EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**and**	**Respondent**
Mrs. L Mortie		**Blue Arrow Limited**

HELD AT **London South** **ON 5 September 2019**

EMPLOYMENT JUDGE PHILLIPS

Appearances

For Claimant: **Ms L Moses, Of Counsel**

For Respondent: **Mr L Wilson, Of Counsel**

RESERVED JUDGMENT

The Claimant's application to amend her Particulars of Claim is allowed, save as to (1) the allegations of Race Discrimination (whether direct (s.13 EqA 2010) or harassment (s.26 EqA 2010) based on the events which occurred prior to her withdrawal of, and contained within, her First Claim (i.e. paragraphs 7(a) to (e) of the Amended Particulars), and (2) the unpaid salary claim at paragraph 17(a) of the Amended Particulars, as all these claims were contained within her First Claim.

REASONS

INTRODUCTION

1. I shall, for ease, refer to the parties as the Claimant and the Respondent. References to rule numbers below are to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, as amended. References to page numbers are to a small bundle of documents that the parties had prepared for the purposes of the Preliminary Hearing.

2. At a Preliminary Hearing on 5 September 2019, the aim of which had been to hear an application by the Claimant to amend her Particulars of Claim in these proceedings to plead a number of new matters, I gave directions for the parties' legal representatives to provide submissions on a point that had unexpectedly arisen during the course of that hearing.

PROCEDURAL BACKGROUND

3. On 5 July 2019, the Claimant made an application to amend her Particulars of Claim to plead a number of new matters, some of which had formed part of a previous claim (which I will hereinafter refer to as the First Claim) that she had made to the employment tribunal but had then withdrawn. That application was made on the basis that she believed no judgment had been issued dismissing that First Claim (see the Initial Submissions of the Claimant for the Preliminary Hearing at #3). That application was due to be heard and decided at the Preliminary Hearing on 5 September 2019.

4. At the hearing on 5 September, following some internal research, I informed the parties that, contrary to their belief, a dismissal judgment had, in fact, been made in regard to the Claimant's withdrawal of the First Claim, on 15 January 2019. That judgment, which had been signed by EJ Spencer, had not been sent to the parties, (as required by r.60) and it was not entered on the register of judgments (as required by r.67). Thus, the parties were not aware of its existence, and its existence was brought to their attention for the first time during the hearing on 5 September 2019.

5. In view of the discovery that a dismissal judgment had been issued in regard to the First Claim, albeit never notified to the parties, Ms Moses, in addition to the original application for leave to amend the Particulars in the Second Claim, made an oral application for reconsideration of the initial dismissal of the judgment in the First Claim, under rr. 70-71.

6. In the event that it was necessary, during a short adjournment, I obtained authorisation from the Deputy Regional Employment Judge, EJ Sage, to deal with any application under r.72(3). I also heard oral evidence from the Claimant as to the circumstances of her bringing and then withdrawing her First Claim. The Respondent's counsel, Mr Wilson had the chance to cross-examine the Claimant about these matters.

7. In the light of this and the point that had arisen, the parties were directed by me to file written submissions in respect of that further r.70 application, as well as in respect of the Claimant's original application to amend her Particulars of Claim in the Second Claim. Those directions were that the Claimant was to provide submissions by 20 September, the Respondent to provide submissions by 4 October 2019 and the Claimant to provide submissions in response by 18 October 2019. The Claimant provided written submissions on

20 September 2019 in accordance with the Tribunal order. However, the Respondent's counsel was unable to comply with the 4 October timetable and in the event, the Respondent's submissions were supplied on 14 October. The Claimant's submissions in reply were received, by agreement, on 1 November 2019. These submissions were first seen and considered by me on 25 November. In addition, I had a small bundle of documents prepared for the Preliminary Hearing, which included the ET1s and ET3s in the First and Second Claims, as well as the Claimant's initial submissions.

FINDINGS OF FACT: RELEVANT FACTUAL BACKGROUND

8. The Claimant commenced her employment with the Respondent in March 2011. It is the Claimant's case that she first experienced poor treatment at the hands of the Respondent in November 2014.

9. On or about 13 July 2018, (while she was still employed), and following a grievance which had not found in her favour, the Claimant presented the First Claim in respect of that alleged poor treatment [pp 36-48]. There are two versions of section 8 of her ET1, setting out details of the claims being made. In the first version [p 41] she has ticked the box for race discrimination and says she is owed for "other payments" and sets out the following brief details of claims for breach of contract (made to work 40 hours instead of 37.5 contracted hours for over 5 years), loss of earnings – business taken away and given to a underperforming work colleague - and bullying behaviour and unfair treatment towards black members of staff". The second version [page 42-3] includes claims for race and age discrimination, as well as claims for arrears of pay and other payments. It sets out more details of these claims through a series of 6 numbered paragraphs. At section 8.2 reference is made to a grievance dating back from November 2014 to "the present date" (i.e. July 2018). For the purposes of bringing the First Claim, the Claimant was represented by her husband, but said she "may obtain an employment lawyer to handle my case" [p 48].

10. The Respondent submits that all the items set out at 8.2 of the First Claim are now being sought to be revisited as discrete acts of race discrimination and as the unpaid salary claim in the Amended Particulars in the Second Claim (race discrimination claims were not initially set out in the original ET1 for the Second Claim).

11. The Claimant in answer to a question asked in cross-examination, said that her husband had located a lawyer shortly after she had issued her claim and they were receiving advice at this time. In answer to a question from me, she said she had met with the lawyers sometime before the ET3 but "I didn't meet with them again" and that she did not speak to the lawyer about the withdrawal email. The Claimant was absent from work due to ill health for a number of weeks, returning to work in August 2018.

12. The Respondent submitted its ET3 Response to the First Claim, through its solicitors, on 10 September 2018 [p 49-60]. Amongst other matters, the particulars, at paragraph 18 [p 59] contended that it was not suggested at any time during the grievance process that any complaint raised was an act of race discrimination. They also referred to an email from the Clamant to the employment tribunal of 30 July 2018, in which it was said to have been clarified that the Claimant was pursuing a claim for race discrimination but not age discrimination. The Respondent also denied that the Tribunal had jurisdiction to hear claims of breach of contract as the Claimant was still employed, and said that the complaints of discrimination related to acts that were alleged to have taken place over 3 months prior to the commencement of the claim and so were out of time.

13. As set out in the Amended Particulars (#7(e) and (f)), an internal meeting had been arranged for 21 September 2018 to discuss the matters complained about by the Claimant in her First Claim.

14. On 15 September 2018, the Claimant emailed the Tribunal to say she was withdrawing the First Claim. In her email [p 61], she stated: I would like to inform you that following a recent development, I would like to withdraw my claim against Blue Arrow with immediate effect. I would therefore be most grateful if you can inform the respondent at your very earliest convenience and provide me with confirmation of receipt of this communication."

15. The Claimant, in her oral evidence to the Tribunal, said she sent this email, in the hope that the meeting on 21 September would lead to a resolution of her dispute with the Respondent. At paragraphs 7(e) and (f) of the Amended Particulars [p 31] this meeting is described as a "conciliatory" meeting. It is said to have been withdrawn "in the hope that the treatment that the Claimant had endured since 2014 might come to an end". My note of the Claimant's oral evidence in answer to the question, in chief, "why withdraw" was as follows: "I returned back to work after illness and she [the manager] said that we would try to work things through and try and come to agreement. I loved my job. I withdrew and then meeting next week on 21 …. She gave me nothing". She elaborated further that "At the meeting on 21, I needed reassurance not have more business taken away from me … review / increase in salary … business taken away ... others paid the same not perform as well …" She added "She [her manager] didn't agree to any of these." My notes also record the Claimant saying that when she withdrew, she hoped that her manager "would stop treating her and realise she loved her job and they would move forward to a better relationship". In answer to the question "had you thought what you would do if the meeting did not give you (what you wanted)"; the Claimant replied "I thought things would work out, if not I believed I could come back to the tribunal". According to Ms Moses, as per her submissions, the Claimant also said in her oral evidence in chief: "I felt like she had used

me. She made out that she would listen and that we would come to some agreement.... I thought we would agree, but the option would be open for me to go back to the Tribunal. That was my belief". In answer to the question if you had received the judgment what would you have done, the Claimant said she "would probably have spoken to my husband as it appears whole thing has been dismissed". In answer to a question as to why the judgment should be set aside, she said that she had been with the Respondent since 2011, "had been treated really terribly.. the tribunal should hear all the evidence about how I was treated and should allow amendments to my claim".

16. During cross examination, the Claimant explained that the recent development she referred to in her email was the conversation with her manager, which had made her hopeful, because she loved her job.

17. On 17 September 2018, the Tribunal Office emailed the Respondent's solicitor (copying in the Claimant) in the following terms: "Please see below an email from the Claimant withdrawing this claim".

18. The meeting took place on 21 September as arranged. Mr Wilson suggested that this meeting may have been "a return to work meeting following a period of illness". In her submission in response to Mr Wilson's submission, (hereafter "Reply"), Ms Moses disputed that characterisation of the 21 September meeting. She explained that the Claimant had returned to work (following a period of sickness) on 13 August 2018 and had been back at work for over a month, when that meeting took place. Paragraph 7(f) of the Amended Particulars said the Claimant at this meeting "asked for assurances from her manager that she would stop making arbitrary and unreasonable reallocations of the Claimant's clients to other members of the team and the Claimant's salary would be reviewed given it was in line with someone in a less senior position". Ms Moses also set out in her Reply, further evidence (which was not before the Tribunal on 5 September and so was not the subject of cross-examination) to the effect that after the meeting on 21 September, the Claimant wrote to her manager in the following terms:

> *"Thanks for our meeting this morning. With reference to our discussion today as mentioned, I would be most grateful if you could please consider the following:*
>
> *Reassurance that no further business current or new will be taken from me within the next 12 months,*
> *Reassurance that should my weekly run rate drop below £2000 within the next 6 months, that I will not be placed on performance management.*
> *Salary review – bearing in mind that Sharon Fry was being paid £27,.500 over 7 years ago and her weekly run rate was well below minimum standards."*

19. On this basis, it appears unlikely that this was a “return to work interview”: the points discussed appear to reflect at least two of the matters complained of in the First Claim.

20. At paragraph 7(f) of the Amended Particulars, it is stated that the reassurances the Claimant sought in the meeting on 21 September were refused, on 17 October and, again, on 12 December.

21. On 2 January 2019, the Claimant resigned on account of the treatment she said she had suffered.

22. On 15 January 2019, (four months after the Claimant notified the Tribunal Office of her withdrawal), and unbeknownst to the parties, a Judgment had been prepared and signed by EJ Spencer, dismissing the First Claim. The Claimant’s evidence to the Tribunal was that, had this been communicated to her, she would have sought legal advice because it would have been apparent to her upon seeing the judgment that “the whole thing had been dismissed”. I accept it is possible, had this been communicated to the Claimant at or around this time, given that she had just resigned, that she might have inquired further about its significance, (but the effect of r.52 would still have been that it was too late to have done anything other than ask for a reconsideration under r.70).

23. On 2 April 2019, the Claimant presented her Second Claim, for constructive unfair dismissal, breach of contract due to non-payment of commission/bonus and unlawful deduction of wages [2-13]. The Claimant’s husband’s details were again given as her representative. Brief details of her claims were provided in section 8.2 of the ET1 form [p 8]:

    i. Unfairly treated for a number of years. Grievance brought to attention of higher management without any satisfactory conclusions whatsoever. Unfair treatment continued, eventually resulting in Constructive Dismissal on 02.01.2019
    ii. Made to work in excess of contracted hours without pay for a considerable length of time.
    iii. With holding commission/bonus earned to my employment with the company ending. Commission/bonus was for the month of December 2018 and annual bonus for the same year in the sum of approximately £8,000.
    iv. Incorrect information in writing distributed to my current employer as well as former clients of mine, giving the impression I was fired from Blue arrow and verbal comments made by representatives of Blue Arrow slandering my good reputation.

24. No mention was made in her Second Claim of the existence of the First Claim, or of any reservations relating to its withdrawal. No claim was made for race

discrimination. However, as pointed out by the Respondent, in its ET3 Response to the Second Claim on 21 June 2019 [pp 14-24 at paragraph 11], it appeared that a number of these matters had already been raised by the Claimant in her First Claim and the Respondent reserved its position as to whether issues of res judicata and/or issue estoppel and/or abuse of process arose, subject to further particulars being provided.

25. The parties were initially directed by the tribunal to comply with deadlines for disclosure and witness evidence on 5 July 2019 and 2 August 2019 respectively, with a 5 September 2019 listing intended for the final hearing of the Second Claim. However, the Claimant (having instructed solicitors to act for her in early June 2019) made an application to the Tribunal on 5 July 201, accepting that the particulars supplied with the ET1 did not adequately particularise the claim and requesting permission to clarify those particulars [25-34] including to add new heads of claim of

    i. Race discrimination
    ii. Harassment related to race; and
    iii. Victimisation.

26. It was stated in the 5 July application to amend the Particulars of Claim that the new heads of claim raised no new factual matters as they overlapped almost entirely with the existing claim. In addition, considerably more detail was provided as to the full particularisation of the Claimant's claims [28-34]. Mention was made in this letter of the withdrawal of the First Claim and that the Claimant was unrepresented at this time. Permission was sought to file Amended Particulars of Claim, and it was suggested that the 5 September 2019 listing be used as a preliminary hearing to determine that application and to make fresh directions. At this time, it was assumed no dismissal judgment had been made.

27. At the hearing on 5 September 2019, the judgment in respect of the dismissal of the First Claim was brought to the attention of the parties for the first time. It was subsequently entered on the register of judgments on 12 September 2019.

SUBSEQUENT CLARIFICATIONS AND NARROWING OF THE ISSUES TO BE DETERMINED

Amended Particulars

28. The detail of the application by the Claimant to amend her Particulars of Claim is set out at pages 28-34 of the bundle. The Constructive Dismissal claim is further and more fully particularised at paragraphs 5 to 9. The Amended Particulars, from paragraphs 7(a) – (g), allege a course of events, principally on the part of the Claimant's line manager, from November 2014 to 28

December 2018, which are alleged to cumulatively constitute a breach of the implied terms of trust and confidence, leading to the Claimant's resignation on 2 January 2019. All those alleged events are relied upon by the Claimant to found not only her claim for Constructive Unfair Dismissal, but also her new claims of direct race discrimination (as provided by s. 13 Equality Act 2010 (EqA 2010)), harassment (as defined by s. 26 EqA 2010) and (paragraphs 7 (f) to (g) only) victimisation (contrary to s.27 EqA 2010) [paragraphs 10-16].

29. Further, monetary claims described as breach of contract/unlawful deduction of wages were also sought to be brought [paragraphs 17-20], including under paragraph 17(a) for unpaid salary for 2.5 hours per week between 14 March 2011 to 12 October 2016, in the sum of £7958-92; (b) under paragraph 17(b) for unpaid commission for December 2018 in the sum of £7133-76 and unpaid bonus for 2018 in the sum of £2000-00; and (c) under paragraph 19 for notice pay.

30. In the course of the provision of their written submissions, the Respondent has made clear that it does not object to the Claimant amending her current claim before the Tribunal to the following extent:
    (a) Constructive Unfair Dismissal as alleged in paras 7(a)-(g);
    (b) Direct Race Discrimination (s. 13 EqA 2010) as alleged in paras 7(f)-(g) (under the *Selkent* principles (see below));
    (c) Harassment (s. 26 EqA 2010) as alleged in paras 7(f)-(g) (under *Selkent)*;
    (d) Victimisation (s.27 EqA 2010) as alleged in paras 7(f)-(g) (under *Selkent*);
    (e) Under paragraph 17(b) for unpaid commission for December 2018 and unpaid bonus for 2018;
    (f) Under paragraph 19 for notice pay (under *Selkent)*.

31. The effect of these concessions by the Respondent is that I did not need to consider the majority of the requests for amendment under the *Selkent* principles. However, the Respondent contends that the Claimant is not entitled to bring individual and discrete allegations of race discrimination (whether direct (s.13 EqA 2010) or harassment (s.26 EqA 2010) based on the events which occurred prior to her withdrawal of, and contained within, her First Claim (i.e. paragraphs 7(a) to (e) of the Amended Particulars), nor is she entitled to bring the claim at paragraph 17(a) of the Amended Particulars for unpaid salary, as all these claims were contained within her First Claim. Further, in so far as it may remain necessary to consider these remaining amendments under the *Selkent* principles, the Respondent submits that "the historic and previously abandoned race discrimination claims are not a mere "relabelling" exercise for the unfair dismissal claim brought by the second ET1. They are substantial allegations which may involve the bringing in of a second

Respondent into the proceedings which the claim of unfair dismissal could not achieve".

Res judicata and cause of action estoppel

32. The Respondent has also clarified that it does not rely on any separate doctrine of res judicata save to the extent that it is expressly stated in rule 52.

33. The effects of these concessions and clarifications is that the real issue that I have to determine is what is the effect of the issue of the dismissal judgment on 15 January 2019 and whether this should be reconsidered under rule 70 and, if so, to what effect.

THE RELEVANT LAW AND RULES OF PROCEDURE
Rules 51 and 52

34. Prior to the 2004 ET Rules, claims that were withdrawn were not formally dismissed by employment tribunals as a matter of course, and often claims were not dismissed at all unless and until a respondent made an application to dismiss. The question arose in those circumstances whether a withdrawal constituted a decision that could not be re-litigated even if proceedings had not been formally dismissed. The 2004 Rules, through r.25 introduced a more formal structure.

35. It is now well established that a withdrawal is the act of the party in question, whereas dismissal is the act of the tribunal and involves a judicial determination. The purpose of dismissal under the 2004 Rules was discussed by HHJ David Richardson in *Drysdale v Department of Transport (Maritime and Coastguard Agency*) [2014] EWCA Civ 1083, who referred to the Court of Appeal in *Verdin v Harrods Limited* [2006] ICR 396 (#35-40) (a passage approved by the Court of Appeal in *Khan v Heywood & Middleton Primary Care Trust* [2006] EWCA Civ 1087 - see below; #44 and 72). Paragraphs 39-40 of *Verdin* state as follows:

> *"39. So a party who receives a notification of withdrawal of the whole proceedings, and wishes to establish once and for all that there is to be no further litigation on the same questions, may apply for dismissal. The subsequent hearing will then concentrate on the question, which Mummery LJ identified in Ako [v Rothschild Asset Management Ltd [2002] ICR 899]. Is the withdrawing party intending to abandon the claim? If the withdrawing party is intending to resurrect the claim in fresh proceedings, would it be an abuse of the process to allow that to occur? If the answer to either of these questions is yes, then it will be just to dismiss the proceedings. If the answer to both*

> *these questions is no, it will be unjust to dismiss the proceedings.*
> *40. I agree with a submission made by Mr Nicholls, that where one party withdraws the other party will generally be entitled to have the proceedings dismissed. This is because the party who withdraws will generally have no intention of resurrecting the claim again, or if he does will generally have no good reason for doing so. There is sometimes a temptation for a litigant, as the day of battle approaches, to withdraw a claim in the hope of being better prepared on another occasion. That will be unacceptable. Tribunals will no doubt be astute to prevent withdrawal being used as an impermissible substitute for an application for adjournment. Occasionally, however, there will be good reason for withdrawing and bringing a claim in a different way."*

36. The 2004 Rules were also considered in *Khan v Heywood*. The claimant in that case sought to set aside the withdrawal of his claim, and the respondent applied to have the claim dismissed on withdrawal. Both the employment tribunal and the EAT held that there was no power under r.25 to revive a withdrawn claim. The Court of Appeal agreed but held [#78] that a withdrawal in and of itself was not a judicial act and therefore did not create any issue or cause of action estoppel, so that a fresh claim based on the same cause of action would not be barred in consequence of the withdrawal. On the other hand, if and when a respondent successfully applied to have the claim dismissed under r.25(4), that would involve a judicial act, and the claimant would then be estopped from bringing fresh proceedings based on the same facts. Rules 50 and 51 of the 2013 Rules were intended to clarify the approach that existed under the 2004 Rules and to an extent codified the approach identified by the Court of Appeal in *Khan*.

37. Rules 51 and 52 of Employment Tribunal Rules of Procedure 2013 now provide as follows:

> End of claim
> 51. Where a claimant informs the Tribunal, either in writing or in the course of a hearing, that a claim, or part of it, is withdrawn, the claim, or part, comes to an end, subject to any application that the respondent may make for a costs, preparation time or wasted costs order.
> Dismissal following withdrawal
> 52. Where a claim, or part of it, has been withdrawn under rule 51, the Tribunal shall issue a judgment dismissing it (which means that the claimant may not commence a further claim against the respondent raising the same, or substantially the same, complaint) unless—

(a) the claimant has expressed at the time of withdrawal a wish to reserve the right to bring such a further claim and the Tribunal is satisfied that there would be legitimate reason for doing so; or
(b) the Tribunal believes that to issue such a judgment would not be in the interests of justice.

38. In *Segor v Goodrich Actuation Systems Ltd* [2012] UKEAT/0145/11, the EAT made clear that tribunals should always take steps to ensure that litigants, particularly those who are self-represented or have lay representation, who seek to concede a point or abandon it, do so on a clear, unambiguous and unequivocal basis before accepting the concession or abandonment indicated. Langstaff P held [#11]:

> "*What we should say, however, is this. A tribunal will always want to take care where a litigant, particularly one who is self-represented or who has a lay representative, seeks to concede a point or to abandon it. It may be a matter of great significance. Though it is always for the parties to shape their cases and for a tribunal to rule upon the cases as put before it, and not as the tribunal might think it would have been better expressed by either party, it must take the greatest of care to ensure that if a party during the course of a hearing seeks to abandon a central and important point that that is precisely what the individual wishes to do, that they understand the significance of what is being said, that there is clarity about it, and if they are unrepresented, that they understand some of the consequences that may flow. As a matter of principle we consider that a concession or withdrawal cannot properly be accepted as such unless it is clear, unequivocal and unambiguous*."

39. In *Drysdale v Department of Transport*, the claimant's wife, Mrs Drysdale, announced that she wished to withdraw her husband's claim for unfair constructive dismissal in the course of the hearing when it became clear that the case would have to be postponed part-heard. The tribunal enquired whether she was making an application for her husband's claim to be withdrawn, and she replied that she was. The respondent then applied for the claim to be dismissed, and after a short deliberation that application was granted by the tribunal. The claimant then applied for a review of the tribunal's decision, which was refused, and the EAT dismissed his appeal. On further appeal to the Court of Appeal, the claimant's wife submitted that she had been tired, stressed and frustrated at the time of the withdrawal, all symptoms exacerbated by her underlying condition of diabetes. She argued that the tribunal should not have accepted the withdrawal so quickly and that it was not voluntary; further, the tribunal should not have dismissed the claim on the

basis of her response to its enquiry in all the circumstances of this particular case. The Court of Appeal concluded that there was nothing in what occurred at the hearing to alert the tribunal to the possibility that Mrs Drysdale was or may have been indisposed so that her judgment was or could be affected. The tribunal was aware of her underlying medical condition, but neither she nor the claimant indicated at any stage during the hearing that she was feeling unwell. The Court reviewed the extent of the duty on tribunals towards litigants without legal representation in the context of applications to withdraw made at a hearing and held as follows:

> *"61. First, it is clear that the ET was under no obligation to enquire into the reasons for the decision to withdraw the claim, with either the appellant or his representative. Other than in exceptional cases (which I do not attempt to define, as on any view this is not one of them) such an enquiry would not only be unnecessary but also inappropriate: it could be construed as an invitation to disclose privileged material relating to the claimant's view (or advice received) as to the merits of the claim and/or as an intervention which might well prejudice the interests of the other side. In many cases it could also prejudice the interests of the claimant himself, who might be persuaded by the court's intervention to pursue an unmeritorious case he was otherwise minded to abandon.*
>
> *…*
>
> *63. That leaves the question whether notwithstanding Mrs Drysdale's confirmation that she wished to withdraw the claim and the appellant's apparent assent to that decision, it was incumbent upon the ET to adjourn the proceedings on that afternoon, either for a few minutes or for a longer period, to enable the appellant and Mrs Drysdale to reflect further on the decision to withdraw.*
>
> *64. In my view, notwithstanding the absence of a legal representation, neither the overriding objective nor any other principle of law required the ET to take such a step. Whether to do so or not was a question of judgment falling squarely within the margin of discretion of the ET. The ET had no reason to suspect that the decision to withdraw the claim was ill-considered or irrational. Further, even if the ET had identified a risk that the decision was impulsive, that risk would have been removed by the conduct of the parties in the immediate aftermath of Mrs Drysdale's announcement. Also, the fact that Mrs Drysdale was not legally qualified would have been lower down the scale of significance in this case than in many others where there is no professional representation, given Mrs Drysdale's evident intelligence, clarity of thought*

> *and speech, and strength of purpose - qualities we have been able to observe ourselves in the course of this appeal."*

40. In *Campbell v OCS Group UK Ltd & Ors* UKEAT/0188/16/, it was noted that no time limits are provided in r.52 within which the tribunal is required to act. Rule 52(a) requires the claimant to reserve his or her right to bring a further claim "*at the time of withdrawal*" so that a claimant who fails to do so will not be able to rely on r.52(a) subsequently and may find that the tribunal has automatically dismissed the claim as r.52 states that a tribunal must issue a dismissal judgment unless one of the two exceptions apply. In *Campbell*, Mrs Justice Simler held that tribunals are not under a mandatory obligation to invite representations from parties before dismissing a claim, but may do so.

41. Simler J said of *Segor* and *Drysdale* [#19] that the approach in those two cases seemed to her to apply in the context of withdrawal and dismissal under rr. 51 and 52. So far as withdrawal is concerned, she said *Segor* established that where there is an application to withdraw a Tribunal must consider if it amounts to a clear, unambiguous and unequivocal withdrawal. Though there is no obligation to intervene whether by reason of the principles of natural justice or the overriding objective, tribunals can make inquiries as appear fit. If the circumstances of the withdrawal give rise to reasonable concern on the tribunal's part, it can make further inquiries. However, the Court of Appeal In *Drysdale* made clear that there was no obligation to do this. Mrs Justice Simler held that although the principles of natural justice and the overriding objective both apply to r.52, there is nothing in its wording that requires tribunals as matter of course to invite representations before dismissing the proceedings. She said it was a matter for the judgment of the Tribunal to decide whether to make further inquiries, which will depend on the facts and the relevant context.

42. However, unless and until a tribunal has dismissed the claim (and no timeframe is specified by r.52(b)) the claimant can seek to rely on r.52(b) on the basis that although his or her rights to re-litigate at the time of withdrawal were not expressly reserved, it would be in the interests of justice for the tribunal not to dismiss the claim so that re-litigation in another forum may be permitted or because there is some other good reason for not dismissing that makes it in the interests of justice not to do so.

Rules 60,65 and 67

43. Rule 60 states that decisions made without a hearing shall be communicated in writing to the parties, identifying the Employment Judge who has made the decision. Rule 65 states that a judgment or order takes effect from the day when it is given or made, or on such later date as specified by the Tribunal. Rule 67 provides that, subject to rr. 50 and 94, a copy shall be entered in the Register of any judgment.

Rule 70

44. Rules 70 and 71 deals with reconsideration of judgments. They provide:

> "70. A Tribunal may, either on its own initiative (which may reflect a request from the Employment Appeal Tribunal) or on the application of a party, reconsider any judgment where it is necessary in the interests of justice to do so. On reconsideration, the decision ("the original decision") may be confirmed, varied or revoked. If it is revoked it may be taken again.
> 71. Except where it is made in the course of a hearing, an application for reconsideration shall be presented in writing (and copied to all the other parties) within 14 days of the date on which the written record, or other written communication, of the original decision was sent to the parties or within 14 days of the date that the written reasons were sent (if later) and shall set out why reconsideration of the original decision is necessary".

45. Under r.70, therefore the Tribunal has a discretionary power to reconsider a judgment "where it is necessary in the interests of justice to do so". In *Outasight VB Ltd v Brown* UKEAT/0253/14, HHJ Eady QC stated, at [28], that "[t]he test for reconsideration under the 2013 Rules is thus straightforwardly whether such reconsideration is in the interests of justice." HHJ Eady QC said at [33] that the interests of justice have "*long allowed for a broad discretion, albeit one that must be exercised judicially, which means having regard not only to the interests of the party seeking the review or reconsideration, but also to the interests of the other party to the litigation and to the public interest requirement that there should, so far as possible, be finality of litigation.*"

46. Under r.70, the decision may be "confirmed, varied or revoked". The procedure to be followed on an application under r.70 is set out under r.71 to r.73.

Cause of action or issue estoppel

47. The doctrine of estoppel by res judicata was first formulated in *Henderson v Henderson* (1843) 3 Hare 100, and precludes a party from raising in subsequent proceedings matters which could and should have been raised in the earlier ones. It has two principles: issue estoppel and cause of action estoppel. Each is defined as per the explanation in *Arnold v National Westminster Bank plc:*

    (1) Issue estoppel – "…may arise when a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same

parties involving a different cause of action to which the same issue is relevant, one of the parties seeks to reopen the issues."

(2) Cause of action estoppel – "…applies where a cause of action in a second action is identical to a cause of action in the first, the latter having been between the same parties or their privies and having involved the same subject matter."

48. Cause of action estoppel provides for a prohibition on the relitigating of a cause of action in earlier proceedings. In *Ako v Rothschild Asset Management Ltd* [2002] EWCA Civ 236, Ms Ako made a claim for unfair dismissal and racial discrimination to the employment tribunal. She wrote to the tribunal withdrawing her application. The tribunal made an order dismissing the application on withdrawal. When she brought a second claim raising the same allegations, Rothschild said that she was barred from doing so by the principle of cause of action estoppel. In the course of deciding that question, the tribunal found that Ms Ako did not intend to abandon her claim. The Court of Appeal held that she was entitled to bring her second claim, despite the dismissal of the first. At [34] Dyson LJ said:

> *"The passage in the judgment of Buxton LJ is capable of being misunderstood. A person may withdraw a claim or (in litigation) consent to judgment for many different reasons. He may do so because he has accepted advice that his claim will fail; or because he cannot afford to continue; or because he wants to defer proceedings until some other avenue of resolving the matter has been explored; or because he has decided that he is not yet in a position to proceed; or that he ought to proceed before a different tribunal (as in Sajid) or add another party (as in the present case). In some cases, the reasons will indicate that the party has decided to abandon the claim. In others, not so. In relation to the question whether a dismissal following withdrawal (or a consent judgment) gives rise to a cause of action or issue estoppel, I consider that the reasons for the withdrawal or consent are not relevant, unless they shed light on the crucial issue of whether the person withdrawing the application or consenting to judgment intended thereby to abandon his claim or cause of action."*

49. These principles of estoppel were considered by the Supreme Court in *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* [2013] UKSC 46 at [17] to [26]. Lord Sumption made clear in that case that the policy underlying these principles is a procedural rule against abusive proceedings [17]. In *Nayif v High Commission of Brunei Darussalam* [2014] EWCA Civ 1521, Mr Nayif issued a claim in the employment tribunal alleging race discrimination. The tribunal held that the claim was out of time. He then issued proceedings in the

High Court alleging breach of contract and negligence, covering the same ground. The Court of Appeal held that Mr Naif was entitled to pursue the High Court action. Elias LJ applied the decision in *Virgin Atlantic* and noted [#14] that "The analysis of Lord Sumption presupposes that there will have been a formal adjudication by a court. That is indeed the typical situation in which the principles arise. But it is well established that this need not be the case. There are circumstances where these principles will operate when the proceedings have been dismissed without any formal adjudication at all." He went on to say at [27]:

> *"The underlying principle is that there should be finality and matters which have been litigated, or would have been but for a party being unwilling to put them to the test, should not be reopened. But I see no justification for the principle applying in circumstances where there has been no actual adjudication of any issue and no action by a party which would justify treating him as having consented, either expressly or by implication, to having conceded the issue by choosing not to have the matter formally determined."*

50. In *Srivasta v Secretary of State for Health* [2018] EWCA Civ 936, an ET1 was presented in May 2011 and withdrawn in October 2011, but no dismissal judgment was issued until October 2014, by which time High Court proceedings had been started, and the claimant had, via an email in November 2011, set out the reasons for his withdrawal and that he objected to any dismissal such that it was found that there was a clear indication that he was not conceding that his claims would fail. The Court of Appeal made clear [#43] that *"[t]he question posed by Elias LJ is whether the claimant has consented either expressly or by implication to concede the issue*." Lewison LJ confirmed this is to be judged from the point of view of the claimant at the time at which they withdrew their claim and "*[t]he mere fact that that someone writes to the ET asking for a claim to be withdrawn without explaining why sheds no real light on the question whether he conceded that his claim would fail on the merits*" [#45] and "*if no further contemporaneous explanation is given before dismissal such an inference could be drawn*" [#45]. In *Srivasta*, Lewison J [#47] quoted Mummery J in *Sajid v Sussex Muslim Society* [2001] EWCA Civ 1684, that the effect of precluding the later claim would be that "*by a neat, technical swipe the (Defendants] would have eliminated a substantial claim without any tribunal or court having heard any evidence or argument about it. That seems to be a decision to which this court is not driven by any principle of cause of action estoppel*". However, he also noted [#46] "*The judge decided against Dr Srivatsa at [84] on the ground that he should have made it clear (either expressly or by necessary implication) that he had it in mind to follow the withdrawal of the ET proceedings by proceedings in the High Court. I do not consider that the burden on a claimant operating under the 2004 Rules was that high (although an express reservation is now required by the 2013*

Rules). As both Dyson and Elias LJJ have explained, the question is a more neutral one."

51. It is to be noted these cases all relate to situations where the relevant employment rules were the 2004 rules (although the related decision of Slade J in the employment tribunal proceedings in *Srivatsa*, (which was not appealed), was that "*The withdrawal of the claim in 2011 was unequivocal. At the time of withdrawal, the Claimant did not express a wish to reserve the right to bring a further claim. Whether under the 2004 ET Rules applying the guidance in Verdin and Ako v Rothschild Asset Management [2002] IRLR 348 or under the 2013 ET Rules applying Rule 52, the only decision open to an ET considering an application for dismissal under the 2004 Rules or acting under the 2013 Rules was that the claim should be dismissed.").* Rules 51 and 52 set out their own schema and constitute a somewhat different approach to res judicata. Mr Wilson has submitted that the Respondent relies on the rules and not on any separate principles.

Amendments

52. The Tribunal has the power to grant permission to amend a Particulars of Claim under its r.29 power (to make case management orders) combined with its r.41 power (to regulate its own procedure in the manner it considers fair and having regard to the principles contained in the overriding objective in r.2). When considering whether to allow an amendment to be made, Mummery J, in *Selkent Bus Co Ltd v Moore* 1996 ICR 836 (at p.843 and p.844) set out some general principles and guidelines as to how an employment tribunal should approach an application to amend. This approach was approved by the Court of Appeal in *Ali v Office of National Statistics*, [2005] IRLR 201.

53. The EAT in *Selkent* said a Tribunal needed to carry out a careful balancing exercise of all the relevant factors, having regard to the interests of justice and to the relative hardship that would be caused to the parties by granting or refusing the amendment. Mummery J said it was impossible and undesirable to attempt to list every relevant circumstance exhaustively but that the following circumstances were certainly relevant:

    (1) *the nature of the amendment*: Mummery J observed: "*applications to amend are of many different kinds, ranging, on the one hand, from the correction of clerical and typing errors, the addition of factual details to existing allegations and the addition or substitution of other labels for facts already pleaded to, on the other hand, the making of entirely new factual allegations which change the basis of the existing claim. The Tribunal [has] to decide whether the amendment sought is one of the minor matters or is a substantial alteration pleading a new cause of action.*" In *Abercrombie and ors v Aga Rangemaster Ltd* 2014

ICR 209, the Court of Appeal said, (at [47]) that the decision of Mummery J in *Selkent*, taken as a whole, did not advocate an approach under which the introduction of a new cause of action should necessarily weigh heavily against permission being granted. It was held in that case that Mummery J's reference to the "substitution of other labels for facts already pleaded" (i.e. a relabelling exercise) is an example of the kind of case where there is the introduction of a new cause of action but - other things being equal - amendment should readily be permitted. This is to be contrasted with the introduction of a new cause of action by "the making of entirely new factual allegations which change the basis of the existing claim". The Court of Appeal in *Abercrombie* made clear (at [48]) that "*the approach of both the Employment Appeal Tribunal and this court in considering applications to amend which arguably raise new causes of action has been to focus not on questions of formal classification but on the extent to which the new pleading is likely to involve substantially different areas of inquiry than the old: the greater the difference between the factual and legal issues raised by the new claim and by the old, the less likely it is that it will be permitted. It is thus well recognised that in cases where the effect of a proposed amendment is simply to put a different legal label on facts which are already pleaded permission will normally be granted*." A distinction can therefore be drawn between amendments which add or substitute a new claim arising out of the same facts as the original claim and those which add a new claim which is unconnected with the original claim and therefore would extend the issues and the evidence.

(2) *the applicability of time limits*: Mummery J observed: "*If a new complaint or cause of action is proposed to be added by way of amendment, it is essential for the Tribunal to consider whether that complaint is out of time and, if so, whether the time limit should be extended under the applicable statutory provisions*". If the amendment is purely a relabelling exercise, time limits are not a relevant factor (*Hammersmith and Fulham London Borough Council v Jesuthasan* 1998 ICR 640). Even if the amendment is more than a relabelling exercise, the time limit is just one (and not necessarily a decisive) factor. In *Transport and General Workers' Union v Safeway Stores Ltd*, Underhill J made clear (at [10]) that Mummery J's observations in *Selkent* "*might, if taken out of context, be read as implying that if the fresh claim is out of time, and time does not fall to be extended, the application must necessarily be refused. But that was clearly not what Mummery P. meant*." Underhill J went on to refer to the following remarks (of Waller LJ in *Ali v Office of National Statistics* 2005 IRLR 201

at [40]) as being the orthodox position on the authorities in relation to time limits: "*There are, as Mummery J said in Selkent, many different circumstances in which applications for leave to amend are made. One can conceive of circumstances in which, although no new claim is being brought, it would, in the circumstances, be contrary to the interests of justice to allow an amendment because the delay in asserting facts which have been known for many months makes it unjust to do so. There will further be circumstances in which, although a new claim is technically being brought, it is so closely related to the claim already the subject of the originating application, that justice requires the amendment to be allowed, even though it is technically out of time.*"

(3) *the timing and manner of the application*: Mummery J observed: "*An application should not be refused solely because there has been a delay in making it. There are no time limits laid down in the Regulations of 1993 for the making of amendments. The amendments may be made at any time - before, at, even after the hearing of the case. Delay in making the application is, however, a discretionary factor.*" It is relevant to consider for example, why an application was not made earlier and why it is now being made, for example whether it was because of the discovery of new facts or information appearing from documents disclosed on discovery. Questions of delay, as a result of adjournment, and additional costs, particularly if they are unlikely to be recovered by the successful party, are also relevant in reaching a decision, but delay in itself should not be the sole reason for refusing an application.

54. It was emphasised by the EAT in *Selkent* that whenever taking any factors into account, "*the paramount considerations are the relative injustice and hardship involved in refusing or granting an amendment*" and that "*the Tribunal should take into account all the circumstances and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it*".

55. The Presidential Guidance on Case Management (Amendments) states that "*Regard must be had to all the circumstances, in particular any injustice or hardship which would result from the amendment or a refusal to make it*".

SUBMISSIONS - THE CLAIMANT
Rule 70

56. In brief, Ms Moses on behalf of the Claimant, submits there are a number of factors in this case that mean (1) it is necessary in the interests of justice under

r.70 to reconsider the dismissal judgment; (2) that the dismissal judgment should be revoked; and (3) that, when looking at the r.52 test, the judgment should not be made again, such that the overlapping claims from the First Claim should be allowed to proceed. Additionally, relying on the principles in *Selkent*, she submits that all the Amendments sought should be permitted. If the Claimant's application under rr.70/71 does not succeed, Ms Moses invited the Tribunal to grant the Claimant's application to amend the Particulars of Claim in full, in any event, based on the decisions in *Nayif* and *Srivasta* and the fact that the Claimant did not intend, when she withdrew the First Claim, to concede that it would fail on the merits.

57. Ms Moses points to a number of factors to support her arguments both with regard to the necessity of reconsideration (r.70 test) and with regard to revoking (r.52 test)

    i. Open justice: the fact that the judgment dismissing the First Claim was issued without a hearing, without any notice being given to the parties (as required by r.60) and without being entered onto the register of judgments (as required by r.67) means, she says, that this is a case in which the judgment in respect of which reconsideration is sought is tainted by a failure to follow even the most basic principles of open justice. She refers to comments by Toulson LJ in *R (Guardian News & Media Ltd) v Westminster Magistrates Court and Another* [2012] EWCA Civ 420, (#1, 2) on the importance of open justice and the transparency of the legal process. Ms Moses reminded the Tribunal that the principle of open justice is one aspect of the right to a fair trial as expressed under Art. 6(1) of the European Convention on Human Rights which states, inter alia, that: "*Judgment shall be pronounced publicly.*" She also pointed out that Art. 6 does not only require that hearings should take place in public; it also requires that judgments will be publicly available (see *Pretto v Italy* [1984] 6 EHRR 182 (#21-23). In *Ameyaw v Pricewaterhousecoopers Services Ltd* UKEAT/0244/18, HHJ Eady QC, having summarised these authorities, acknowledged that r.67 is the embodiment of the principle of open justice in the ET Rules (#36- 38);
    ii. Lack of legal advice: Ms Moses says that the Claimant's evidence was that, had the Tribunal complied with r.60 and r.67, she would have sought legal advice because it would have been apparent to her upon seeing the judgment that "the whole thing had been dismissed". Ms Moses submits that while one can only speculate as to what the content of that advice might have been, had the Tribunal complied with r.60 and r.67, the Claimant would (without question) have been in

a position to seek (and to take into account) that advice before resigning from her role with the Respondent;

iii. Lack of any intention to concede the merits; Ms Moses submits there is simply no evidence to suggest that the Claimant's intention was to concede her claim. Relying on Lewison LJ's acknowledgement in *Srivasta* that although *"[t]he mere fact that that someone writes to the ET asking for a claim to be withdrawn without explaining why sheds no real light on the question whether he conceded that his claim would fail on the merits*", and "*if no further contemporaneous explanation is given before dismissal such an inference could be drawn*" [#45], Ms Moses says, in this case, dismissal did not formally take place until 5 September 2019 and the Claimant had made clear on several occasions before then that she had not conceded that the First Claim would fail on the merits. The clearest example of that, she said, was when the Claimant made her application on 5 July 2019 to amend her Particulars of Claim so that it could be litigated;

iv. The lack of intention combined with the lack of any substantive adjudication on the merits of the First Claim.

58. Ms Moses submits, that because of the Tribunal's failures, the Claimant was denied the opportunity to take advice and reconsider her position, and the only way that can be remedied and injustice avoided, is by revoking the dismissal judgment. If the judgment is not revoked, Ms Moses says, the Claimant will be fixed with the serious consequences of the judgment having been issued in circumstances where the most basic principles of open justice have not been followed in relation to it. She says it is notable that the r.71 wording is different to the previous r.36(3), which provided that if a decision were revoked, it must be taken again. In the circumstances of this case, she says, it would clearly be in the interests of justice not to make the decision again where the effect would, in reality, be to put the Claimant in precisely the same position as she would be in had it not been revoked i.e. fixed with the serious consequences of a judgment having been issued in circumstances where the most basic principles of open justice have not been followed in relation to it.

59. Ms Moses accepted that the Tribunal was obliged to consider "the interests of the other party to the litigation and to the public interest requirement that there should, so far as possible, be finality of litigation" (see *Outasight (*#33)). However, she submits, given that the First Claim had not been the subject of any substantive adjudication neither factor should weigh heavily and certainly not sufficiently heavily to be capable of outweighing the Claimant's rights under Art. 6(1) ECHR. She also accepted the Tribunal must consider r.2 and the Overriding Objective: to deal with cases fairly and justly, which includes seeking flexibility in the proceedings and dealing with cases in ways which are proportionate to the importance of the issues.

Amendments to the particulars

60. Ms Moses made a number of submissions based on *Selkent* with regard to the application to amend the Particulars more generally. However, Mr Wilson, on behalf of the Respondent, accepted, (save for reserving a final defemination on jurisdiction to the tribunal hearing the case) on the basis of *Selkent*, that all the amendments, save for the two which overlap with the First Claim, should be permitted to proceed. I have summarised the principles in *Selkent* above, and with no disrespect to Ms Moses submissions on this point, given this concession, I am not proposing to set out her arguments on this issue here.

61. Finally, Ms Moses says, relying on *Nayif* and *Srivasta*, that even if her application under rr.70 / 71 fails, the principles of cause of action and issue estoppel do not preclude the Second Claim, because the Claimant did not intend, when she withdrew the First Claim, to concede that it would fail on the merits. She submits that the current state of the ET/EAT authorities is clear that (notwithstanding the ET Rules on the effect of a judgment dismissing a claim under r.52) where i) there has been no substantive adjudication on the merits and ii) the underlying withdrawal reveals no express or implied concession of the earlier claim, the principles of res judicata have no application and the claim should therefore be allowed to proceed.

Conclusion

62. Ms Moses submits that the situation in which the parties, and indeed the Tribunal, now find themselves is one that can only really be described as “a complicated mess”. This has happened, she submits, partly because the Claimant (acting as a litigant in person) was not familiar with the ET Rules, and partly because the Tribunal staff “neglected to do as they ought to have done”. “The issues faced by litigants in person and underfunded public services with be well known to the Tribunal”. The Tribunal should also have in mind, she says, that in many cases, because of the - sometimes - harsh operation of legal rules, these issues can lead to unfairness and it is often not within the Tribunal’s power in any given case to address that unfairness. This, however, she says, is not one of those cases. She submits that it is within the Tribunal’s power to address the unfairness that has arisen in this case by granting these applications both of which, ultimately, come down to the Tribunal’s assessment of whether it would be in the interests of justice to do so. For those reasons, Ms Moses submitted that the Tribunal ought to revoke the judgment dismissing the First Claim and grant permission for the Claimant to amend her Particulars of Claim.

SUBMISSIONS - THE RESPONDENT
Introduction

63. Mr Wilson for the Respondent contends that the Claimant is not entitled to bring individual and discrete allegations of race discrimination (whether direct (s.13 EqA 2010) or harassment (s.26 EqA 2010) for the events which occurred prior to her withdrawal of, and contained within, her First Claim (as defined in the Amended Particulars), nor is she entitled to bring her claim at paragraph 17(a) for unpaid salary, as all these claims were contained within her First Claim.

64. As I understood his submissions, if I were to have allowed the dismissal judgment to be reconsidered and revoked, the Respondent would not at that stage seek to rely on any common law res judicata principles, but would argue, if I had decided to revoke the dismissal judgment, relying on *Selkent*, that the historic and previously abandoned race discrimination claims were not a mere "relabelling" exercise for the unfair dismissal claim brought by the second ET1 but were substantial allegations which may involve the bringing in of a second Respondent into the proceedings which the claim of unfair dismissal could not achieve.

Claimant's evidence and her state of mind

65. Mr Wilson submitted that it was clear from the evidence that the Claimant: (1) knew the importance of having legal advice at the outset; and (2) obtained legal advice at the outset. Mr Wilson says this is an important factor because (1) it presents a possible opportunity for redress to the Claimant if the advice which she received was in any way flawed or otherwise negligent; (2) it tips the balance in the Respondent's favour when considering the overall justice of the circumstances against the Claimant if that is a relevant consideration within the context of the very fair legal framework. He further submits that in the First ET1 the Claimant, (at a time when she continued to be employed by the Respondent), gave her type and details of claim in two section 8s (pages 41 and 42) which contained some inconsistencies in the claims she was making (for example one reference was to an age discrimination claim. In these sections, the Claimant refers to numerous letters of complaints from her regarding her manager's conduct and bullying behaviour, the grievance raised in April 2018 by her, the upholding of the grievance against the claimant at first instance and on appeal, and alleging that higher management is protecting her manager and they are "not able to accept liability even with clear convincing evidence". Mr Wilson submits that all these items are now being sought to be revisited as discrete acts of race discrimination and as the unpaid salary claim in the amended particulars. It is particularly noteworthy he says

that the race discrimination claims did not find themselves initially set out in the original ET1 for the Second Claim.

66. Further, he submits that the language used in the Claimant's email of 15 September in withdrawing the First Claim, is formal and precise. It refers to a past event, not something about to happen. It is, he says, very definite in its intentions. It is not vague. It does not seek to keep open the prospect of litigating the claim in the future. It is a clear, unequivocal and unambiguous withdrawal of the claim. He asks the Tribunal to infer from the language and tone that this step was not taken without the benefit of legal advice following the service of the ET3 by the Respondent.

67. Further, he submits that in the Amended Particulars at para 7(e) it is stated on the Claimant's behalf: "However, that claim ("the First Claim") was withdrawn on 15 September 2018 just before a conciliatory meeting with …. and in the hope that the treatment that the Claimant had endured since 2014 might come to an end." He says this is an odd thing to do, and that it is also remarkably different from the tone and precise nature of the Claimant's email as noted above. He says the suggestion that the Claimant was naïve and beguiled into withdrawing her claim stands in utter contrast to: (a) her pursuit of her grievance and appeal with rigour and formality; and (b) her carefully pleaded ET1 including reference to the possibility of a solicitor later; (c) the formal way in which she withdrew her claim.

68. Nor, he says, was the Claimant particularly supportive of this account in her oral evidence. There was, he said, scant evidence that the intention of the meeting that the Claimant understandably went to have with her line manager was anything other than a return to work meeting following a period of illness. Describing it as a "conciliatory meeting", he submits is a post-facto expression which was not made out by the Claimant, nor contained anywhere within her email withdrawing her claim. It is, he says, a misconceived endeavour to somehow give a laudable motive to the withdrawal of the claim. He submitted that this explanation for the withdrawal of the claim is not supported on the evidence, even that provided orally by the Claimant.

69. Further, Mr Wilson says, the second ET1 received by the Tribunal Service on 2 April 2019 (the Second Claim) brings no claim of race discrimination. He says the Claimant was ambiguous as to how she came to know about Constructive Dismissal, but submits that the clear account of how a series of allegedly unfair treatments can lead her to plead constructive dismissal lends support to the Respondent's contention that the Claimant has had the benefit of knowledgeable legal support more than she has cared to admit.

70. In regard to the head of claim "Made to work in excess of contracted hours without pay for a considerable length of time", Mr Wilson asks the Tribunal to note, "this time the box marked arrears of pay had not been ticked – so this

detail is assuredly added in support of the Constructive Dismissal allegation – it is not a stand-alone claim for arrears of pay so is not a repetition of what was claimed earlier". He points out that initially it was said on behalf of the Claimant that she was ignorant as to the consequences of withdrawing her First Claim. With respect, he argues, it is inconceivable that if the Claimant had regarded herself as having been "cheated" out of her First Claim by being misled into believing that she was entering into conciliatory talks with a view to a settlement agreement, and if she did not know the law in operation at the time, that she would not have initially tried to repeat her claims of race discrimination at the outset in her Second Claim. It was, clearly, he says known by the Claimant that she could not bring forward her claim for race discrimination or for arrears of pay. The Claimant was aware of her ability to bring a claim of constructive dismissal after a string of alleged unfair treatments.

Rules 51-2

71. Mr Wilson says there was no substantive adjudication on the withdrawal because the Claimant chose to withdraw her claim and, at the time of withdrawal, did not express a wish to reserve the right to bring a further claim raising the same or substantially the same complaint. Moreover, he submits, under r.52, the Tribunal did issue a judgment dismissing the claim. At the time the Tribunal did this, there was no reason to consider that issuing such a judgment would not be in the interests of justice. That he says is where this matter should rest. The effect of this is that the Claimant is not prevented from bringing her Second Claim, but she is, by operation of the rules, prevented from including within it, complaints that raise the same, or substantially the same, complaints as those raised in the First Claim.

Rule 70 application

72. The r.70 test is, Mr Wilson submits, stricter – imposing the condition of necessity – than the r.52 test. The r. 52 test should not he says encompass consideration of anything that was not before the original tribunal at the time that the decision to dismiss was made. If the Respondent is wrong in that submission, then he says, it is for the Claimant to satisfy the Tribunal, first that it is necessary to reconsider the judgment dismissing the claim; then to revoke it upon consideration; then to reconsider the issue and determine why it is not in the interests of justice to dismiss the withdrawn claim. A similar approach he says was adopted in *Campbell*.

73. Either way, Mr Wilson submits that it cannot be that the simple fact that the claims have not been adjudicated upon is sufficient to establish that it is just and equitable to reconsider the judgment. That would make a nonsense he says of the rules, particularly the operation of rr.51 and 52, and would operate contrary to the principle that there should be finality of litigation, particularly with regard to historic allegations.

74. As far as the interests of justice tests are concerned and the points advanced by Ms Moses in support of this, r.70 test is concerned, Mr Wilson says the failure of the Tribunal to send the judgment out to the parties and to register the judgment can only have impinged upon the Respondent, who was entitled to have that judgment made public. He says these failures do not offend against open justice. There is, he says, no time limit on r.52 and no requirement that the judgment is sent to the parties before r.52 has this effect. He said that these rules provide for closure and finality to litigation in fairness to all parties, including the Respondent and the Respondent's officers: the failure to register the judgment does not establish that it is just and fair to allow the Claimant to re-open her withdrawn complaints. He submits that the Claimant has failed to establish that that failure alone, even if a serious administrative flaw, has meted any injustice upon her.

75. As far as the argument that the Claimant did not have the benefit of legal advice was "beguiled into withdrawing her claim through conciliatory behaviour, and was ignorant of the procedure", Mr Wilson says a great deal of circumspection should be applied by the Tribunal to this suggestion: the evidence he says points to the contrary. He referred the Tribunal to the Claimant's access to legal advice and what he describes as her clear knowledge of the ramifications of her withdrawing her first claim. The suggestion that the Claimant may not even have resigned her role if the dismissal of the claim had been registered is misconceived, he says, as the resignation took place prior to the dismissal of the claim. It is noteworthy, he says, that there is no provision in the rules as to when dismissal should take place following withdrawal.

76. Mr Wilson says the Claimant has put forward no argument that is sufficiently convincing to distinguish her case from the enormous tranche of cases that properly and appropriately are dismissed upon a claimant's unequivocal and unambiguous withdrawal.

77. He submits therefore that the Claimant has satisfied neither the r.70 nor the r.52 tests.

The application to amend the Particulars of Claim, and estoppel

78. As previously mentioned, the amendments which relate to events after the withdrawal of the First Claim are not objected to, under the *Selkent* principles. However, Mr Wilson asserts that the question as to whether the Tribunal has jurisdiction to hear the complaints is a matter which can and should be reserved to the Tribunal dealing with the eventual claim when issues such as the just and equitable extension of time can be considered in light of all the circumstances

79. Mr Wilson said that the Respondent does not seek to advance estoppel arguments beyond the position contained in the rules, (by which I understood him to mean that if I did agree that the judgment should be reconsidered and that it should be revoked, he would not at that stage seek to raise any common law res judicata arguments on the application to amend. However, he says the Respondent does take issue with the Claimant's suggestion (paragraph 39 of the submissions) that dismissal has not formally taken place until 5 September 2019. He says it took place in January 2019. He adds that it is erroneous to advance that the inference (that the Claimant conceded the issues when she withdrew her claim initially) should be withdrawn simply because of the later applications which he says are flawed in their presentation of the Claimant's state of mind.

Conclusion

80. Put simply, he says the Tribunal should not be persuaded by contrived claims that the Claimant was not aware of both the effect of and the consequences of her withdrawal, and the endeavour to revisit the extensive and historic race discrimination claims as discrete claims is not dismissed "by a neat technical swipe" on the part of the Respondent, but rather by the operation of the rules and the finding of fact which the Tribunal is invited to find about the Claimant's state of mind and intent at the time of withdrawal of her claim which have been set out above.

DISCUSSION AND CONCLUSIONS

The state of the Claimant's mind at the time of withdrawal

81. Much has been made as to the state of the Claimant's mind when she sent in her email withdrawing the First Claim. Ms Moses has argued with considerable force that there is no evidence to suggest that the Claimant's intention in withdrawing her claim was to concede it and that "she simply stated that, due to a recent development, she would be withdrawing it". She says this is important because it impacts on both the interests of justice arguments and whether, if I refuse the r.70 reconsideration application, I should nonetheless (as I understand her submissions), still allow the matters from the First Claim to go forward. Mr Wilson contests both what Ms Moses says about the Claimant's state of mind and what she says about the res judicata point. He also says there was evidence that the Claimant was in receipt of some legal advice at this time.

82. The Claimant's withdrawal by email on 15 September was, in my judgment, clear, unequivocal and unambiguous. I accept Mr Wilson's submission that it was "formal and precise. It refers to a past event, not something about to happen. It is very definite in its intentions. It is not vague. It does not seek to keep open the prospect of litigation the claim in the future". There is nothing in

the accompanying email to suggest (as per the Court of Appeal in *Drysdale*) that "*the decision to withdraw the claim was ill-considered or irrational".*

83. Rules 51 and 52 place a burden on a claimant to take a positive step, if they wish to avoid the automatic consequence of dismissal. That did not happen here. Nor, in my judgment, was there anything, either at the time of the withdrawal in September 2018 or at any time up to when the dismissal judgment was signed on 15 January 2019, that might have caused a Tribunal to have grounds for further inquiry or to believe it would not be in the interests of justice to issue that judgment.

84. In my judgment, and to the contrary of how Ms Moses put it in her submissions, there is nothing on the facts here to suggest that the Claimant did not intend to concede her claim at this time. Indeed, there were, in my judgment, a number of opportunities when, (even assuming she was not in receipt of advice and was ignorant of the law) it might have been thought if she had doubts about her withdrawal, or was not making any concessions, she might have sought to raise this, but she did not do anything that might be said *to be consistent* (my emphasis) with not intending to concede her claim: she did not raise any query or concern after the meeting on 21 September, nor after her proposals were rejected in October and December; she did not do anything when she resigned on 2 January 2019, and she did not make any mention of the First Claim when she submitted her Second Claim; even after solicitors were instructed, they did not seek, in the absence of having received a dismissal judgment, to make an application to prevent such a judgment being issued on the basis that it would not be in the interests of justice to do so.

85. Ms Moses sought to argue that a good example of the fact that the Claimant did not intend to concede her First Claim was when the Claimant made her application on 5 July 2019 to amend her Particulars of Claim and included all these overlapping matters, so that it could be litigated. However, that action at that time could be interpreted as lawyers being optimistic: there appeared to be no dismissal judgment and, if that was the case, then there was apparently nothing to prevent the Claimant relying on the matters stated in her First Claim.
86. On balance, I do not accept that the Claimant did not intend to concede her claim when she withdrew it. I accept that she was most likely not in receipt of any focussed legal advice on the withdrawal or its consequences, but assuming she was ignorant of the law, I believe, if she really had not intended to concede it, she would, precisely because of her ignorance, have said or done something at some point in the intervening months to query her withdrawal, given the way that things developed for her in her workplace. On the available evidence, I do not therefore accept, on the balance of probabilities, that the Claimant considered that the First Claim was still in play.

The rule 51 and 52 regime

87. The intent, language and legal effect of rr.51 and 52 are clear. Rule 51 makes clear that where a claimant informs the Tribunal, in writing, that a claim is withdrawn, the claim comes to an end (unless the respondent applies for costs). However, until a dismissal judgment is issued, which is a judicial act, there is nothing to prevent a fresh claim on the same facts being commenced (see *Campbell, Drysdale, Verdin)*. No time limits are provided in Rule 52 within which the tribunal is required to act. Once a judgment is issued dismissing the claim, r.52 makes clear that the claimant may not commence a further claim against the respondent raising the same, or substantially the same, complaint) unless — (a) the claimant has expressed at the time of withdrawal a wish to reserve the right to bring such a further claim and the Tribunal is satisfied that there would be legitimate reason for doing so; or (b) the Tribunal believes that to issue such a judgment would not be in the interests of justice.

88. It is possible to extrapolate from *Segor* and *Drysdale* (which were both concerned with withdrawals and concessions during a hearing) that tribunals should always take steps to ensure that litigants, particularly those who are self-represented or have lay representation, who seek to concede a point or abandon it, do so on a clear, unambiguous and unequivocal basis before accepting the concession or abandonment indicated. Drysdale however makes clear that there are limits on this duty: an employment tribunal is not obliged to intervene in the decision or to "*enquire into the reasons for the decision to withdraw the claim, with either the appellant or his representative"* nor was it whether under the overriding objective or any other principle of law *"incumbent upon the ET to adjourn the proceedings on that afternoon, either for a few minutes or for a longer period, to enable the appellant and Mrs Drysdale to reflect further on the decision to withdraw".* There is no dispute here that the Claimant did inform the Tribunal in writing that she wanted to withdraw her claim, no application was made for costs, and the Claimant did not at the time reserve her position. I have found that the Claimant's withdrawal was not ambivalent or unclear - it did not of itself give rise, in my judgment, to any basis on which a Tribunal might have had any reason to pause before issuing the dismissal judgment. There was nothing in the way the Claimant's email of 15 September was worded to have provided any basis for ambiguity or review.

89. Nor was there anything else at any material time that might have given the tribunal prior to making the dismissal judgment any reason to question whether it was in the interest of justice to make it.

90. The rules are clear: where a claim has been dismissed this operates in the same way as a judgment on the merits of the claim, and gives rise, in effect, to a cause of action estoppel. This approach is confirmed by the Court of Appeal in *Khan v Heywood (*see too *Drysdale* and *Verdin).*

91. It has been argued by Ms Moses that the dismissal judgment did not become effective until the hearing before me on 5 September. I do not agree. Rule 65 states that a judgment or order takes effect from the day when it is given or made, or on such later date as specified by the Tribunal. The dismissal judgment was therefore made and became effective on 15 January 2019, when it was signed. It bit at that time. At any point up until then, had the Claimant contacted the tribunal, there might have been more information before it, which might have led it to ask for more information. Further, there is no evidence and it has not been argued, that at this time there was anything that might have caused the tribunal to pause for thought. There is no obligation, as *Campbell* established, for a tribunal to make its own inquiries in a vacuum.

92. These rules set out a statutory scheme that makes clear that once a claim is withdrawn it cannot be revived, and that dismissal will be a consequence of withdrawal, unless a claimant expressly says they do not want the withdrawal to become a dismissal or the tribunal believes it would not be in the interest of justice to dismiss the claim. While I accept the annoyance, irritation and raised expectations caused by the delay in finding out about the dismissal judgment, (and the failures to notify and register it) but dismissal is the default position under the rules. I do not accept on the facts that any real prejudice has been caused to the Claimant by the delay in making the judgment, the failure to notify the parties or place it on the register. The judgment could have been made at the same time as or within days of the withdrawal, and the Claimant would have been no worse off and in the same position that she is in now.

93. While there is no denying that the consequences of rr.51 and 52 for the Claimant are serious, nonetheless their effect here is that Claimant's email of 15 September 2018 was a withdrawal, and the issuing of the dismissal judgment on 15 January, prevents her raising the First Claim again, notwithstanding there has never having been any substantive adjudication on it. Therefore there is an extant and valid dismissal judgment and the only way that it can be re-opened is by reconsideration under the r.70 regime - there is no scope once such a judgment is made, other than via the r.70 route (or on appeal).

Rules 51, 52 and 70 – what tests and when should they be applied.

94. The wording of the interests of justice tests in rr.52 and 70 are different. I accept Mr Wilson's submission that the rule 70 test is one of necessity and imposes a stricter test than the r.52 test. If I do decide that the dismissal judgment should be reconsidered, it would be reconsidered on the basis of the application of the r.52(2) (b) interest of justice test. A subsidiary point that arose in this context, is whether, if I get to this stage, I should look at things as they were at 15 January, when the dismissal judgment was made, or as they

are now. Mr Wilson submits as I understand it that while the r.70 test will be considered as things now stand, if I decide to reconsider that judgment, as far as r.52 is concerned, I should look at things as at 15 January (when he says there was nothing to alert the tribunal that it might be in the interest of justice). Ms Moses submits that that is not the way to approach this and that I must consider all the arguments which have been levied on the Claimant's behalf in considering the r.52 test.

95. Timing is of course potentially important. If I look at things as they are now, then I do so in the knowledge of considering everything that has happened since the judgment was withdrawn. If I do so at the date of the withdrawal, or the date of the making of the dismissal judgment, there is a more limited factual scenario.

96. It seems to me beyond argument that when looking at the time for any rule 70 consideration that this has to be done at the time of the application. In *Campbell,* the case was sent back to the original tribunal for a r.70 reconsideration, and Simler J criticised the Employment Judge for not taking account of information in letters that post-dated the making of the judgment, in particular on medical evidence. While r.70 does envisages that, in the normal course of events, a reconsideration will follow reasonably closely upon the original judgment, it sets no specific time limits. Previous manifestations of that rule allowed matters post the judgment to be looked at – for example material facts or documents that had come to light since the judgment. Moreover, there is provision for the EAT to ask for reconsideration, which may well be many months after the judgment was made. Eady J in *Outasight* talks of the "broad discretion" that the test for reconsideration under the 2013 Rules creates. It seems to me that any reconsideration under r.70 will involve looking at things as at the date that the reconsideration is taking place.

97. In so far as the appropriate time to consider matters for r.52, while I understand the logic of Mr Wilson's submission that if I get to this point, then I should be looking at it in terms of what was known to the tribunal at the time it was made, i.e. 15 January 2019, that does impose an element of artificiality and practical difficulty, not least because it effectively asks me to ignore or put out of my mind, matters that have occurred since and information that I am now aware of, but also because it would create in practice a very narrow test for reconsidering dismissal judgments. Rule 70 refers to the possibility of a decision being revoked and specifically says if it is revoked it may be taken again. This implies to me that this is a process that must be carried out on the basis of knowledge as at the date of the reconsideration and not at the time the judgment was made. That is the consequence of it being reconsidered. If I get to this stage, in my judgment, I should be looking at everything in the round as it is now known, and apply the r.52 test in the light of what is now known.

Rule 70 reconsideration

98. As I have said, other than by appeal, the only basis on which the dismissal judgment can properly be challenged is under r.70, by way of reconsideration. Rule 70 provides that "A Tribunal may, either on its own initiative (which may reflect a request from the Employment Appeal Tribunal) or on the application of a party, reconsider any judgment where it is necessary in the interests of justice to do so. Rule 71 states that "Except where it is made in the course of a hearing, an application for reconsideration shall be presented in writing …. within 14 days of the date on which the written record, or other written communication, of the original decision was sent to the parties or within 14 days of the date that the written reasons were sent (if later) and shall set out why reconsideration of the original decision is necessary." In this case, the written record of the decision was only notified to the parties on 5 September, and the application here was made "in the course of a hearing".

99. Rule 72(3) provides that, where practicable, the reconsideration should be by the Employment Judge who made the original decision, but where that is not practicable, (inter alia) a Regional Employment Judge shall appoint another Employment Judge to deal with the application. In this instance, given the circumstances, I was appointed by deputy Regional Employment Judge Sage to make the reconsideration on this case.

100. There is a three-part process to be applied under r.70:

i. Is it is necessary in the interests of justice to reconsider the judgment?;
ii. If so, on reconsideration, the decision may be confirmed, varied or revoked.
iii. If it is revoked, it may be taken again."

101. Ms Moses pointed out, that this wording is different to old r.36(3) which provided that if a decision were revoked, it must be taken again. She says, in the circumstances of this case, it would clearly be in the interests of justice not to make the decision again where the effect would, in reality, be to put the Claimant in precisely the same position as she would be in had it not been revoked i.e. fixed with the serious consequences of a judgment having been issued in circumstances where the most basic principles of open justice have not been followed in relation to it. I accept that there is logic and persuasion in this argument, if one gets to that stage.

102. In *Outasight*, the EAT stated, at [28], that "[t]he test for reconsideration under the 2013 Rules is thus straightforwardly whether such reconsideration is in the interests of justice" and at [33] stated that the interests of justice have "*long allowed for a broad discretion, albeit one that must be exercised judicially, which means having regard not only to the interests of the party*

seeking the review or reconsideration, but also to the interests of the other party to the litigation and to the public interest requirement that there should, so far as possible, be finality of litigation."

The delayed issuing and notification of the dismissal judgment

103. There is no dispute it was not until 15 January 2019, four months after the Claimant's withdrawal, that the Tribunal made the dismissal judgment. This was not sent to the parties (as required by r.60), nor was it entered on the Register (as required by r.67). Ms. Moses submits that these facts, together with the fact that the judgment dismissing the First Claim was issued without a hearing, means this is a case in which the judgment in respect of which reconsideration is sought is tainted by a failure to follow even the most basic principles of open justice. She refers to the comments by Toulson LJ in the *Guardian News & Media* case as well as to Art.6(1) ECHR as well as *Pretto* and *Ameyaw* on the fundamental importance of open justice and the right to a fair trial.

104. While I accept what Ms Moses has to say about the importance of open justice, and also that issuing the judgment and not notifying the parties or placing it on the public record, was contrary to the rules, I do not believe in practice this caused any prejudice to the Claimant, or made any difference to the situation in which she finds herself. I say this because: (i) the rules do not contain a time limit for the issuing of a dismissal judgment; (ii) rr.51 and 52 do not require a hearing in any event; (iii) Tribunals are not under a mandatory obligation to invite representations from parties before dismissing a withdrawn claim, but (depending on the facts and circumstances of the particular case), may in exercise of their power to manage proceedings fairly, and in accordance with the overriding objective, do so – this is a matter of judgment falling squarely within the margin of a tribunal's discretion). Further, in looking at this I need to take account of the interests of the Respondent and to bear in mind the overriding objective. As I have already indicated, in my judgment it made no difference on the facts here whether the judgment was issued in a timely fashion or not, the Claimant would have been in the same position come what may. Indeed, to the contrary, the delay actually left a period of time when the Claimant might have been able to rescue matters. Even if the Tribunal's delays and omissions could be said to amount to a serious administrative flaw, and regrettable though they are, no injustice has resulted to the Claimant. Mr Wilson says in this context that failure has provided a greater injustice on the Respondent, who has not had the fact that the claims against it have been dismissed revealed to the public.

105. So, applying this test, the starting point is to ask is it "necessary in the interests of justice" to reconsider this dismissal judgment. Ms Moses has ought to argue that regard that open justice is a key consideration and there have been failures in this case to follow even the "most basic principles of open

justice". Ms Moses says, on the facts here, neither the interests of the other party or the finality of litigation as factors should be capable of outweighing the Claimant's rights under Art.6(1) ECHR. She says these failings meant that the Claimant was denied an opportunity to take advice before she resigned. She also relies on the Claimant's lack of legal advice when she made her withdrawal. Taking account of all these matters as well as r.2 and the overriding objective she says that this judgment should be reconsidered and revoked.

106. I am not satisfied that the fact that the claims had not been adjudicated upon is sufficient per se to establish that it is necessary in the interests of justice to reconsider the judgment. To say that would I believe make a nonsense of rr.51 and 52, as this will be the case in the vast majority of withdrawals prior to the substantive hearing, and will lead to the opposite of certainty and finality. There needs in my view to be more than this. I have asked myself what more is there in this case. What is there that makes this case any different from other withdrawals, where later on down the track, a party changes their mind? Here, the other factors to take into account are 1) that the Claimant was not represented when she sent her request for withdrawal – but this is by no means an unusual state of affairs in the employment tribunal; and 2) the delays and failings of the tribunal, but as I have said I do not believe that have left the Claimant in any different or worse position than she would have been in had this happened in the correct manner.

107. On balance, I do not accept Ms Moses' submissions on this point. Taking account of everything that is now known, from the details of the circumstances of the withdrawal to what has transpired to date, I do not believe it is necessary in the interest of justice to reconsider the dismissal judgment. As I have already said above [paras 92, 104], the failures in this case, while entirely regrettable, have not actually had any adverse or detrimental impact on the Claimant. I do not believe that the Claimant is in any worse or different position that she would have been had the judgment been issued immediately – she has not lost any opportunity to argue about the dismissal. Nor do I think that the absence of legal advice per se is a trump card. I have found on the facts that while the Claimant did get legal advice, there was no evidence she had it in regard to her withdrawal, but as I have said in a way her ignorance could have benefitted her, in the sense that there were a number of moments when she could have contacted the Tribunal about the withdrawal, not least when it became clear that the outcome of the 21 September meeting was not going to be the one she wanted, but did not do so. I have also borne in mind, that the principle of finality in litigation is not an absolute one *(Outasight at [28]: "*there should, *so far as possible*, be finality of litigation"), however it is still nonetheless an important consideration and is the backbone of the rr.51 /52 regime. I have also borne in mind that the Respondent has an interest in this decision.

108. Despite the very persuasive and creative submissions of Ms Moses, I do not find anything in this case, to distinguish it from any other case that is automatically dismissed upon withdrawal. That being the case, I do not believe it is in the interest of justice to reconsider the making of the dismissal judgment.

109. Ms Moses invited the Tribunal to grant the Claimant's application to amend the Particulars of Claim in full, notwithstanding that the dismissal judgment was not revoked, based on the decisions in *Nayif* and *Srivasta* and the fact that there had been no substantive adjudication on the merits and that as she maintained the Claimant did not intend, when she withdrew the First Claim, to concede that it would fail on the merits. However, as I have found above, I did not find that there was evidence that the Claimant did not intend when she withdrew the First Claim, to concede that it would fail on the merits. So I do not grant the application to amend on this basis.

110. That being the case, I find that the dismissal judgment stands and as such, the Claimant is not able to rely on the matters that were contained in the First Claim. That means that she cannot plead i) paragraphs 7(a) to (f) (to the extent that they are relied on in support of the claims for race discrimination, harassment on grounds of race and victimisation); and ii) paragraph 17 of the Amended Particulars.

Amendments

111. The Tribunal has the power to grant permission to amend the Particulars of Claim under its r.29 power (to make case management orders) combined with its r.41 power (to regulate its own procedure in the manner it considers fair and having regard to the principles contained in the overriding objective in r.2). The amendments which relate to events **after** the withdrawal of the First Claim are not objected to by the Respondent, who accepts that, under the *Selkent* principles, the authorities suggest such amendments should be allowed. However, the Respondent qualified this concession, to the extent that "the question as to whether the Tribunal has jurisdiction to hear the complaints is a matter which can and should be reserved to the Tribunal dealing with the eventual claim when issues such as the just and equitable extension of time can be considered in light of all the circumstances". Although neither party specifically referred me to this case, the point raised by Mr Wilson was considered in the case of *Galilee v The Commissioner of Police of the Metropolis* (UKEAT/0207/16) where the EAT said that the guidance given by Mummery J in *Selkent* and his use of the word "essential" should not be taken in an absolutely literal sense and applied in a rigid and inflexible way so as to create an invariable and mandatory rule that all out of time issues must be decided before permission to amend can be considered. Because evidence may often be needed before a Tribunal can determine the jurisdictional issue on whether amendments made out of time, should be permitted, whether under the reasonably practicable or just and equitable tests, this is often a

matter that is best left to the Tribunal at the full hearing to determine. Whilst in some cases it may be possible without hearing evidence to conclude this issue, in many cases, not necessarily confined to discrimination cases, it will not be possible to reach such a conclusion without an evidential investigation and decisions may need to be postponed until all the evidence has been heard. On this basis, I accepted Mr Wilson's submission that the question as to whether the Tribunal has jurisdiction to hear the complaints is a matter which should properly be reserved to the Tribunal dealing with the eventual claim.

112. On this basis, while the Claimant's application to amend the majority of her Particulars of Claim is allowed, the allegations of race discrimination (whether direct (s.13 EqA 2010) or harassment (s.26 EqA 2010) based on the events which occurred prior to her withdrawal of, and contained within, her First Claim (i.e. paragraphs 7(a) to (e) of the Amended Particulars), and (2) the unpaid salary claim at paragraph 17(a) of the Amended Particulars, are disallowed, as all these claims were contained within her First Claim, which was withdrawn and has been dismissed. By virtue of r.52 the Claimant cannot commence a further claim against the Respondent raising the same or substantially the same complaint.

113. This being the case, it will be necessary for this case to now be relisted for a preliminary hearing for case management directions to be made.

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Employment Judge Phillips
12 December 2019, London South