

# THE INDUSTRIAL TRIBUNALS

CASE REF: 921/08

**CLAIMANT:** Patrick Moore

**RESPONDENTS:** 1. Peninsula Business Services Ltd  
2. Tony Sutcliffe

## DECISION ON A PRE HEARING REVIEW

The tribunal's decision is that:-

1. The tribunal does have jurisdiction to consider the claimant's complaints in respect of sex discrimination, race discrimination, notice pay, referral fees, breach of contract and unilateral variation of contract in addition to his complaint of unfair dismissal which are contained in the claimant's claim case reference number 921/08 and the claimant is ordered to provide details of his complaints by way of Additional Information in respect of sex discrimination, race discrimination, breach of contract and unilateral variation of contract to the respondent's representative within **21 days** of the date on which this decision is issued to the parties. The respondent should provide a detailed response to those details within **28 days** of the date on which details of those claims have been received by the respondent's representative.
2. The tribunal is required to take a claimant's conduct into account when determining compensation in a complaint of unfair dismissal whether or not the respondent raises it as part of its defence.
3. In light of the tribunal's decision at 2. an amendment of the response is not required.

### Constitution of Tribunal:

**President:** Miss Eileen McBride (sitting alone)

### Appearances:

The claimant appeared in person.

The respondents were represented by Mr K Denvir, Barrister-at-Law, instructed by Campbell Stafford Solicitors.

## **1. The claim**

- 1.1 On 26 June 2008, the claimant presented a claim to the industrial tribunal in which he made complaints in respect of unfair dismissal, sex discrimination, race discrimination, notice pay, referral payments, breach of contract and unilateral variation of contract. The claimant indicated that he had also submitted a claim to the Fair Employment Tribunal and on 27 June 2008 he presented a claim to the Fair Employment Tribunal in which he made a complaint of unlawful discrimination on grounds of religious belief and political opinion.
- 1.2 The claimant's complaints were originally made against both respondents as set out above. At a Case Management Discussion on 11 November 2008, the claimant withdrew all his complaints to the industrial tribunal and to the Fair Employment Tribunal against the second respondent who will therefore be dismissed from both sets of proceedings. His claims will continue against the first respondent who will hereinafter be called "the respondent".
- 1.3 By response to the claimant's claim to the Fair Employment Tribunal, received on 19 August 2008, the respondent contended that the claimant had failed to comply with the requirements of Rule 1(4)(e) of the Fair Employment Tribunal Rules of Procedure in relation to his complaint of unlawful discrimination on the grounds of religious belief and political opinion by way of dismissal. That issue was resolved at the Case Management Discussion on 11 November 2008, when the issues of unlawful discrimination on the grounds of religious belief and political opinion were identified. No jurisdictional issue therefore arose in relation to that claim at the Pre Hearing Review.
- 1.4 By response to the claimant's claim to the industrial tribunal, received on 19 August 2008, the respondent contended that the claimant had failed to comply with the requirements of Rule 1(4)(g) of the Industrial Tribunals Rules of Procedure in relation to his complaints of sex discrimination, race discrimination, notice pay, referral payments, breach of contract and unilateral variation of contract in that "the nature of the claims is asserted but no details in respect of these claims have been presented".

## **2. The issues for the Pre Hearing Review**

- 2.1 Upon application of the respondent, this Pre Hearing Review was arranged to consider and determine the following issues:-
  - (1) Whether the tribunal has jurisdiction to consider the claimant's complaints in respect of race discrimination and sex discrimination in view of the provisions of Rule 1(4)(g) of the Industrial Tribunal Rules of Procedure 2005.

With the consent of the parties this issue was amended at the Pre Hearing Review to cover the claimant's complaints in respect of notice pay, referral payments, breach of contract and unilateral variation of contract.
  - (2) Whether the tribunal has jurisdiction to consider a defence of contributory conduct in respect of the claimant's complaint of unfair dismissal in view of the provision of Rule 4(4)(d) of the Industrial Tribunal Rules of Procedure 2005.

- (3) Whether the response should be amended to include a defence of contributory conduct.

## **Issue 1**

**Whether the tribunal has jurisdiction to consider the claimant's complaints in respect of race discrimination, sex discrimination, notice pay, referral payments, breach of contract and unilateral variation of contract.**

### **3. The Procedural Rules**

- 3.1 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 -

“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 ....”

- 3.2 The required information is defined by Rule 1(4) as follows:

- “ (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;
- (i) whether or not the claim includes a complaint that the respondent has dismissed the claimant or has contemplated doing so;
- (j) whether or not the claimant has raised the subject matter of the claim with the respondent in writing at least 28 days prior to presenting the claim to the Office of the Tribunals; and
- (k) if the claimant has not done as described in sub-paragraph (j), why he has not done so.”

- 3.3 On receipt of a claim form at the Office of the Industrial Tribunals, Rule 2(1) requires the Secretary to the tribunal to “consider whether the claim or part of it should be accepted in accordance with rule 3.”
- 3.4 If the claim does not contain all the relevant required information set out at Rule 1(4), then Rule 3(1) provides that the Secretary shall not accept the claim or the relevant part of it. Under Rule 3(2) the Secretary must then refer the matter to a Chairman who will decide whether the claim or part of it should be accepted.

3.5 Rule 3(8) provides: “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”.

#### 4. **The details of the claimant’s complaints**

4.1 The claimant gave details of his complaint of unfair dismissal at sections 7.1 and 12.1 of his claim form to the industrial tribunal and no jurisdictional issue arises in relation to that complaint.

4.2 At section 8 of the claim form the claimant indicated that he was also making complaints of race discrimination and sex discrimination.

At section 8.2 the claimant indicated, in response to a question on the claim form, that the complaint of race discrimination and sex discrimination arose on 31 March 2008.

At section 8.3 the claimant indicated in response to another question on the claim form, that he first knew about the alleged discrimination on 31 March 2008.

At section 8.4 the claimant was asked to explain what discrimination he was complaining about. In response the claimant stated –

*“Race discrimination: particulars to follow  
Sex discrimination: particulars to follow  
Full particulars will follow with regards to these heads of claim although the respondents are fully aware of the issues as they were raised by way of grievance letter on 10/4/08.”*

The letter of 10/4/08 which was provided to the tribunal identified these complaints as grievance issues but did not provide details of them.

4.3 At section 10 of the claim form the claimant indicated that he was making complaints in respect of notice pay and referral payments. At section 10.3 he stated that he believed he was entitled to £2,678 in respect of one month’s notice pay and £3,000 in respect of 4 referral payments at £750 each.

4.4 At section 11 of the claim form the claimant indicated that he was making complaints in respect of breach of contract and unilateral variation of contract and that *“particulars for both heads of claim to follow. Too detailed to include here but the respondents are fully aware of the issues as they were raised by way of grievance letter on 10/4/08.”* As for the complaints of race discrimination and sex discrimination, these complaints were identified in the letter of 10/4/08 but no details were provided.

#### 5. **The Chairman’s decision**

5.1 In accordance with Rules 2(1), 3(1), and 3(2), the Deputy Secretary, on behalf of the Secretary, considered the claim, accepted the complaints in respect of unfair dismissal, notice pay and non payment of referral fees, but did not accept the complaints in respect of race discrimination, sex discrimination, breach of contract and unilateral variation of contract. That was because the Deputy Secretary

considered that no details of those complaints had been given on the claim form. The Deputy Secretary then referred the claim to a Chairman who followed the decision of the Employment Appeal Tribunal in the case of **Grimmer –v- KLM City Hopper UK (2005) IRLR 596** and decided to accept the claim in full. His reasons were that the identification of the complaints was sufficient detail and that further information could be obtained by the parties or by the tribunal under the Rules of Procedure. It is that decision which the respondent challenges under Rule 3(8).

## 6. **The respondent's submissions**

6.1 The Employment Appeal Tribunal has considered the test to be applied by tribunals in relation to the requirements imposed by Rule 1(1) and (4) in 3 cases.

1. **Grimmer –v- KLM City Hopper UK (2005) IRLR 595**
2. **Richardson –v- U Mole Ltd (2005) IRLR 668**
3. **Hamling –v- Coxlease School Limited (2007) IRLR 8**

6.2 The decisions of the Employment Appeal Tribunal in the **Grimmer** and **Hamling** cases are inconsistent and incompatible. In the absence of any guidance from the Court of Appeal, this situation has caused difficulties for lawyers as both decisions are of equal authority.

6.3 The test laid down by the Employment Appeal Tribunal in the **Grimmer** case for compliance with Rule 1(1) and (4) is whether it can be discerned from the claim form that the claimant is claiming an alleged breach of an employment right which the tribunal can determine. If the tribunal follows that test then the claimant's complaints in respect of race discrimination, sex discrimination, notice pay, referral payments, breach of contract and unilateral variation of contract were validly accepted.

6.4 The test laid down by the Employment Appeal Tribunal in the **Hamling** case is in 2 parts namely whether:-

- (i) the omission is relevant; and
- (ii) whether the omission is material.

If the tribunal follows that test then the said complaints have not been validly accepted and should be dismissed.

6.5 Although both decisions are of equal authority, the tribunal should follow the **Hamling** decision for the following reasons:-

- (i) The decision of HHJ Prophet in the **Grimmer** case was criticised by Harvey on Industrial Relations and Employment Law at Division T paragraph 305. Not only did Harvey regard HHJ Prophet's decision as strongly critical of the Rules, but it regarded it as "dubious whether the learned judge was right to attribute to the Employment Appeal Tribunal in the **Burns** case the proposition which he adopted in **Grimmer**, that it is a principle ... that the Rules of Procedure 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”, to which Judge Prophet added: “If there is conflict, the Rules must give way”.

- (ii) The view of Judge Prophet in the **Grimmer** case was not endorsed by Mr Justice Burton (then President of the Employment Appeal Tribunal) in the **Richardson** case. Although Mr Justice Burton was critical of the relevant rules, he did not go as far as Judge Prophet in his criticism of them.
- (iii) The test in **Grimmer** does not enable tribunals to give effect to the overriding objective of the Regulations, in particular the requirement to put parties on an equal footing, to hear cases expeditiously and fairly and to save expense;
- (iv) the approach of the Employment Appeal Tribunal in the **Hamling** case is more in line with the obiter comment of Lord Hailsham in the unrelated decision of the House of Lords in London and **Clydeside Estates –v- Aberdeen District Council (1980) 1WLR186** with regard to the requirement to exercise judicial discretion when applying statutory rules. That is because the test in **Hamling** requires an exercise of judgment on the part of the tribunal whereas the test in **Grimmer** is in the nature of a mechanistic exercise which is more akin to an administrative exercise rather than a judicial one.
- (v) The approach of the Employment Appeal Tribunal in **Grimmer** is inconsistent with the approach of the Court of Appeal in **Chapman & another –v- Simon (1994) IRLR124** in respect of the previous rules which were less stringent than the current rules. In the **Chapman** case the Court of Appeal held that tribunals can only decide complaints which have been made in the claim form and cannot deal with other unlawful conduct which emerges during the hearing but which has not been made the subject of the complaint in the claim form.
- (vi) While a Chairman or tribunal faces a difficult balancing exercise between the desirability of preserving a claimant’s right of access to justice with a desirability of enabling a respondent to comply with the Rules and to know, in broad terms, the case being made against it and while there may be flexibility in the exercise of judicial discretion, the claimant must still set out the particulars of his claim in the claim form as they are both relevant and material. That is because without those particulars, the respondent cannot comply with the requirement in Rule 4(4) to set out the grounds on which it intends to resist the claim.
- (vii) In the present case, the claimant has conceded in the claim form itself (sections 8.4 and 11.1) that he has not furnished any particulars of his race discrimination, sex discrimination, breach of contract and unilateral variation of contract claims and states that full particulars will follow with regard to these heads of claim and that the respondents are fully aware of the issues as they were raised by way of grievance letter on 10/4/08. However, what interpretation is to be put on that particularly when particulars have not followed.

- (viii) The fact that the respondent might have some knowledge of these complaints is quite irrelevant to the requirement placed on the claimant by the Rules.
- (ix) The tribunal is not dealing with a claimant who has no knowledge of procedure.
- (x) If the tribunal adopts an unduly laissez faire approach to what amounts to material and relevant detail, the respondent may be exposed to an onerous burden of having to provide discovery in relation to the race discrimination, sex discrimination, breach of contract and unilateral variation of contract complaints only for it to find out that there was never any substance to the complaints and that they may have been made simply for the purpose of being oppressive. In this particular case there is a live issue as to whether the making of these additional heads of complaint is merely gratuitous to make life difficult for the respondent.

## 7. The claimant's submissions

- 7.1 The claimant's claim form does comply with the requirements of Rule 1(1) and Rule 1(4).
- 7.2 In relation to Rule 1(4)(g) namely "details of the claim", the claimant's claim form has identified complaints of race discrimination, sex discrimination, notice pay, referral payments, breach of contract and unilateral breach of contract which is sufficient to meet the test laid down by the Employment Appeal Tribunal at paragraph 15 of the **Grimmer** case.
- 7.3 The **Grimmer** test has been followed by an industrial tribunal in Northern Ireland in the case of **Andrews –v- Shorts** and has been approved by an industrial tribunal in Northern Ireland in the case of **Lynn & Donegan –v- Bombardier**.
- 7.4 The claimant followed the **Grimmer** test while employed as an advocate on behalf of the respondent and followed it when completing his application form.
- 7.5 Mr Denvir's submission that Mr Justice Burton in the **Richardson** case did not support the views of HHJ Prophet in the **Grimmer** case is not correct.
- 7.6 Nowhere in the **Chapman** decision was there any indication that the claim had been refused because it contained insufficient detail.
- 7.7 The present case can be distinguished from the decision of the House of Lords in the **London and Clydeside Estates Ltd** case on the ground that there was total non compliance in that case whereas there has not been total non compliance in the present case. In this case the claim form has made it clear that the claimant is making complaints of race and sex discrimination and breach of contract and that at some date in the not too distant future, the respondents can seek further particulars from him and if necessary apply for Orders from the tribunal.

## 8. Mr Denvir's Reply

- 8.1 When a claimant states in his claim form, as in this case, that full particulars are to follow but they do not, it is difficult for him to contend with any degree of credibility that the respondent must pursue them through requests for Orders.
- 8.2 Mr Justice Burton made it clear at paragraph 3 of the **Richardson** decision that the system under the previous Rules of dealing with inadequacies in the claim form by way of subsequent directions or applications for further information or further and better particulars has been changed by the 2005 Rules which introduced a clear test at the outset.
- 8.3 If too much stress is put on the rights of a claimant to have access to the tribunal, the rights of respondents are compromised. The fundamental requirement of the Rules is for the claimant to present a valid claim. That is the trigger for everything that follows and if the claimant does not present a valid claim, subsequent obligations do not arise. It is unfair to respondents to put the onus on them to pursue the required detail by way of Additional Information.

## 9. The decisions of the Employment Appeal Tribunal

- 9.1 The facts of the **Grimmer –v – KLM Cityhopper UK (2005) IRLR596** case were that Ms Grimmer presented a claim form in which she made a complaint in relation to flexible working. In box 1 of her claim form, which asked her to give the type of complaint she wanted the tribunal to decide, she put “flexible working”. In box 11, which asked for details of her complaint, she 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.” A Chairman rejected her claim because it did not set out “details of the claim” as required by rule 1(4). The Employment Appeal Tribunal overturned the tribunal's decision on appeal and allowed the claim to proceed.
- 9.2 In relation to the Rules and their construction, HHJ Prophet (formerly President of the Employment Tribunals) stated at paragraph 8 of his decision,:-

*“The Rules cannot be seen in isolation. 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 i.e. an employment tribunal...”*

At paragraph 10 he continued:-

*“What is the purpose of insisting through Rules that a failure to provide all the 'required information' can lead to a claim not being accepted as a valid claim? If the primary responsibility for making judicial rules rests, not with the judicial body but with the executive, there is a danger that executive objectives may gain precedence over the interests of justice. One can see that providing such information is desirable both to smooth the passage of*

*the complaint through administrative and judicial processes and also for the benefit of the respondent should the claim reach the respondent. But can it be essential to the point that the judicial body itself is compelled to take the draconian step of refusing to accept the claim at all when, as Mr McCarthy says, there is no compelling reason why the merits of the complaint cannot be examined?"*

At paragraph 11 he continued:-

*Furthermore, how does such a policy meet the overriding objective in reg. 3 of dealing with a case justly and ensuring that the parties are on an equal footing? How does it have proper regard to the fact that employment tribunals are frequently approached by claimants who are not legally represented? How does refusing to accept a claim on the basis of not providing 'required information' affect a claimant in respect of the running out of time limits for bringing claims? How can principles of considering prejudice to the claimant and the respondent be taken properly into account? Could it be that a rigid application of these rules might result in a breach of the safeguards enshrined in Article 6 of the European Convention on Human Rights?...."*

- 9.3 The facts of the **Richardson –v- U Mole Ltd (2005) IRLR668** case were that Mr Richardson was dismissed on the ground of gross misconduct. He presented a complaint to the employment tribunal alleging unfair dismissal but his claim did not expressly state that he was an employee of the respondent as required by rule 1(4). A Chairman refused to accept his claim because of that omission. The Employment Appeal Tribunal overturned the Chairman's decision and allowed the claim to proceed.
- 9.4 In relation to the Rules and their construction Mr Justice Burton (the then President of the Employment Appeal Tribunal) stated at paragraph 2 of his decision:-

*".... I am satisfied, however, that this is a situation in which the tribunal acted in what it saw to be the strictest possible compliance with what I have no doubt this tribunal, as do many other employment tribunals, regard as being unsatisfactory Rules. I am equally clear that there is an answer to this problem, and I propose to allow the appeal so that the injustice, which would otherwise be done, of driving this claimant from the judgment seat, or, at best, submitting the claimant to the rigours of the time bar jurisdiction, can be avoided, but it must nevertheless be said that the sooner that these Rules are looked at again the better."*

At paragraph 3 he continued:-

*"In a number of cases which antedated the new Rules it was left uncertain as to whether requirements, either for originating applications or responses, were mandatory or directory or advisory and what the consequence would be of failing to comply with those requirements. The approach that was taken over many years by tribunals and by this Appeal Tribunal was that if parties failed to comply with requirements then the matter was best dealt with in most cases by accepting the application or the response as valid, and dealing with inadequacies by way of subsequent directions or applications for further information or further and*

*better particulars. That system has now changed to introduce a clear test at the outset.”*

At paragraph 4 he continued:-

*“On the face of it the new Rules are extremely welcome, whereby there is a gateway to ensure that applications or responses kick off on a sensible and complete basis from the beginning, so that there is no need for subsequent clarifications. In the first instance, the ET secretary and, in the second instance, the chairman are the guardians of those gateways. It must make sense that if there are defects or gaps in applications or responses they be pointed out, rather like, as I pointed out in the course of argument to Mr McFarlane, an immigration or passport officer at the entry to a country pointing out that paperwork of some kind, such as a visa form, had been inadequately completed, and ought to be completed before the person can be allowed in. If, however, the result of the imposition of the gateway is not simply to point out gaps which ought to be corrected, but to drive away a claimant so that, as, for example, in this case, it means that by the time the completely immaterial defect is corrected the claimant is out of time, then injustice is inevitably going to be done”.*

Mr Justice Burton then referred to what HHJ Prophet had said in the **Grimmer** case with approval as follows:

*“I have no doubt that that is not, and if it were it should not be, the purpose of the Rules, and, as Judge Prophet has said in **Grimmer**, there ought to be, and is, an overriding objective of encouraging dealing with cases justly and fairly, such that the tribunals ought to be in the business of ensuring that that is the case, rather than driving possibly meritorious claimants or indeed respondents from the judgment seat. ...”*

At paragraph 19 he continued:-

*“What should be, and will be, beneficial, namely the introduction of these gateways, must not be allowed to degenerate into injustice ... “*

- 9.5 The facts of the **Hamling –v- Coxlease School Limited (2007) IRLR 8** case were that Ms Hamling presented a claim form in which she made complaints of unfair dismissal, sex discrimination, disability discrimination and calculation of statutory redundancy payment. A Chairman rejected her claim form because it did not include her address which is information required by Rule 1(4). The Employment Appeal Tribunal overturned the decision and allowed the claim to proceed.
- 9.6 In relation to the Rules and their construction, Mr Recorder Luba QC stated at paragraph 4 of his decision:-

*“This appeal is, sadly, but the latest in a series of such appeals arising from the strict applications by the Secretaries and Chairmen of employment tribunals of the relatively new Rules of Procedure governing the required content of claim forms presented to the Employment Tribunal Service.”*

At paragraph 33 he stated:

*“In my judgment, the starting point for consideration of those submissions must lie in the true construction of rules 1-3 of the procedural rules. As is manifest, they impose what appear to be firm procedural requirements as to the content of the claim form. The question to be determined is whether those requirements are to be treated as “absolute” with the automatic consequence that **any** omission to comply with the requirement to give “required information” is necessarily fatal to the validity of the claim form.”*

At paragraph 34 he continued:-

*“On that issue of construction one must first have regard to the words used in the Regulations but thereafter also to the policy background to the introduction of the new Rules. It is plain that the purpose and function of the new Rules was to tighten-up the previous procedures being observed (or breached) in the tribunal Service and to ensure that in future more rigorous application of the Rules would be enforced by the tribunal Service itself. On the other hand it is important to appreciate that the Rules are simply a **procedural** vehicle to enable important statutory claims to be advanced before the tribunal Service.”*

At paragraph 35 Mr Recorder Luba QC specifically referred to and quoted with approval from the judgment of HHJ Prophet in the **Grimmer** case as follows:-

*“On a true construction of the Rules, I am not satisfied that the exercise of consideration by a Chairman, on a referral of a claim form by the secretary, is confined to the mechanistic exercise of checking-off the list of required information in Rule 1(4) against the content of the form. The rules envisage both an administrative scrutiny (by the Secretary) and a judicial scrutiny (by the Chairman). Obviously the Chairman’s role under Rule 3(3) envisages (in part) a double-check as to whether there has been any omission at all but it goes further than that. It is a truly judicial function as HHJ Prophet has said in **Grimmer –v- KLM Cityhopper UK (2005) IRLR 596** (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 i.e. an employment tribunal. Most Chairmen would not wish to feel forced to do so without there being a very good reason.”*

## 10. **The tests laid down by the Employment Appeal Tribunal**

### 10.1 The Grimmer test

At paragraph 15 of his decision in the **Grimmer** case, HHJ Prophet 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. 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 e.g. 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)."*

Mr Denvir conceded that under this test the claimant's complaints of race discrimination, sex discrimination, notice pay, referral payments and breach of contract were validly made, correctly accepted and should proceed to Hearing.

## 10.2 The Richardson test

The test laid down by Mr Justice Burton, was twofold:

- (1) could the required information be implied from the claim form read as a whole;
- (2) if not was the required information material to an issue in the case?

Where the required and omitted information was material, on review, the Chairman should consider whether it would be just and equitable to allow a correction of the error or omission.

In relation to a situation where the "detail of the claim" had been omitted, Mr Justice Burton stated: "*Similarly, no doubt applying principles analogous to those in **Selkent Bus Company –v- Moore (1996) IRLR661**, it might be well be a matter of considerable contention to allow, on a review, a correction of an error with regard to failure to give required information under rule 1(4)(e)", (rule 1(4)(g) in Northern Ireland). The test laid down in the **Selkent** case for amending a claim requires tribunals to take into account all the circumstances and to balance the injustice and hardship of allowing the amendment sought with the injustice and hardship of refusing it.*

It was not clear whether Mr Justice Burton was referring to a situation in which the claim included no details of the complaint at all i.e. had not even identified the complaint, or whether he was referring to a situation in which the claim did identify the complaint but did not include any other or sufficient particulars of the complaint as in the **Grimmer** case and the present case. In view of this ambiguity and the fact that neither Mr Denvir nor Mr Moore addressed the tribunal on the **Selkent** test in relation to this issue, the tribunal did not consider that it would be appropriate to reach any conclusion in relation to it.

## 10.3 The Hamling test

The test laid down by Mr Recorder Luba QC is that the Chairman ought to ask himself two questions:-

- (1) Whether the omission of the required information is a "relevant" omission?  
and

- (2) if so, whether it is a material or immaterial omission?

At paragraph 40 of his decision, Mr Recorder Luba QC made it clear that in asking and answering both questions, the Chairman is required to have regard to the overriding objective in regulation 3 of the rules which requires tribunals and chairmen to deal with the cases justly.

Applying this test, I am satisfied that the claimant's claims in respect of notice pay and referral payments do contain sufficient detail to comply with rule 1(4)(g). In relation to the claimant's complaints in respect of race discrimination, sex discrimination, breach of contract and unilateral variation of contract, I am satisfied that apart from identifying those complaints, when they arose and when he first knew of them, the claimant has omitted to provide details of those complaints. I am also satisfied that the omitted details are relevant and material to the complaints.

However, that is not the end of the test because in asking and answering those two questions, I must have regard to the overriding objective which is to do justice between the parties. I must also bear in mind that it is a very serious step to deny a claimant the opportunity of having an employment rights issue resolved by an independent judicial body without there being a very good reason. While I consider that it is very important for claims to contain sufficient detail of alleged complaints, for the reasons set out by HHJ Prophet, Mr Justice Burton and Mr Recorder Luba QC (see paragraphs 9.2, 9.4 and 9.6 above), I consider that justice between the parties would be best achieved by confirming the acceptance of the claim in full and by making an Order requiring the claimant to provide additional information in relation to his complaints in respect of sex discrimination, race discrimination, breach of contract and unilateral variation of contract to the respondent, for the following reasons.

- (1) It is clear that there are three decisions of the Employment Appeal Tribunal of equal authority which appear to have laid down different tests for interpreting rule 1(4) in relation to "required information".
- (2) I am satisfied that the claimant followed the test in the **Grimmer** case which was closest to his own case factually.
- (3) I am satisfied that the claimant correctly believed that chairmen in Northern Ireland were also following the **Grimmer** decision in respect of "details of the claim". His belief was supported by the fact that the chairman who accepted his claim did so, in light of the **Grimmer** decision.
- (4) I am satisfied that the claimant's belief was supported by decisions of industrial tribunals in Northern Ireland.
- (5) I am satisfied that it is now not possible for the claimant to correct any deficiencies in his claim form within the time limit. However, if his claim had been rejected by the chairman who accepted it, the claimant would have had another three months to remedy the defects within the time limit in relation to the discrimination complaints.
- (6) The defect can be remedied by an Order for Additional Information.

I therefore confirm acceptance of the claim and the tribunal's jurisdiction to consider it and I order the claimant to provide full details of his complaints in respect of sex discrimination, race discrimination, breach of contract and unilateral variation of contract by way of Additional Information to the respondent's representative within **21 days** of the date of issue of this decision. The respondent should then provide a detailed response to the claimant within **28 days** of receipt of this Additional Information.

## **Issue 2**

**Whether the tribunal has jurisdiction to consider a defence of contributory conduct in the claimant's complaint in respect of unfair dismissal in view of the provision of Rule 4(4)(d) of the Industrial Tribunal Rules of Procedure 2005.**

### **11. Mr Denvir's submissions**

- 11.1 The issue of contributory conduct is a matter that the tribunal must take into account when determining remedy. It is not a matter that the respondent must raise in its response.
- 11.2 The respondent would prefer to make the application to amend the response to include the following paragraph.

"If the claimant is found by a tribunal to have been unfairly dismissed, which is denied, the respondent contends that the claimant by his own acts caused or contributed to his dismissal and the respondent seeks a reduction in any applicable award."

However, the respondent does not consider that this issue needs to be raised by it in its response before the tribunal can consider it.

### **12. The claimant's submissions**

- 12.1 The response must contain the proposed amendment before the tribunal can consider the issue of the claimant's conduct when determining compensation.
- 12.2 The test to be followed is that laid down in the case of **Selkent Bus Company Ltd -v- Moore** and under this test the application should be refused and costs should be ordered against the respondent.

### **13. The Procedural Rules**

Rule 4(1) of the Industrial Tribunal Rules of Procedure 2005 provides that a respondent's response must include all the relevant required information.

Rule 4(4) provides that the required information is:

- (a) Each respondent's name;
- (b) each respondent's address;
- (c) whether or not the respondent wishes to resist the claim in whole or in part;

and

- (d) if the respondent wishes to so resist, on what grounds.

Article 156(2) of the Employment Rights (Northern Ireland) Order 1996 provides:

“Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly.”

Article 157(6) states:

“Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such a proportion as it considers just and equitable having regard to that finding.”

#### 14. **Conclusion**

- 14.1. I am satisfied that Articles 156(2) and 157(6) require the tribunal to take a claimant's conduct into account in the circumstances specified therein when determining the issue of compensation in a complaint of unfair dismissal, whether or not it is specifically raised by the respondent in its response. I am therefore satisfied that the tribunal has jurisdiction to consider a defence of contributory conduct in this case although the respondent has not included it as a ground on which it intends to resist the claimant's complaint of unfair dismissal. The issue of costs does not therefore arise.

### **Issue 3**

#### **Whether the response should be amended.**

15. In view of my findings in relation to issue 2, as set out above, I do not consider that it is necessary to amend the response to include the paragraphs set out above. Instead the proposed paragraph can be treated as additional information from the respondent.
16. To enable this claim to be progressed to Hearing, I order that the complaints within it should be heard and determined with the claimant's complaint of unlawful discrimination on the grounds of religious belief and political opinion, case reference number 123//08FET, by the Fair Employment Tribunal.
17. A further Case Management Discussion will take place on **Tuesday, 19 May 2009 at 10.00 a.m.** to progress these claims to Hearing and to deal with any outstanding

interlocutory issues which have already been raised, unless either party indicates within 14 days of receipt of this decision that this date is unsuitable.

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**E McBride**  
**President**

**Date and place of hearing: 20 November 2008, Belfast**

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