Neutral Citation No: [2025] NICA 60	*Ref:* **McC12912**
	ICOS Nos:
Judgment: approved by the court for handing down (subject to editorial corrections)	*Delivered*: **26/11/2025**

IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM THE INDUSTRIAL TRIBUNAL

Between:

PATRICK GRANT

Appellant

and

METLOC SYSTEMS LIMITED

Respondent

Mr Frank O'Donoghue KC and Mr Barry Mulqueen (instructed by Peter Bowles and Co Solicitors) for the Appellant
Peter Hopkins KC and Sarah Agnew (instructed by CMG Cunningham Dickey Solicitors) for the Respondent

---

Before: McCloskey LJ, Colton J and Kinney J

McCLOSKEY LJ (*delivering the judgment of the court*)

Introduction

[1] Patrick Grant (the "appellant") has brought proceedings in the Industrial Tribunal (the "Tribunal") against Metloc Systems Limited (the "respondent") pursuing various remedies for what he contends was unlawful conduct amounting to age discrimination on the part of his former employer, the respondent. There being an issue about whether the proceedings had been initiated in compliance with the relevant statutory time limit, the Tribunal determined to convene a hearing to deal with this issue only, in the following terms:

> "Whether the claim was lodged within the requisite time limit and if not whether time should be extended on just and equitable grounds and/or if appropriate because it was not reasonable to lodge the claim within the time limit."

A preliminary hearing in these terms ensued and the Tribunal resolved this issue in favour of the respondent. The appeal to this court follows.

The time issue

[2] The relevant statutory time limit is contained in Regulation 48(1) of the Employment Equality (Age) Regulations (NI) 2006, which provides:

> "An industrial tribunal shall not consider a complaint under Regulation 41 (jurisdiction of industrial tribunals) unless it is presented to the tribunal before the end of the period of three months beginning when the act complained of was done."

This is not an inflexible time limit by virtue of Regulation 48(4), which provides:

> "A court or tribunal may nevertheless consider any such complaint or claim which is out of time if, in all the circumstances of the case, it considers that it is just and equitable to do so."

This discrete statutory matrix also incorporates the overriding objective in Rule 2 to the Industrial Tribunals and Fair Employment Tribunal (Constitution and Rules of Procedure) Regulations (Northern Ireland) 2020:

> "The overriding objective of these Rules is to enable tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—
>
> (a) ensuring that the parties are on an equal footing;
>
> (b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;
>
> (c) avoiding unnecessary formality and seeking flexibility in the proceedings;
>
> (d) avoiding delay, so far as compatible with proper consideration of the issues; and
>
> (e) saving expense.
>
> A tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives

> shall assist the tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the tribunal."

[3] It is common case that the appellant's complaint to the Tribunal was submitted four days late. He was, in consequence, driven to applying to the Tribunal for an extension of time under Regulation 48(4), unsuccessfully so.

[4] Certain salient elements of the factual matrix, which are uncontentious, are these:

(i) The appellant's employment began in 2017 and was terminated by the respondent on 15 January 2024.

(ii) On 21 March 2024, the appellant began engagement with the Labour Relations Agency for Northern Ireland ("LRA").

(iii) On 19 April 2024, LRA issued an "early conciliation" certificate.

(iv) The backstop date for initiating the proceedings in time was 19 May 2024.

(v) The complaint was lodged on 23 May 2024, four days late.

The Tribunal's decision

[5] The Tribunal made the following material findings of fact:

(i) Initially the appellant was not aware of either any redress available to him or any relevant time limits.

(ii) The appellant became aware of possible redress (on an unspecified date) after speaking to a friend.

(iii) The appellant then contacted the LRA, on 21 March 2024.

(iv) On 22 March 2024 the appellant received an explanatory early conciliation process booklet.

(v) During the next few days there was telephonic communication between the appellant and LRA.

(vi) On 27 March 2024, the appellant received an email from LRA informing him of eight organisations which could provide advice, including information about how limited free legal advice could be procured.

(vii) The appellant then made a conscious decision not to contact any of these organisations, his explanation being that he would be unable to afford legal advice.

(viii) He provided no explanation for not pursuing those options which would have generated free legal advice.

(ix) The appellant made no further contact with LRA.

(x) On 19 April 2024, LRA transmitted electronically to the appellant the "Early Conciliation" certificate simultaneously informing him:

> "You are advised that the time limit 'clock' on any Tribunal claim, which was paused for early conciliation purposes, will now commence with the issuing of this Certificate."

The accompanying guidance stated that he would have to lodge any claim "within three or six months of the alleged incident or behaviour."

(xi) At this stage, the appellant believed that he had a period of up to six months to lodge his claim.

(The contradiction between (vii) and (viii) will be at once apparent: see further *infra*.)

[6] In concluding that the time issue should be resolved in favour of the respondent, the identifiable elements of the Tribunal's reasoning are the following:

(a) The appellant's delay was "… not significant …. a matter of days …."

(b) Notwithstanding, "… the consequence of granting an extension is likely to open up issues going back many years".

(c) "... there is likely to be an inherent prejudice to the respondent should an extension of time be granted."

(d) The appellant did not provide a satisfactory explanation – or "any explanation" - for his delay.

(e) The Tribunal expressed its overarching conclusion in these terms:

> "For all of those reasons, he has not persuaded the Tribunal that it is just and equitable to extend time for presenting his claim, given the fact that such an extension should be the exception rather than the rule."

The appeal to this court

[7] There are five grounds of appeal. Each of these embodies a contention that the Tribunal "erred in law" in certain respects. In essence, these grounds resolve to a challenge to the Tribunal's reasons and reasoning, rehearsed in paragraph [6] above.

[8] In our determination of this appeal, there is a notable starting point. Both parties are agreed that the Tribunal's repeated statement that the claim was lodged six days late is erroneous. The delay was, in fact, four days. This error invites the analysis that the Tribunal has taken into account an erroneous matter and has disregarded a material fact. This is not a trivial error, as the following passage in *Harvey on Industrial Relations and Employment Law*, paragraph 281.02, makes clear:

> "As to the length of the delay, to state the obvious, it makes a difference whether the claim form was presented one minute late or one year late. A finding of fact must therefore be made by the Tribunal as to the length of the delay before it can properly exercise its discretion about an extension of time one way or the other."

Before this court, the correctness of this passage was unchallenged and we propose to adopt it.

[9] Pausing, this court is disposed to accept that a tribunal's error of this species will not invariably invalidate the exercise of its discretion whether to extend time. In this context we are mindful of *Abertawe,* paragraph [20], which stresses the limited scope for appellate court intervention in an appeal of this *genre.* It is trite that every tribunal's decision of this species must be considered as a whole. Furthermore, it will be for the appellate court to measure magnitude of the error in its particular context. We consider that an error of this kind will normally tend to cast a cloud over the reasoning and the conclusions which follow it.

[10] We turn to consider a separate issue. The appeal has proceeded on the basis that the leading decision among the decided cases is *Abertawe (etc) Board v Morgan* [2018] EWCA Civ 640. This case was concerned with the equivalent statutory time limit provision in the jurisdiction of England and Wales, namely section 123(1) of the Equality Act. In the judgment of Underhill LJ, giving the unanimous decision, the Court of Appeal disavowed the somewhat rigid structured approach adopted by the Employment Appeal Tribunal in *British Coal Corporation v Keeble* [1997] IRLR 336 Disapproval of this checklist approach had previously been expressed by the Court of Appeal in *London Borough of Southwark v Afolabi* [2003] EWCA Civ 15. **Paragraphs [18] and [19] are in these terms:

> "First, it is plain from the language used ('such other period as the employment tribunal thinks just and equitable') that Parliament has chosen to give the employment tribunal the

> widest possible discretion. Unlike s 33 of the Limitation Act 1980, s 123(1) of the Equality Act does not specify any list of factors to which the tribunal is instructed to have regard, and it would be wrong in these circumstances to put a gloss on the words of the provision or to interpret it as if it contains such a list. Thus, although it has been suggested that it may be useful for a tribunal in exercising its discretion to consider the list of factors specified in s 33(3) of the Limitation Act 1980 (see British Coal Corporation v Keeble [1997] IRLR 336), the Court of Appeal has made it clear that the tribunal is not required to go through such a list, the only requirement being that it does not leave a significant factor out of account: see Southwark London Borough Council v Afolabi [2003] EWCA Civ 15, [2003] IRLR 220, para [33]. The position is analogous to that where a court or tribunal is exercising the similarly worded discretion to extend the time for bringing proceedings under s 7(5) of the Human Rights Act 1998: see Dunn v Parole Board [2008] EWCA Civ 374, [2009] 1 WLR 728, paras [30]–[32], [43], [48]; and Rabone v Pennine Care NHS Trust [2012] UKSC 2, [2012] 2 All ER 381, para [75].
>
> That said, factors which are almost always relevant to consider when exercising any discretion whether to extend time are: (a) the length of, and reasons for, the delay and (b) whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh)."

[11] Summarising, *Abertawe* espouses a broad, open - textured and non-prescriptive approach to extension of time adjudications. While it highlights the three factors of (a) the length of the delay, (b) the reasons for the delay and (c) whether the delay has prejudiced the respondent, it does so subject to two important qualifications. First, while it is to be expected that these factors will "almost always" be relevant, this is not a rigid prescription or universal legal rule. Second, other factors may, dependent upon the fact sensitive context of the individual case, also be relevant.

[12] The first question for this court is whether to adopt the *Abertawe* approach. This question must be posed because decisions of the English Court of Appeal do not, as a matter of precedent, bind this court, though they are not infrequently treated as sufficiently persuasive to be followed, particularly where they concern the same, or a kindred statutory provision or the same common ;law principle. See, for example, *Re Staritt* [2005] NICA 48, at [21]. We are satisfied that the approach specified in paragraphs [18] and [19] of *Abertawe* is consonant with the terms of the equivalent Northern Ireland statutory provisions, does not abrade with any relevant decision of this court and is couched in persuasive terms. We shall follow it accordingly. We

would add that neither party brought to our attention any material previous decision of this appellate court.

[13] We turn to consider the third main issue, namely the appellant's reasons for his delay in initiating the proceedings. It is important to emphasise that this court approaches this issue as an appellate court of review. We must, therefore, scrutinise particularly the Tribunal's material findings of fact bearing on this issue. These we have rehearsed in paragraph [5] above.

[14] There are three elements of the Tribunal's findings of fact which in the view of this court do not bear scrutiny. First, the Tribunal stated, and then repeated, that the appellant had provided no explanation for his belief that the proceedings could validly be initiated within a period of up to six months. This is unsustainable, given that within these passages it recorded that the appellant did provide an explanation for his belief, namely the statement in the LRA materials to this very effect.

[15] Next, the tribunal stated, in its conclusions, that the appellant had provided "no explanation" for his lack of promptness. This is belied by both what is rehearsed in the immediately preceding paragraph and the Tribunal's finding of fact at paragraph [5] (vii) above. Furthermore, the appellant provided a third explanation, namely that he was "busy working." All of this was overlooked by the Tribunal in its conclusions, which contain a clearly erroneous self - direction.

[16] The fourth matter of concern to this court is associated with the second. The Tribunal, having repeatedly stated, erroneously, that the appellant had provided no explanation for his delay, compounded this error by adding the stipulation that any such explanation had to be "satisfactory." In *Abertawe (supra)*, the English Court of Appeal held that this approach is erroneous in law. Leggatt LJ stated at paragraph [25]:

> "There is no justification for reading into the statutory language any requirement that the tribunal must be satisfied that there was a good reason for the delay, let alone that time cannot be extended in the absence of an explanation of the delay from the claimant. The most that can be said is that whether there is any explanation or apparent reason for the delay and the nature of any such reason are relevant matters to which the tribunal ought to have regard."

Once again, while not binding upon this court as a matter of precedent, we consider this approach to be compatible with the relevant Northern Ireland statutory provisions and not in conflict with the jurisprudence of this court and we shall follow it accordingly. Thus, the Tribunal's approach was erroneous in law.

[17] Summarising, there is no statutory requirement that a tardy claimant provide an explanation, much less a persuasive explanation, of their delay. To elevate this to the status of a legal requirement, as the Tribunal did, is erroneous in law. The Tribunal's discretion can be exercised in the claimant's favour in the absence of either type of explanation. However, in any case where a late claimant does provide an explanation considered persuasive by the tribunal, this will improve their prospects of a favourable exercise of discretion.

[18] The fifth main issue to be addressed is the Tribunal's treatment of the issue of prejudice to the respondent. Notably, the respondent, who could have adduced evidence on the issue of prejudice, did not do so. In this context we refer to paragraph [6] (b) & (c) above. We consider that there are two central infirmities in this aspect of the Tribunal's decision. First, the respondent invoked the mechanism of bare, unsubstantiated assertion and the Tribunal, succumbing, entered this world of pure speculation. The manifest frailties in this approach require no elaboration.

[19] Second, the Tribunal's "going back many years" assessment is unsustainable for the reasons canvassed in the submissions of Mr O'Donoghue KC (with Mr Mulqueen of counsel), namely on the face of Form ET1 there was but a single discriminatory act viz the termination of the appellant's employment on 15 January 2024; the cross-examination of the appellant at the hearing did not open any "*many years*" issue or avenue; and finally, as noted, the respondent adduced no evidence on this subject.

[20] The following passage in *Bryant v Nestle UK* [2021] NICA 34, at paragraph [26], is tailor made for this context:

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

[21] Finally, there is one further aspect of the Tribunal's decision to be addressed. The Tribunal did not consider at all the substantive merits of the appellant's age

discrimination complaint. The evidence before the Tribunal included the appellant's witness statement. This incorporates what would appear to be the bedrock of the appellant's claim, namely statements allegedly made on behalf of the respondent at the time of termination of the appellant's employment. In Form ET3, the respondent, *inter alia* denied the content of the conversation asserted. The Tribunal's self-direction on this issue was in these terms:

> "In this preliminary hearing, in considering the issue of prejudice, no real determination can be made on the merits of the substantive case. However, there is a significant factual dispute between the parties which will have to be explored by a tribunal dealing with the substantive case."

This statement, in the view of this court, is impeccable. While the final limb of the appellant's written argument sought to develop a free-standing challenge based on Harvey, paragraph 285, Mr O'Donoghue, sensibly, did not pursue this at the hearing.

Conclusion

[22] For the reasons given, the exercise of the Tribunal's statutory discretion founding its decision is infected by several material errors of law. Its decision is, in consequence, unsustainable. For the reasons given, the appeal succeeds.

[23] Having invited, and considered, the parties' submissions on the appropriate consequential order having regard to the powers conferred on this court by section 38 of the Judicature (NI) Act 1978 we order:

(i) The Tribunal's decision is varied to the extent that time is extended in favour of the appellant under Regulation 48(4) of the Employment Equality (Age) Regulations (NI) 2006.

(ii) The case is remitted for consideration and determination by a differently constituted tribunal.

We consider part (i) appropriate in the exercise of our discretion under section 38(1)(a) as this court is fully equipped to determine the extension of time issue for itself and this course is harmonious with the virtues of acceleration and expedition.