevant why it is said that the act was carried out and sixth any matter affecting remedy".*

24. HHJ Laing deemed these observations to be of some analogical help and noted that she had no hesitation in holding that *"no reasonable EJ properly directing himself in law could have concluded that an ET1 in this form could reasonably be responded to"* (para 31). This is the test for acceptance under the new 2013 Rules of Procedure and is arguably less stringent and certainly less prescriptive that our Rules.

25. The core facts in **Parry** are worth mentioning as they are most akin to the facts of this case. The ET1 indicated an intention to bring claims of unfair dismissal and arrears of wages. This was indicated by ticks against the two relevant boxes. "Please see attached" was all that was stated in the details of claim. The solicitor for the claimant erroneously attached a rider which provided details of a wholly unrelated claim. The Judge decided not to reject the claim and another Judge refused the respondents request that this decision be reviewed. There were further preliminary hearings which ultimately led to the hearing before the EAT which dealt with a number of jurisdictional issues. Crucially however HHJ Laing noted that had the only issue been whether the Judge erred in law in not rejecting the claim then her answer would have been a resounding "yes".

26. Finally the authorities appropriately reference the impact of the Tribunal's overriding objective, (contained in Regulation 3 of the 2005 Regulations) and the importance of factoring this duty into any decision as to whether a claim has been validly made / should be rejected.

27. The authorities show that consideration of the overriding objective must be done in the context of the facts each case. Also a cautionary note is given by

HHJ Laing in the **Parry** case to emphasis on the overriding objective in cases were there has been a breach of mandatory rules, authorised by primary legislation to cut down employment rights if they are not complied with. (See paragraph 20).

The Respondent's Submissions

29. The Respondent's submission is set out below and in summary is as follows;

i) The ET1 submitted for Claim 1 does not include a claim of unfair dismissal.

ii) The details of claim which suggest an intention to include a claim of unfair dismissal are limited to the tick of a box.

iii) The Secretary did not reject the claim of unfair dismissal as the details provided were so deficient that it was not discernible from the ET1 that such a claim was being presented i.e. the claimant failed to bring a claim, hence the need to apply Rules 2 and 3 did not arise.

iv) The chronology of events supports this proposition notably the issuing of a new claim, Claim 2 when the deficiencies in Claim 1 were realised and the timing of the introduction of the purported existence in Claim 1 of a claim of unfair dismissal.

v) Had the complaint of unfair dismissal been identified, the mandatory requirements of Rules 1(1), 1(4) & 3(1) of the 2005 Rules would have led the Secretary to reject the complaint and the Employment Judge in light of same and the authorities.

vi) This holds true whether the Employment Judge chose to apply the **Grimmer** or **Hamling** test and took into account the overriding objective as an alternative decision would fundamentally undermine the importance of compliance with Rule 1(1) & 1(4) of the 2005 Rules.

vii) Alternatively should the Tribunal agree with the Claimant that the claim of unfair dismissal was accepted by default then the Employment Judge should exercise his judicial discretion provided for in Rule 3(8) and reject this complaint.

viii) Such a decision is consistent with the 2005 Rules, the ITO (notably Article 9(2)), the case law referred to herein and the overriding objective.

30 In all of the relevant cases bar the **Parry** case there was more than a tick box to indicate an intention to bring a complaint. Hence the complaint was identified and the steps set out in Rules 2 and 3 of the 2005 Rules were applied. In **Parry** the relevant complaints were only identified because they were the only complaints referenced in the ET1. Therefore attention had to be drawn to the two ticked boxes.

31 In this case there were other claims in the ET1. Save for the ticked box indicating an intention to bring a claim of unfair dismissal there was no other information to highlight this fact. The other details provided and summarised in para 22 of the claimant's submissions must be considered in the context of the ET1 as a whole (as per **Baker v Commissioner of the Police of the Metropolis UKEAT/0201/09**). As such they are details compatible with the accepted working time claims and provide no indication of a claim of unfair dismissal.

32 It is not surprising therefore that the claim of unfair dismissal was not picked up by the Secretary. The ticked box was understandably lost amongst the significant details of the accepted "sleep in" claims. No valid claim of unfair dismissal was presented and the obligations on the Secretary and the Employment Judge set out in Rules 2 & 3 of the 2005 Rules did not apply.

33 The claimant's submits that in the absence of an express rejection of the unfair dismissal claim, the claim was accepted and the failure on the part of the Secretary not to register the claim was simply a clerical error. The respondent submits that this is an artificial argument which does not accord with the facts of this case. If this proposition is correct then why did the claimant's representative not alert the Tribunal to the clerical error when the problems with Claim 1 were realised? The claimant's representative took legal advice at the relevant time and instead of running this argument chose to issue a new claim of unfair dismissal, Claim 2. Claim 2 does not contain any reference to the purported existence of a claim of unfair dismissal in Claim 1. This argument was only raised at a very late stage, the day before the PHR re the time point for Claim 2 was due to take place.

34 The information contained in Claim 1 regarding a claim of unfair dismissal does not meet the test in **Grimmer,** the most lenient test. It clearly was not discernible from the information contained in Claim 1 that a complaint for unfair dismissal was being made as evidenced by the fact that neither the Tribunal nor the respondent identified this claim.

35 It follows therefore that the information provided does not meet the **Hamling** test which the respondent submits is the appropriate test. The omissions were clearly relevant and material. The checklist of essential criteria referenced in **Fairbanks** was not met. In particular, the factual basis for the claim, who was involved, the act(s) that led to the dismissal and why the dismissal occurred.

36 In view of the above the respondent's submits that Claim 1 does not include a claim of unfair dismissal.

37 In the alternative should the Tribunal accept the claimant's argument that the unfair dismissal claim is included in Claim 1 and was accepted by the Tribunal due to the absence of an express rejection, the respondent asks the Tribunal to exercise its judicial discretion provided for in Rule 3(8) to reject the claim of unfair dismissal in Claim 1. The respondent submits this would be consistent with the strict requirements of the relevant 2005 Rules of Procedure (Rules 1(1), 1(4) and 3(1)), the primary legislation (Article 9(2) of the ITO), the case

law in this area outlined within these submissions and the overriding objective which requires the Tribunal to do justice to both parties.

38 Cognisance of the overriding objective will inevitably involve consideration of the key facts. The claimant was represented over the relevant period. The errors in Claim 1 should have been detected much earlier than they were. Had this happened then a valid claim of unfair dismissal could have been presented within the normal time limits. Even when the error was detected the purported existence of the unfair dismissal claim was not raised in a timely fashion.

39 In addition the magnitude of the deficiency is of central relevance to the overriding objective. This lack of details of claim in this case was so significant as to prevent the Tribunal and the respondent from discerning that a complaint of unfair dismissal was being made. The respondent believes that these facts distinguish this case from the authorities and in particular the case of **Moore** were consideration of the overriding objective led the President to conclude that the Tribunal had jurisdiction to hear claims which were not fully particularised in the ET1.

40 Moreover use of the overriding objective to circumvent the strict nature of the 2005 rules should be limited to minor, immaterial and irrelevant omissions, otherwise the impact of the Rules will be eroded. HHJ Elias in **Parry** endorsed the observation of President Langstaff J in **Cranwell v Cullen UKEAT/0046/14** when he said;

> *"To say in one part of the rules "The Tribunal has no option but to do X" and then to read is as subject to the provisio "except where it does not want to" is incoherent".*

41. These observations relate to the 2013 Rules but they were made in reference to the Tribunal's overriding objective, a concept which is substantially similar to our overriding objective in the 2005 Regulations and its interaction with the strict rules of procedure for bringing a claim. Therefore the discussion is relevant and persuasive.

42. If the overriding objective was applied to permit the claim of unfair dismissal in this case to be accepted, what impact would that have on the 2005 Rules of Procedure, notably Rules 1(1) & 1(4)? The respondent submits it would undermine the strict nature of these Rules and would be inappropriate and unfair to the respondent. The overriding objective requires a balance fairness between the claimant and his ability to access to justice against fairness to the respondent and its entitlement to have certainty with regards to the claims being made by the claimant in each claim and confidence that mandatory rules of procedure will not be bent beyond that which the 2005 Rules and case law allows.

Issue 2 - If not, whether the claimant's claim of unfair dismissal 1156/16 IT (referred to herein as "Claim 2") was lodged within the relevant three month time limit? If not, should time be extended on the basis that it was not reasonably practicable to present this claim in time and it was presented within a reasonable period of time thereafter?

The Law

42. The relevant extract from the Employment Rights (NI) Order 1996 is Article 145 which sets out within what period of time a claim of unfair dismissal should be brought to the Tribunal and when time should be extended by the Tribunal to accept a claim lodged outside of the normal time limits.

Article 145 (2) (a) defines the normal time limit as - "*before the end of the period of three months beginning with the effective date of termination*".

The effective date of termination in this case is 8th December 2015. Therefore the claim for unfair dismissal should have been lodged on or before 8th March 2016. Claim 2 was received by the Tribunal on 11th April 2016. Therefore Claim 2 is presented over one month past the normal time limit.

43. There follows a two limbed test;

If a claim is presented outside the normal time limit Article 145(2) (b) provides that the Tribunal must be satisfied that;

1. "*It was not reasonably practicable for the claim to be presented before the end of that period of three months*". If so then to be accepted the Tribunal must be satisfied that;

2. The clam was presented "*within such further period as the Tribunal considers reasonable*".

The burden is on the claimant to prove this.

The Case Law

44. Unlike issue 1, the case law in this area is well known and well established. Therefore I have not outlined the law in any great detail.

45. Whether or not it was reasonably practicable to lodge an unfair dismissal claim in time is a question of fact. There is significant case law on what is reasonably practicable and it is summarised in **Harvey on Industrial Relations and Employment Law Division PI F paras 190 – 208.**

The test set down in **Dedman v British Building and Engineering Appliances Ltd (1974)1 All ER 520** and echoed in **Wall's Meat Co Ltd v Khan (1978) IRLR 499** is still valid and is one of liberal construction but requires a stricter interpretation that one of pure reasonableness (CA in **Schultz v Esso Petroleum Ltd (1999) 3 All ER 338**)

"Had the man just cause or just excuse for not presenting his complaint within the prescribed time? Ignorance of his rights –or ignorance of the time limit is not just cause or excuse unless it appears that he or his advisers could not reasonably be expected to have been aware of them. If he or his advisers could reasonably have been so expected, it was his or their fault and he must take the consequences..."

46. Only if the Tribunal concludes that it was not reasonably practicable to present the claim in time does it turn its attention to whether it was presented within a reasonable period thereafter. The Tribunal has a very limited discretion in respect of this limb of the test. The case law shows that claimants are expected to make their applications asap once the impediment preventing them has been removed. Actual knowledge of his rights over this additional period and what his knowledge ought reasonably have been is relevant.

The often endorsed approach by Underhill J in **Cullinane v Balfour Beatty Engineering Services Ltd UKEAT/0537/10** is that-

"objective consideration of the factors causing the delay is required and what extra period should be reasonably allowed in those circumstances having regard to the strong public interest in claims being brought promptly...against a background where the primary time limit is three months.. "

47. If the delay is unreasonable the fact that it is the fault of advisers is irrelevant. Endorsed in more recent decision in **Balfour Beatty Engineering Services v Allen UKEAT/0236/11**

Respondent's Submissions

48 The claimant's claim of unfair dismissal in Claim 2 was lodged over one month outside of the normal time limit.

49. There was no impediment preventing the claimant from lodging his claim within the normal time limit. The Tribunal heard the evidence of Mr Brownlee that the claimant signed and approved the ET1 completed with the intention of bring a claim of unfair dismissal on 3rd February which is well inside the normal time limit. That claim form, Claim 1, was lodged within the normal time limit, on 26th February 2016. Therefore it was reasonably practicable for the claim to be lodged in time. The cause of the claimant's failure to lodge the claim for unfair dismissal, Claim 2, within the normal time limit was due to the mistaken belief of the claimant's representative that Claim 1 included a valid claim of unfair dismissal.

50. Therefore should the Tribunal agree that it was reasonably practicable for the claimant to lodge a claim of unfair dismissal within the normal time limit it cannot, according to the wording of Article 145(2)(b) extend the normal time limit to allow the claim to be heard.

51. For the sake of completeness the respondent submits that Claim 2 was not submitted within a reasonable period after the normal time limit as the

claimant's representative could have and should have checked the Claim 1 after it was lodged with the Tribunal whereupon the administrative errors would have been realised and could easily have been corrected via the submission of a new claim for unfair dismissal or alternatively an application to amend Claim 1 to add the details of claim regarding the claim of unfair dismissal.

52. The case law shows that the fault of the claimant's advisors is not a ground upon which time should be extend to allow an out of time unfair dismissal claim to be heard.

Issue 3 - If not, should the Tribunal grant the claimant's application to amend claim 582/16 IT to include the written statement appended to claim 1156/16 IT?

53. This is a new issue which was first raised in the claimant's submissions in paragraphs 24 – 28 inclusive.

54. The application is made as an alternative approach to the claimant's contention that Claim 1 already contains a valid claim of unfair dismissal. This application will only be activated if the Tribunal forms the view that Claim 1 does not include a valid claim of unfair dismissal. Therefore the respondent submits that the application can only sensibly be viewed as a Category III type application as described in **Harvey, Section PI para 311.04 and paras 312.05 - 312.11**, i.e. this is a new claim unconnected to the original claim as pleaded.

55. As Harvey points out (a para 312.05) the issue of time limits will be required to be considered. The Tribunal must decide whether the claim is in time. The respondent submits that it is not. The normal time limit expired on 8th March 2016 and the application to amend was made on 2nd September 2016. The test for extending time is the same test as outlined for issue 2 above. Therefore if Claim 2 which was issued on 11th April, just over one month past the normal time limit is deemed by the Tribunal to be out of time and time should not be extended, this application to amend Claim 1 to add a new claim, almost 6 months past the normal time limit should not be accepted for the same reasons as those which applied to Claim 2.

56. The respondent accepts that the issue of time limits is only one factor when considering an application to amend, "albeit an important and potentially decisive one" (as per **Selkent Bus Co Ltd v Moore (1996) IRLR 661**). The Tribunal has discretion to allow this application despite the wording of Article 145(2) not providing a basis for doing so.

57. However the respondent submits that the Tribunal should not do so as this application represents the addition of an entirely new claim relying on a new set of facts not pleaded in Claim 1. The respondent does not believe that a ticked box provides a sufficient causative link between Claim 1, a "sleep in" claim and the proposed amendment.

58. Moreover the respondent submits that this application is far from prompt. The claimant chose to issue a new claim and within this claim made no reference to Claim 1 and its potential connection to the claim of unfair dismissal in Claim 2. In addition despite having the benefit of union and legal advice from in or around 8th April 2016 the claimant did not make this application until 2nd September. This is hard to reconcile with the emphasis placed on the time point via the respondent in its response to Claim 2, the listing of a PHR, the respondent's request for additional information and discovery about the time issue (which was not responded to) and the final focus on this issue at the CMD in August. This chain of events provided numerous opportunities for this application to be made well before 2nd September.

59. The reason for this application is also very relevant to its merit. It is an application which is being made on a protective basis. It is only be considered should the answers to issue 1 and 2 be "no". Consequently it is an attempt to circumvent the strict rules regarding the presentation of a claim. The respondent submits that it is not consistent with the tribunal's overriding objective to do so. The overriding objective must strike a balance of fairness and justice to both parties. The claimant has had ample time and opportunities to rectify the deficiencies in Claim 1 and make an application to amend this claim. The respondent submits that to grant this application would tip the balance too far in favour of the claimant given his access to legal and union advice and support and the numerous opportunities to make this application particularly given the emphasis placed on this issue by the respondent for almost 3 months.

60. In view of these facts and the principles laid down in **Selkent** the respondent submits that it would be inconsistent with the case law guidance and the tribunal's overriding objective to grant this application.

Conclusion

61. The respondent submits that the answer to all four questions posed by the three preliminary issues should be "No". The reasoning behind this submission is set out in detail herein. In summary;

- Issue 1 - the facts and law do not support the argument that Claim 1 includes a valid unfair dismissal claim. Even if the Tribunal accepts the claimant's argument that the unfair dismissal claim has been accepted by virtue of the absence of the express rejection of this claim the respondent argues that the Tribunal has the power to expressly reject the claim and should do so. The facts and case law point to this step being entirely appropriate, proportionate and fair.
- Issue 2 - Claim 2 was lodged outside of the normal time limit. It was reasonably practicable for the claimant to make this claim in time and it was not made within a reasonable period of time thereafter. The reason for the claim being made out of time was solely due to the fault of the claimant's advisor. Thus time should not be extended to allow this claim.

- Issue 3 - the reason and timing of the application to amend are central considerations for the Tribunal. In the respondent's respectful submission these factors should lead to refusal of this application.

Clare Tiffney

Solicitor for the Respondent

INDUSTRIAL TRIBUNAL S (CONSTITUTION AND RULES OF PROCEDURE) (REGULATIONS) (NORTHERN IRELAND) ORDER 2005

BETWEEN:

EAMONN MC GRATH

Claimant

AND

SOUTHERN HEALTH AND SOCIAL CARE TRUST

Respondent

Annex A

Chronology of Events

Date	Event
8th December 2015	Claimant's dismissal takes effect.
3rd February 2016	Claimant meets his trade union representative Mr Brownlee, reviews and signs the ET1 for Claim 1.
26th February 2016	Claim 1 received by Tribunal.
8th March 2016	Date upon which the normal time limit for bringing a claim of unfair dismissal expired.
1st April 2016	Respondent's response to Claim 1 received by Tribunal.
8th April 2016	Response considered by Mr Brownlee and legal advice sought.
11th April 2016	Claim 2 received by Tribunal.
7th June 2016	Respondent's response to Claim 2 received by Tribunal.
5th July 2016	Telephone case conference re Claim 2 – PHR listed for 12th August to deal with time point.
27th July 2016	Respondent serves Notices on the claimant's representative re the time point.
11th August 2016	Mr Brownlee serves a bundle of papers on the respondent's representative and the Tribunal. Claim 1 is referenced and asserted as including an unfair dismissal claim.
12th August 2016	CMD - PHR relisted to deal with issues I and II.
2nd September 2016	PHR commences. Claimant's representative makes an application to amend Claim 1 – issue III added.

32.

IN THE OFFICE OF THE INDUSTRIAL TRIBUNALS
AND THE FAIR EMPLOYMENT TRIBUNAL

BETWEEN:

EAMONN MCGRATH

CLAIMANT

AND

SOUTHERN HEALTH & SOCIAL CARE TRUST

RESPONDENT

FURTHER WRITTEN SUBMISSIONS ON BEHALF OF THE CLAIMANT

Issue 1: Whether the Claim 583/16IT contains a valid unfair dismissal claim.

The Law

[1] The Claimant reiterates that the test which is applied in this jurisdiction is that set out in *Grimmer* v *KLM City Hopper* [2005] IRLR 596:

a. Employment Judge Drennan QC applied the test in the 2006 case of *Fay* v *An Tearmann Project Ltd & Anor* [2006] NIIT 273/06

b. President McBride applied the test in the 2008 case of *Moore* v *Peninsula Business Services* Ltd [2009] NIIT 921/08IT

c. Employment Judge Drennan QC applied the test in the 2010 case of *Marcinek* v *Qualitrol Hathaway Danahar UK* [2010] NIIT 00077/10IT

d. Employment Judge Drennan QC also applied the test in the 2016 case of *Kelly* v *K-Tec Automation Ltd* [2016] NIIT 00005/16FET

[2] The Respondent relies heavily upon the recent Employment Appeal Tribunal's decision of *The Trustees of The William Jones's Schools Foundation* v *Parry* EAT/0088/16. This is a case in which any comments regarding the acceptance of a claim were entirely *obiter dicta*; the case was determined on the basis that the rule in question, Rule 12(1)(b) of Schedule

1 of The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, was *ultra vires* (HHJ Laing at [45]).

[3] Therefore, what the Respondent is asking the Tribunal to do is to abandon a test which has been applied in a long line of authority in this jurisdiction on the basis of an *obiter dicta* comment made in another jurisdiction which is using a completely different set of rules from our own. The cases of *Grimmer*, *Parry*, and *Hamling* are all cases from the Employment Appeal Tribunal in England and Wales; as such, none are binding upon this jurisdiction, all are of equal authority and in this jurisdiction the Tribunal has chosen *Grimmer*. The President of the Tribunal, in the case of *Moore* v *Peninsula Business Services* Ltd [2009] NIIT 921/08IT at [10.3], made it clear that it is *Grimmer* and not *Hamling* which is applied in determining whether Rule 1(4)(g) has been satisfied.

[4] Furthermore, the Respondent puts forward no authority for the proposition that the applicable test is now *Hamling*; this case is mentioned nowhere in the *obiter* comments of HHJ Laing who put forward no test as her ruling was that their new rule was *ultra vires*. The only comment coming close to identifying an alternative test is the approval of further *obiter dicta* of another EAT decision; that of *Fairbank* v *Care Management Group* UKEAT/0139/12 which concerned whether an Employment Judge could direct that an ET1 be reduced in size. In that case Slade J states that the following "may well be" the essentials of a claim form:

> "*the basis for the claims advanced in law (for example, unfair dismissal, discrimination); second, when the act complained of occurred, third, who carried out that act; fourth, what the act was; fifth, if relevant, why it is said that the act was carried out; and sixth, any matter affecting remedy*"; at paragraph [13]

[5] The Respondent is again asking the Tribunal to abandon almost a decade of local authority to instead apply the noncommittal *obiter* statement of a Judge determining whether an ET1 can be too long rather than too short. Slade J was not attempting to espouse a new test regarding the details of claim; he was simply agreeing with a letter of the Regional Employment Judge in that case that once a claim form hits the above six points anything else may be superfluous.

Claimant's Submissions

[6] In paragraph [32] the Respondent states that, as no valid claim of unfair dismissal was presented, Rules 2 and 3 did not apply. In the Claimant's respectful submission that contention is flawed; a potential claim is validated or rejected by the Tribunal's actions under Rules 2 and 3 which are engaged as soon as an ET1 form is received. The Claimant reiterates that the rules are clear; if any part of the claim form is deemed to not be a valid claim there must be an express rejection of that part following determination from a Tribunal judge. This is not an artificial argument; the Secretary has no power to reject any part of a claim and one cannot simply disregard Section 7.1; the Secretary's actions created a valid claim of unfair dismissal submitted within the time limit and so Issue 1 is answered in the affirmative.

[7] Mr. Brownlee stated that upon receiving the Respondent's first ET3, he sought legal advice over the phone and immediately sought to lodge a second ET1; at this time, he was not aware that Section 7.1 (a) had in fact been ticked. As soon as this was identified, Mr. Brownlee sought further legal advice and this led to the raising of Issue 1 before the first PHR. Therefore, to answer the question posed by the Respondent in paragraph [33]:

> "why did the claimant's representative not alert the Tribunal to the clerical error when the problems with Claim 1 were realised?"

The Claimant's representative did in fact raise the issue as soon as the error was realised. Furthermore, it is submitted that this extraneous evidence is immaterial in determining how the rules have been applied; the only relevant evidence is what was written on the Claim form and what actions the Tribunal took in processing said Claim form.

[8] Therefore, the rules remain clear; the claim of unfair dismissal was processed and not rejected by the Tribunal and so the First Claim must contain a valid and accepted claim of unfair dismissal.

[9] However, if the Tribunal does wish to exercise its residual discretion under Rule 3(8) the answer to Issue 1 must still be in the affirmative as one can clearly discern from Section 7.1 that the Claimant is alleging a breach of his right to not be unfairly dismissed.

[10] The Respondent states at paragraph [34] that the test of *Grimmer* has not been met by the First Claim Form. This is a contention which cannot be

supported on any reading of the Claim Form; the fact that "neither the Tribunal nor the respondent identified this claim" is irrelevant in determining whether or not the test is in fact met. There is no authority for the proposition that what a respondent believes is contained within the form in any way influences the determination as to whether an "alleged breach of an employment right" can be discerned; *Grimmer* at paragraph [15].

[11] Rule 1(2) of the 2005 Rules directed that a claim to the Tribunal be made using the ET1 claim form created specifically for that purpose and, in creating that claim form, it was decided to include a series of check boxes, at Section 7.1, for Claimants to easily indicate what "type of complaint" they wished the Tribunal to consider. Therefore, it is the Claimant's submission that one cannot read Section 7.1 of the first Claim and, seeing the affirmatively marked box at 7.1(a), not be able to discern that the Claimant was alleging that he was unfairly dismissed as that is the entire purpose of that Section's inclusion within the ET1 claim form.

[12] Judge Drennan QC, in the case of *Fay* v *An Tearmann Project Ltd & Anor* [2006] NIIT 273/06, applied *Grimmer* and found that the statement "I also believe my employer was in breach of the Working Time Regulations" was sufficient to accept such a claim. It is submitted that the Claimant has similarly made the statement "I was unfairly dismissed"; the only difference is that it did not occur within the body of a written statement but in Section 7.1, a section specifically created for Claimants to make such statements.

[13] Furthermore, even if one applied the *Fairbank* criteria, which go far further than what is required in this jurisdiction, the claim form is sufficient:

a. Section 7.1 sets out the claims advanced in law: Unfair Dismissal

b. Section 5.2 establishes when the act occurred: 8th of December 2015

c. Section 7.1 again establishes what the act was: A dismissal

d. The fifth criteria only applies where relevant and it is for a Respondent not a Claimant to assert why a dismissal occurred.

e. Section 6.11 establishes that the Claimant wishes for compensation only as a remedy.

Therefore, it is submitted that even if one holds that HHJ Laing was attempting to replace *Grimmer* with *Fairbank*, a contention which is wholly unsupported by the *Parry* judgment, the claim form remains sufficient.

[14] Finally, if the Tribunal makes the decision to overturn the entirety of local authority and introduce the *Hamling* test instead; the Respondent has at no point indicated what omissions were material and relevant. They reference the *Fairbank* criteria which the Claimant submits has been met as set out above.

[15] The law on what must be proven by each side in a claim of unfair dismissal is clear. It is for the Claimant to prove both that he is an employee of the Respondent and that he has been dismissed by the Respondent and it is then for the Respondent to establish the reason for dismissal and that the dismissal was fair. Therefore, as the Claimant, as set out above, asserts both that he was an employee of the Respondent and that he was dismissed by the Respondent there is nothing more which the Claimant need assert to begin a claim for unfair dismissal. On that basis, it is the Claimant's submission that there can be nothing else, relevant and material to a claim for unfair dismissal, which was omitted from the claim form.

[16] The Respondent references no decisions of the Industrial Tribunal or Fair Employment Tribunal in Northern Ireland to support its argument. This is because none exist as the entire weight of precedent within this jurisdiction supports the application of *Grimmer* in determining the **Issue 1**. Therefore, if the Tribunal wishes to exercise its residual discretion under Rule 3(8) and re-examine the claim the practice in this jurisdiction is clear; *Grimmer* is applied and there is nothing within the *obiter* comments of the non-binding judgment of HHJ Laing which overturns that practice. In any event, the Claimant contends that the information contained within the claim form meets the relevant *Fairbank* criteria and, as what a Claimant must prove in an unfair dismissal claim is very limited, contains no relevant or material omissions under the *Hamling* test.

Issue 2 - If not, whether the claimant's claim of unfair dismissal 1156/16 IT (referred to herein as "Claim 2") was lodged within the relevant three month time limit? If not, should time be extended on the basis that it was not reasonably practicable to present this claim in time and it was presented within a reasonable period of time thereafter?

The Law

[17] The law in this area is governed by Article 145 (2) of the Employment Rights (NI) Order 1996:

"(2) Subject to paragraph (3), an industrial tribunal shall not consider a complaint under this Article unless it is presented to the tribunal—

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

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

[18] As set out by the Respondent, the law on whether it was reasonably practicable to lodge within the time limit is well established; the leading case of *Palmer and Saunders* v *Southend-on-Sea Borough Council* [1984] IRLR 119 (at 211) defines the test as one of "reasonable feasibility": See also *Dedman* v *British Building and Engineering Appliances Ltd* (1974)1 All ER 520 *Wall's Meat Co Ltd* v *Khan* (1978) IRLR 499.

[19] The Claimant does not seek to set out such well-established law any further than is done in the Respondent's submissions except insofar as the law deals with cases in which a second claim is lodged out of time due to the rejection of the first.

[20] Langstaff J, in the Employment Appeal Tribunal case of *Software Box Ltd* v *Gannon (Debarred)* UKEAT/0433/14/BA, set out the following at paragraph [41]:

"Here, as it seems to me, the fact that a complaint was made within time and then rejected does not and should not, as a matter of principle, preclude the consideration of whether a second claim traversing the same ground is one in which the tribunal should have jurisdiction. The purpose of the Act is to ensure that claims are brought promptly. But the need to do so within a short period of time is balanced by the interests of justice which Parliament has regarded as encompassed in the test of reasonable practicability. If the approach to reasonable practicability is taken as it was by Brandon LJ in Wall's Meat v Khan, it requires a focus upon what is reasonably understood by the Claimant. If there is a case in which a Claimant reasonably considers that there is no need to make a claim, not therefore understanding (for very good reasons) that the time limits apply to the claim, as they do, because she had already made a claim which remains effective, it seems to me to be open to a tribunal to consider a second claim made once she realises that her view was mistaken."

[21] This issue was further considered in the Employment Appeal Tribunal case of *Adams* v *British Telecommunications PLC* UKEAT/0342/15/LA. Briefly, this was a case where a Claimant, acting with legal representatives, lodged a claim with the Tribunal on the 16th of February with the time limit expiring on the 18th of that month. The claim was rejected by the Tribunal and the Claimant was notified of this when they received the form on the 19th of February and re-lodged that same day. Simler J held that, in cases where a second claim is lodged out of time due to the first claim being rejected, a Tribunal must consider the circumstances relevant to that second claim.

[22] In determining whether or not it was reasonably practicable to have lodged the second claim in time, Simler J stated that the focus is on the "Claimant's state of mind viewed objectively" (at [18]). Simler J further held at [19]:

> "The question for the Tribunal, in those circumstances, was not whether the mistake she originally made on 16 February was a reasonable one **but whether her mistaken belief that she had correctly presented the first claim on time and did not therefore need to put in a second claim was reasonable having regard to all the facts and all the circumstances.** In that regard, it seems to me, it must be assumed that the Claimant's error was genuine and unintentional. Further, as I have already indicated, it must be assumed that she was altogether unaware of the error since had she been aware of it no doubt she would not have made it or it would have been corrected." – emphasis mine.

Claimant's Submissions

[23] If the Tribunal rejects the above submissions and, moving this jurisdiction away from the *Grimmer* test, holds that the First Claim does not contain a valid claim of unfair dismissal it is submitted that it was not reasonably practicable for the Claimant to have lodged the Second Claim in time.

[24] It is submitted that the respondent's contention at paragraph 49 that "There was no impediment preventing the claimant from lodging his claim within the normal time limit" is at odds with the cases of *Software Box* and *Adams* where a similar argument was rejected. The consideration for the Tribunal, as set out in *Adams*, is whether the error was "genuine and unintentional". As Mr. Brownlee stated in evidence, the written statement dealing with unfair dismissal was removed in error by a secretary who mistakenly believed it was part of the large number of working time directive cases

currently being processed and lodged by NIPSA at that time. This was a genuine and unintentional error of which the Claimant and Mr. Brownlee were wholly unaware of.

[25] Therefore, it is submitted that the Respondent's submissions in paragraph [51] are irrelevant. The focus is on the Claimant's state of mind, viewed objectively, and there is no evidence of anything which should have alerted the Claimant to the error. As stated by Simler J, if the Claimant became aware of the error while the time limit was running they would have taken steps as they did on receiving the response.

[26] If the Tribunal had rejected the claim for unfair dismissal in its letter dated the 8th of March 2016 this case would have been almost identical to that of *Adams* as the actions taken on the 8th of April 2016 would instead have been taken at that time. Instead, if the Tribunal holds that either the Secretary rejected the claim or should have rejected the claim, the Secretary of the Tribunal made a significant error in not notifying the Claimant of the rejection. It is submitted that this error made it not reasonably practicable for the Claimant to have submitted the Second Claim within the time limit; the Claimant had been informed that the Claim had been sent to the Respondent and was therefore, as in *Adams*, labouring under the belief that it had been accepted.

[27] Upon discovering the error on Friday the 8th of April 2016 the Tribunal has heard from Mr. Brownlee that he acted promptly and lodged the second claim on Monday the 11th of April. Therefore, it is submitted that a reasonable period of one working day upon discovery of the error was taken by the Claimant to lodge the claim.

[28] To conclude, if the Tribunal overturns precedent and decides that the First Issue must be answered in the negative it is submitted that, relying on the case of *Adams*, it was not reasonably practicable for the Claimant to lodge the second claim within the three-month limit. Upon learning of the error, the Claimant then acted promptly and lodge within the reasonable period of a single working day. Therefore, the Claimant submits that the Second Issue should be answered "Yes".

Issue 3 - If not, should the Tribunal grant the claimant's application to amend claim 582/16 IT to include the written statement appended to claim 1156/16 IT?

[29] The Claimant does not propose to reiterate its position in regards to Issue 3 in great detail. In paragraph [58], the Respondent makes issue of the promptness of the application to amend; in the Claimant's respectful submission this is an argument focused on technicalities rather than substance. Although the application was only formally made, after instruction of Counsel, on the 2nd of September, the substance of the proposed amendment was served upon the Respondent on the 11th of April and the Respondent has already served its response. Therefore, a granting of this application would not place the Respondent in a more disadvantageous a position.

[30] Further, in response to paragraph [59], the reasoning for this application is to provide the tribunal with an alternative formulation to Issue 2. The Tribunal retains an overall discretion to allow amendments in cases which satisfy the *Selkent* relative hardship test for the purpose of alleviating the strict three-month time limit where the overriding objective requires. The Claimant is requesting that, if the Tribunal finds that it must find against the Claimant in Issues 1 and 2, the Tribunal exercises its discretion under Rule 10(2)(q) to amend the claim.

[31] The Claimant was, by an error of the Secretary of the Tribunal, led to believe that the initial claim was error free and so was unaware of any need to rectify until receiving the response. It is submitted that it is this which justifies the exercising of the Tribunal's discretionary power; especially when the proposed amendment has in fact been with the Respondent since the 11th of April and they have responded to it.

Michael Quigley BL
Counsel for the Claimant