

Neutral Citation Number: [2025] EAT 105

Case No: EA-2024-000506-RN

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 19 June 2025

Before :

JUDGE KEITH

Between :

MR C MILEHAM

Appellant

- and -

(1) ZEUS LIMESTONE LTD (T/A Rovic Tiles) (In Creditors' Voluntary Liquidation)

(2) MR WILLIAM EDWARD DOE

Respondents

MR RAD KOHANZAD of Counsel (instructed by **Atkinson Rose LLP**) for the **Appellant**
MS CAROL CHENG of Counsel (instructed by **Gullands Solicitors LLP**) for the **2nd Respondent**

Hearing date: 19th June 2025

JUDGMENT

SUMMARY

PRACTICE AND PROCEDURE

The Employment Judge erred in refusing the Claimant's application to add a respondent to a claim which had been presented in time. While there is no criticism of the brevity of the decision, the EJ had failed to refer to or consider the prejudice to the Claimant in refusing the application, when submissions had been made about such prejudice. In contrast, the EJ had referred to the prejudice to the prospective additional respondent, where no representations had been made about such prejudice and without sufficiently explaining what that prejudice was said to be.

JUDGE KEITH:

1. These reasons reflect the full oral reasons which were given at the end of the hearing. To avoid confusion, I refer to the parties as they were before the Employment Judge: the ‘Claimant’ and the ‘Respondents.’

Background

2. The Claimant appeals against the decision of Employment Judge Wright of 14th March 2024 to refuse his application to amend his claim, to add a Mr Doe as a Second Respondent. By way of confirmation, Mr Doe is the party’s actual name, rather than a legal cipher.

3. The context is that the Claimant was employed and apparently dismissed by the First Respondent on 9th November 2022. He subsequently presented an ET claim on 20th March 2023, apparently without legal representation. At that stage, he claimed disability discrimination and unfair dismissal, and although Mr Doe is mentioned at a number of points during the Particulars of Claim, the sole party identified as a party to the litigation was the First Respondent.

4. The First Respondent entered a Response on 20th April 2023, and following that, the Claimant obtained legal representation on 15th September 2023. There followed a case management hearing on 17th November 2023. Ms Cheng represented the First Respondent at that hearing, the purpose of which, the representatives before me agreed, was not to decide finally or determine any preliminary legal issue, but simply to give directions and progress the case. However, the EJ subsequently noted and attached weight to the fact that the Claimant did not apply at that hearing to add Mr Doe as a Respondent.

The First Respondent's insolvency

5. It is said that on 16th January 2024, in light of correspondence from the First Respondent's solicitor, a copy of which was in the bundle before me, the Appellant learnt for the first time that the First Respondent was now insolvent and therefore they could no longer accept service of documents or orders. The solicitors asked to be removed from the ET's record, as representatives, forthwith. They also provided details of the First Respondent's liquidator.

6. I add that this Tribunal administration considered whether it was appropriate, in the context of the subsequent appeal, for Mr Doe to be permitted to participate in these proceedings. It was decided that because he was affected by the outcome of this appeal, he should be permitted to participate in the EAT proceedings. I also add that the First Respondent is in Creditors Voluntary Liquidation, so that there is no need or requirement for this Tribunal to stay proceedings because of the insolvency proceedings, but, in any event, it appears that the liquidators have no objection to these proceedings continuing.

The Claimant's application to add Mr Doe as a respondent

7. On becoming aware of the insolvency, the Claimant's solicitors first notified ACAS to obtain an Early Conciliation certificate in respect of Mr Doe on 18th January 2024 and then applied on 19th January 2024 to amend the claim form, to add him as a Respondent.

8. I do not recite all of the Claimant's application, and I do not criticise its brevity. It was made pursuant to Rule 29 of the Employment Tribunals Rules of Procedure 2013 (ET Rules), as then in force. The application to add Mr Doe as a Respondent was explained in light of the First Respondent's insolvency; the Claimant's understanding that Mr Doe had full control over the First Respondent, with sole responsibility for the alleged discriminatory behaviour; and that the Claimant had only learnt of the financial status of the First respondent on 16th January 2024 and had taken steps to make

the application promptly. The application added that the Claimant was a litigant in person at the time of presenting his Claim Form and that it was not reasonable for him to have understood any necessity to have included Mr Doe as an additional Respondent.

9. The application added that it was in the interest of justice to protect the Claimant from the possibility of being unable to enforce a judgment, which would otherwise result in serious hardship, by reference to the leading authority of **Cocking v Sandhurst (Stationers) Ltd** [1974] ICR 650. In contrast, the addition of Mr Doe as a Respondent would be no impact on either the current directions or the hearing date and was in accordance with the overriding objective because the amendment arose from the same factual matrix. The application confirmed that a copy had been provided to the First Respondent and also asked for the ET's assistance in ensuring that Mr Doe had sight of the application in case there were any objection to it.

10. I canvassed with Ms Cheng whether between the date of the amendment application and the impugned decision there had been any communication by or on behalf of Mr Doe, and she confirmed that there had not. I do not criticise Mr Doe for that lack of response, but it is noteworthy that there was an opportunity for him to object at that stage.

The EJ's decision under challenge

11. The next event is the impugned decision itself of 14th March 2024, and it is necessary to cite that decision in full. It reads as follows:

“The claimant’s application to add an additional respondent is refused. It was open to the claimant to present his claim against an individual named respondent, and indeed the claim form on p.3 refers to there being additional respondents. The claimant has been legally represented since 15th September 2023, and was represented by counsel at the preliminary hearing on 17th November 2023. The claimant did not make any application at the preliminary hearing. The financial viability of a respondent is a matter which the claimant should keep under review. There is prejudice to Mr Doe were he now to be added as a respondent to a claim which was presented on 20th March 2023.”

The Claimant's Notice of Appeal

12. The Claimant filed a Notice of Appeal on 25th April 2024. It raised the following grounds.

13. First, the EJ had erred in failing to identify and weigh the prejudice or hardship to Mr Doe, which may be caused if the proposed amendment were allowed, versus being refused, beyond Mr Doe being named as a party. The EJ had also failed to engage in any weighing process more generally. This was not simply a question of whether there was prejudice to one or other of the parties. The principles in Cocking required the EJ to weigh the relevant prejudice, and the EJ had failed to do that. The EJ had not referred to the hardship suffered by the Claimant if his application were rejected, or the EJ weighing that prejudice if the application were not granted by having an unenforceable judgment, versus the prejudice to Mr Doe.

14. Second, the reasons were not 'Meek' compliant (Meek v City of Birmingham District Council [1987] IRLR 250, CA), as it was insufficiently clear what prejudice Mr Doe would suffer beyond the fact of being a party to the litigation.

15. Third, the EJ had erred in focusing upon the Claimant's delay in making the application. Whilst delay was relevant, it was merely one factor to be taken into account and should not have been determinative.

16. Fourth, the EJ had erred in weighing against the Claimant his supposed failure to keep the financial viability of the First Respondent under review. The matter had been brought to the Claimant's attention, and he had applied to add Mr Doe as a Respondent promptly. The EJ had taken into account an irrelevant factor in exercising his discretion.

The grant of permission and Mr Doe's answer

17. Permission was granted by John Bowers KC, sitting as a Deputy High Court Judge. In reply, Mr Doe filed an Answer and disputed that there was any error of law. There was no failure to identify or weigh the respective hardship or injustice to the parties in refusing or allowing the application. The EJ had clearly taken into account, first, the nature of the amendment; second, the applicability of time limits; and third, the timing and manner of the application, all in accordance with the authorities, including **Selkent Bus Co Ltd v Moore** [1996] ICR 836. It was not an error in itself to fail to refer to the phrase “balance of injustice” (see **Choudhry v Cerberus Security and Monitoring Services Limited** [2022] EAT 172, at para [30]) and otherwise there risked an over pernickety assessment of what was a case management decision in response to a brief amendment application.

18. The EJ had not erred in focusing upon the Claimant's delay in making the application. That was a permissible factor to take into account, and, in any event, there was nothing to suggest that it was determinative in the decision.

19. The EJ consideration of the Claimant's need to keep an opponent party's solvency under review was not impermissible.

20. Mr Doe referred in the Answer to proceedings against Mr Doe being out of time, although Ms Cheng conceded, in my view rightly, that that proposition could not be correct in light of the authorities of **British Newspaper Printing Corp (North) Ltd v Kelly** [1989] IRLR 222, para [10] and **Cocking**, which make clear that the factors when considering an application to amend a claim to add a party are separate from the time limits that apply to a presentation of the claim. Nevertheless, the Answer reiterated that the Claimant had been legally represented since 15th September 2023, and prior to the current application there had been no intimation of a claim against Mr Doe personally,

and any alleged hardship or loss sustained by the Claimant should be directed to the Claimant's solicitors for a possible professional negligence claim.

The parties' respective submissions

21. I do not recite the parties' respective submissions, except to explain why I have reached my decision.

The Claimant's position

22. Mr Kohanzad was clear that he was not criticising the brevity of the EJ's decision. He accepted that these are commonplace decisions, and in this case, it was a response to a short application. Nevertheless, the decision was legally in error, on the basis that I was otherwise being asked to go beyond obvious inferences and 'fill in gaps' impermissibly in the reasoning or effectively decide part of the decision myself. As Cocking made clear at page [657]:

“In deciding whether or not to exercise their discretion to allow an amendment, the tribunal should in every case have regard to all the circumstances of the case. In particular they should consider any injustice or hardship which may be caused to any of the parties, including those proposed to be added, if the proposed amendment were allowed or, as the case may be, refused.”

23. Moreover, the question of delay, whilst relevant, was one that was not determinative, and as British Newspaper Printing Corp (North) Ltd confirmed, the normal time limits for presentations of claims did not apply. Delay here was only relevant to the extent that there was prejudice caused to Mr Doe.

24. The practical difficulty in the EJ's decision was that first, the prejudice to the Claimant had not even been referred to, let alone considered. That was important in the context where Mr Doe did not suggest that there was only one answer to whether to grant the amendment application.

25. Moreover, the claim form had referred to Mr Doe throughout. He would, in any event, have had to give some form of witness evidence. The author of the Response had made repeated references to Mr Doe throughout, and all that was sought was an application to add Mr Doe in circumstances where the First Respondent was insolvent. In contrast, the omission of any reference to the hardship, or potential hardship to the Claimant, in refusing the application, even if it was said that it was a given, did not feature in any balancing exercise.

26. Moreover, beyond the mere fact of being added as a party, which at its highest would weigh no more than the prejudice to Claimant in not having a claim against a solvent party, the prejudice to Mr Doe was not explained anywhere. This would have the effect, assuming that the claim was well-founded, of leaving a person who had been discriminated against being left without any practical remedy, versus the alleged discriminator, Mr Doe, thereby escaping liability. If that was the correct balance, it was a surprising result, which even if it were explained in short form, needed to be explained more fully. In those circumstances, the EJ's reasons were not **Meek** compliant.

27. The EJ's focus on the Claimant's delay in making the application was an unfair criticism. Tribunals often sought to encourage parties to not pursue claims against individually named respondents, particularly where a statutory defence was not relied upon, and the Claimant's initial lack of reference to Mr Doe in that context was understandable. It was also wholly unrealistic, Mr Kohanzad suggested, to expect the Claimant's solicitor to check on a regular basis the solvency of the First Respondent. Rather, as here, upon learning of the First Respondent's insolvency, the Claimant had acted swiftly.

Mr Doe's position

28. Ms Cheng reiterated, first, that the amendment application was brief, and the decision under challenge had to be seen in that light. Second, that the EJ had clearly taken into account the nature of

the amendment. She reiterated that there need not be any express reference to a balancing exercise when it was tolerably clear that that was what the EJ had done. The reasons were **Meek** compliant, and the danger otherwise was of an overly fastidious analysis of the EJ's decision. Moreover, it was perfectly permissible for the EJ to have taken into account the delay by the Claimant in applying to amend his claim, in circumstances where there had been an earlier case management hearing at which he was legally represented. Alertness to the financial viability of the First Respondent was also something that was open to the EJ to have taken into account.

Discussion and conclusions

29. I remind myself of the substantial degree of latitude that any Judge is entitled to be afforded in their case management decisions, which they exercise on a daily basis. I also accept, and, in my view, both parties realistically accepted, that decisions of this nature do not need to be lengthy or discursive, not only because applications like this may be on a frequent basis, but also, practically, the Claimant's application was relatively brief. Consequently, there is no issue as to the brevity of the decision.

30. The key question is whether the EJ took into account the relevant factors in a balancing exercise, even if he did not use that phrase. The benefit of a balancing exercise was emphasised by HHJ Tayler in **Choudhry**.

31. I conclude that the EJ's decision contained errors of law for a number of reasons. The first is in relation to the EJ's assessment of the prejudice to the Claimant. On the one hand, there is an express reference to the prejudice to Mr Doe, and what is obvious from that is an omission of any reference to the Claimant. It might be said, as Ms Cheng invited me to consider, that that was an obvious point, which need not be stated. Similarly, it also might be said that the fact of the balancing exercise need not be stated. The practical difficulty is not only that the potential prejudice to the Claimant is not

referenced anywhere in the decision, but it is unclear how, in the context of the reasons which were included, there is said to be prejudice to Mr Doe. I say that not because there could not be prejudice to Mr Doe, but that in response to the application, Mr Doe had made no comment. I do not criticise Mr Doe for not commenting, but it begs the question of why the EJ reached the decision that they did, that there was prejudice to Mr Doe, if the EJ had had no representations to that effect, and then why in those circumstances, in making an explicit reference where he had no representations from Mr Doe, he did not make any reference to the prejudice to the Claimant, when he had received express references to the potential prejudice to the Claimant. In that context, I am satisfied that there was a flaw in the EJ's analysis of the respective prejudice to the parties.

32. In concluding that the EJ erred, I do not go so far as to say that it was impermissible for the EJ to have considered the timing of the application, particularly in circumstances where there had been a previous case management hearing. That being said, I have doubts that criticism of the Appellant's lack of monitoring of the financial viability of the First Respondent is realistic, although for the avoidance of doubt, this is not material to the Judge's error, and will need to be considered further when a decision on the amendment application is considered afresh.

33. I also accept that the EJ's reasons were not Meek compliant, in the sense that they begged the question of what the prejudice might be to Mr Doe, other than the fact of being named as a party. For the avoidance of doubt, I do not rule out a Judge considering a variety of factors as to what the prejudice might be said to be in a remaking decision, but it is simply unclear beyond being added as a party what that prejudice was.

34. For the above reasons, the EJ's decision is unsafe and cannot stand.

Disposal of the appeal

35. I have considered how I should resolve the outstanding application, having set aside the EJ's decision. I considered the well-known authority of **Sinclair Roche and Temperley and Ors v Heard and Anor** [2004] IRLR 763, EAT, and in particular Mr Kohanzad's submission that there is only one answer to the Claimant's application. Ms Cheng disagrees and invites me to instead remit matters to a Judge in the Employment Tribunal.

36. I accept Ms Cheng's submissions that this is not a case where there is only one answer. The reason is that in assessing the balance of prejudices to the parties, this is necessarily an intensely fact specific exercise, and one where potentially the other prejudices to Mr Doe, which as yet are unclear, will need to be explored. In those circumstances, just as I have found the EJ to have erred for not having set out what those prejudices are, I do not accept that I can, in all fairness to the parties, reach a conclusion that there is only one answer to the application.

37. Having set aside the EJ's decision of 14th March 2024, I regard it as appropriate that the decision on the application to add Mr Doe as a party is remitted to a Judge other than EJ Wright, as selected by the Regional Employment Judge.