**IN THE EMPLOYMENT TRIBUNAL (SCOTLAND) AT EDINBURGH**

**Judgment of the Employment Tribunal in Case No: 8000110/2022 Issued Following Open Preliminary Hearing Held at Edinburgh on the 12th of June 2023 at 10 am**

**Employment Judge J G d'Inverno**

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| **Miss M Archibald** | **Claimant**<br>**In Person** |
| **Apex Resources Ltd** | **Respondent**<br>**Represented by:**<br>**Ms Macdonald, Solicitor** |

**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The Judgment of the Employment Tribunal is:

**(First)** That the claimant is granted Leave to Amend in terms of the Proposed Amendment dated 23rd March 2023 for the restricted purposes of introducing an additional complaint of section 13 EqA Direct Discrimination said to be evidenced by the alleged particular exchange, between the claimant and the respondent's Managing Director on 10th August 2022, of which notice is given in the amendment, but subject to the Preliminary Issue

of challenge to the Tribunal's Jurisdiction by reason of asserted Time Bar, which Preliminary Issue is reserved for determination at a Final Hearing after the evidence.

**(Second)** That the Application for Leave to Amend is refused for the purposes of supporting the claimant's complaint of Constructive Unfair Dismissal in terms of section 95(1)(c) of the Employment Rights Act 1996.

**Employment Judge:** **J d'Inverno**
**Date of Judgment:** **27 June 2023**
**Entered in register:** **28 June 2023**
**and copied to parties**

**I confirm that this is my Judgment in the case of Archibald v Apex Resources Ltd and that I have signed the Judgment by electronic signature.**

## REASONS

1. The Open Preliminary Hearing, fixed in terms of the Tribunal's Order (Seventh) of 20th March 2023 proceeded for consideration and determination of the claimant's opposed Application for Leave to Amend.

2. The claimant appeared In Person and gave evidence on oath, answered questions put in cross examination and questions from the Tribunal. The Respondent Company was represented by Ms Macdonald, Solicitor. Parties placed before the Tribunal a Joint Bundle extending to some 86 pages of documents, to some of which reference was made in the course of evidence and submission.

3. In advance of the Hearing parties had, of their own initiative, exchanged outline submissions copies of which were put up at the start of the Hearing. The Tribunal, while accepting those documents as helpful, advised parties that the issue before the Tribunal would be determined upon the oral evidence and submissions respectively presented and made by the parties.

**The Issue**

4. In the course of Case Management Discussion conducted at the outset of the Hearing parties agreed, and the Tribunal recorded, that the issue requiring determination was:-

> Whether the claimant requires, and if so should be granted, Leave to Amend to add to her pleaded case the averments set out in her "Proposed Amendment" dated 24th March 2023, produced at page 53 of the Joint Bundle ("J-53").

**The Facts**

5. On the oral and documentary evidence presented the Tribunal found the following facts, restricted to those relevant and necessary to the Determination of the Application, to be established on the evidence or mutually confirmed by the parties as not in dispute between them for the purposes of the Hearing.

6. The claimant is a litigant in person who completed and first presented her initiating Application ET1 to the Employment Tribunal on 14th October 2022.

7. At page 6 section 8.1 of the ET1, the claimant has ticked the boxes beside which the following wording appears:-

- *"/ was unfairly dismissed (including constructive dismissal)*

- *I was discriminated against on the grounds of*

  *Pregnancy or maternity*
  *Sex including equal pay*

- *I am owed notice pay"*

8. In section 8.2 of the ET1, where asked to set out the background and details of her claim, the claimant stated as follows:-

> *"Pregnancy discrimination - during my employment with Apex Resources Ltd I was lucky enough to fall pregnant with both my children. Apex failed to carry a risk assessment out on me during both pregnancies.*
>
> *In March 2021, I met with my Line Manager to tell him of my second pregnancy. He responded to the news saying that it was 'far from ideal'. This left me in complete shock. I was very upset at such a negative response to what was a blessing for me to be carrying by a baby. His words left me feeling guilty about my pregnancy and that it was a complete inconvenience for the business. Resulting in my cutting my maternity leave short to 6 months out of guilt for leaving the business in the lurch.*
>
> *Since my return to work in May 2022, I was asked twice if I planned to have any more children. I find this question inappropriate and uncomfortable.*
>
> *My manager commented to me in July 2022 whilst discussing my business figures that my brain didn't work properly when I was pregnant the previous year. This made me upset and angry.*

*Maternity discrimination - during a meeting in August 2022 with the company owner and my line manager I was told that I hadn't been considered for pay rises as I had been on maternity leave. During the same meeting whilst discussing a large company account I was told I had been left off this account due to my maternity leave status at the start of the year. Dispute* [sic Despite?] *me working on the account tender process since 2018. I lost out on the opportunity to earn commission on this account during this time.*

*Constructive dismissal - following my return to work from maternity, I returned to discover my line manager now in a relationship with one of my staff members. A series of events between them left me in very awkward situations on numerous occasions. The staff member received preferential treatment with bonuses and client opportunities which no other staff member would have been. This staff member revealed to me some information which is very disappointing and illegal in which how the company operates which I was not aware of which left me no option but to resign and remove myself from the situation."*

9. The Particulars of Claim set out at section 8.2 page 7 of the ET1 consist of 6 paragraphs, the first 4 of which sit under a heading **"Pregnancy Discrimination"** and the last 2 respectively under the headings **"Maternity Discrimination"** and **"Constructive Dismissal".**

10. The third paragraph of the Particulars contains the statement *"Since my return to work in May 2022, I was asked twice if I planned to have any more children."* No specification as to when, in what circumstances or by whom the questions are said to have been put is given.

11. Under the heading **"Constructive Dismissal"** the Particulars set out and describe the conduct of the respondent upon which the claimant gives notice of founding, for the purposes of entitling her to resign, in terms of section 95(c) of the Employment Rights Act and treat herself as constructively

dismissed; And in response to which she offers to prove she resigned. The averments relate wholly to a series of events concerning or arising out of a personal relationship between the claimant's Line Manager and one of the claimant's own staff members and to the disclosure of some unspecified information by the staff member to the claimant being information of which the claimant was not aware and which *"left me no option but to resign and remove myself from the situation".* Nothing referring to or from which there might objectively be inferred a reference to the meeting of 10th August and specifically to the alleged statement assertedly made by the claimant and the response assertedly made by Mr Osazee at that meeting and which is described in terms of the proposed amendment, is contained in the ET1. Additionally, whereas on the one hand the statement in the ET1 is … "*I was asked …"* the averment in the amendment does not bear to relate to the claimant being asked but rather to the claimant herself making a statement and to Mr Osazee making a response.

12. Paragraph 4 of the Particulars contains no mention of or reference to the meeting of 10th August and in particular no mention of or reference to what is set out in terms of the Proposed Amendment, that being an alleged statement made by the claimant and an alleged response made by the respondent's Mr Osazee.

13. On 16th November 2023, the claimant, of her own initiative, lodged a document partially containing Further Particulars of her claims and referred to in the email with which she covered it as "Claimant's Additional Information". The 4% page document of 16th November 2023 ("The Document") is produced at pages 30 to 34 of the Joint Bundle. The document comprises a mixture of factual narrative with contentions and comment made by the claimant.

14. The 4!4 page document ("the document") comprises a mixture of factual narrative and contentions and commentary and is divided into 7 sections:-

- An introductory section under the heading **"Marianne Archibald vs Apex Resources - Case Ref - 8000110/2022**
- **Pregnancy discrimination**
- **Maternity leave discrimination**
- **Covid restrictions**
- **Constructive Dismissal**
- **Fraud**
- **Withheld support**

15. Under the heading **"Pregnancy Discrimination"** the claimant reiterates and sets out more detail of the matters which she offers to prove as amounting to discrimination because of the protected characteristic of pregnancy. At page 31, in second paragraph, the claimant reiterates verbatim the statement contained at paragraph 3 of her ET1 Particulars - *"Since my return to work in May 2022, I was asked twice if 'I planned to have any more children'* and adds the further specification that it was the respondent's Tope Osazee who asked her.

16. Beyond identifying the questioner, the document makes no reference to the meeting of 10th August or the asserted statements made respectively by the claimant and the response by Mr Osazee, which are described in the Proposed Amendment.

17. Under the heading **"Constructive Dismissal",** and the heading **"Fraud",** in the document, the claimant reiterates the wording of the corresponding paragraph contained in her ET1 Particulars and then goes on to provide

detailed specification of the matters referred to, including identification of the staff member and of the disclosure to which she refers. Those Particulars, contained in the document, unambiguously refer and entirely to the matters given notice of in less specific terms in the ET1 as the matters upon which the claimant founds as entitling her to resign and in response to which she offers to prove she did resign.

18. The detailed averments contained in the document under the headings **"Constructive Dismissal"** and **"Fraud"** contain no mention of the matter described in the Proposed Amendment. Nor do they contain anything from which it might objectively be inferred that the matter given notice of in the Proposed Amendment was a matter upon which the claimant founded for the purposes of her section 95(c) ERA Constructive Dismissal claim, or in response to which she offers to prove she resigned.

19. On the 14th February 2023, and in response to an Order of the Tribunal, the claimant tendered Further Particulars of Claim which included, at paragraph 23 the wording now set out in the Proposed Amendment.

20. Objection was taken by the respondent to the inclusion of paragraph 23 on the grounds that it sought to introduce new matters not heralded in the initiating Application ET1 of 14th October 2022, (nor, in the claimant's own initiative Further Particulars of 16th November 2022) and thus, required to be the subject of an Application for Leave to Amend.

21. While the remainder of the tendered Further Particulars were received by the Tribunal upon confirmation by the claimant that she sought to include the terms of paragraph 7 and 8 for the purposes of background only, the terms of paragraph 23 were not received by the Tribunal, becoming the subject of the opposed Application for Leave to Amend, and are reiterated in the terms of the Proposed Amendment dated 23rd March 2023.

22. The averments contained at paragraph 23 of the 14th February tendered Further Particulars, and reiterated in the 24th March Proposed Amendment, provide notice, for the first time as at 14th February and 24th March respectively, of; the meeting of 10th August 2022, of the alleged statement made by the claimant at that meeting, of the alleged response made by the respondent's Mr Osazee and, that the claimant offers to prove that that exchange amounted to a separate instance of section 13 EqA Direct Discrimination.

23. Neither the wording at paragraph 23 nor of the Proposed Amendment, give notice of the claimant's reliance upon the exchange as conduct of the respondent justifying her resignation in terms of section 95(c) of the ERA, or of an offer to prove that she resigned in response to it. (Constructive Dismissal claim)

24. The Effective Date of Termination of the claimant's employment was 30th August 2022. Day A, the day upon which the claimant made contact with ACAS for the purposes of early conciliation was 1st September 2022.

    (a) Absent extension under the early conciliation provisions the statutory time period during which the claimant would be entitled to present a complaint of Unfair Constructive Dismissal would expire at midnight on the 9th of November 2022

    (b) Day A, the day upon which the claimant made contact with ACAS for early conciliation purposes was 1st September 2022

    (c) Day B, the date upon which ACAS issued to the claimant an Early Conciliation Certificate was the 13th of October 2022

    (d) By operation of section 207B(3) of the Employment Rights Act 1996, the statutory period within which the claimant might raise, of right, a complaint of Unfair Constructive Dismissal, or add to such a claim already raised, was extended by the number of days

occurring between and including 2nd September 22 (the day after day A) and 13th October 22, day B that is the relevant last day is extended by 42 days to the 24th of November 2023

(e) The 24th of November 2023 is more than one month after day B and accordingly, sub section 207B(4) does not apply.

25. As at the 16th of November, the date upon which the claimant sent to the Tribunal and intimated to the respondent a 4½ page document of further narrative, the claimant, being within the statutory time limit as extended by section 207B ERA, was entitled to add and could have added Further Particulars to her complaint of Constructive Unfair Dismissal.

26. In respect of any discriminatory act of the respondent said to have occurred on 10th August 2022, the applicable statutory time limit for presenting a complaint of Discrimination because of a relevant protected characteristic was likewise extended by operation of section 140B(3) of the Equality Act 2010 by 42 days from date B 13th of October to the 24th of November 2022.

27. As at the 16th of November, the date upon which the claimant sent to the Tribunal her 4½ page further narrative, the claimant was entitled to add to the Particulars given notice of by her of her complaints of both Constructive Unfair Dismissal and Direct Discrimination (that being a date falling before the expiry of the statutory time period as extended, respectively by the operation of section 207B(3) of the ERA and section 140B(3) of the EqA.

**The Applicable Law**

**When is an Application to Amend required?**

28. A party's case should be set out in its original pleading (the claimant's ET1 and the respondent's ET3), their essential cases. In **Chandhok v Tirkey** [2015] ICR 527, per Langstaff P as he was then, the EAT said:

> "The claim, as set out in the ET1, is not something just to set the ball rolling, as an initial document necessary to comply with time limits but which is otherwise free to be augmented by whatever the parties choose to add or subtract merely upon their say so. Instead, it serves not only a useful but a necessary function. It sets out the essential case. It is that to which a respondent is required to respond. A respondent is not required to answer a witness statement, nor a document, but the claims made - meaning under the Rules of Procedure 2013, the claim as set out in the ET1".

29. It follows that if a claimant wishes to argue a claim that is not set out in the ET1, they should make an Application to Amend. Similarly, a respondent needs to apply to amend their ET3 if it wishes to assert a new ground of defence. In principle, it is not permissible to expand the scope of a claim or a response through, for example, Further Particulars, inter party correspondence, a List of Issues or witness statement.

30. A Tribunal can consider an Application to Amend a claim or a response at any stage of the proceedings.

31. In **Scottish Opera Limited v Winning** UKEAT/0047/09 Underhill P (as he then was) noted that:

> "Clear and accurate pleadings are of importance in all cases, but particularly in discrimination claims. It is essential that parties seeking permission to amend to introduce such a claim, formulate the proposed amendment in the same degree of detail as would be expected had it formed part of the original claim; and Tribunal should ensure that the terms of any such proposed amendments are clearly recorded."

32. "While the Rules of Procedure do not prohibit the making of an Oral Application to Amend in the course of a Hearing the above guidance points to the appropriateness of amendments being set out in writing."

**Factors taken account of**

33. The Tribunal considers an Application to Amend a claim or response, in light of its duty, under the Overriding Objective and which is set out in Rule 2 of the Procedure Rules, to deal with cases fairly and justly and which includes:

- Ensuring that the parties are on an equal footing
- Dealing with a case in ways which are proportionate to the complexity and importance of the issues
- Avoiding unnecessary formality and seeking flexibility in the proceedings
- Avoiding delay, so far as compatible with proper consideration of the issues
- Saving expense

34. Two key decisions of the Employment Appeal Tribunal have identified factors which the Tribunal should include in its consideration when determining an Application to Amend:-

- In **Cocking v Sandhurst (Stationers) Limited** [1974] ICR 650, the then President held that regard should be had to all the circumstances of the case and in particular, the Tribunal should *"consider any injustice or hardship which may be caused to any of the parties …. if the proposed amendment were allowed, or as the case may be, refused."*

- The case of **Cocking** was followed by the EAT in **Selkent Bus Company Limited (trading as Stagecoach Selkent) v Moore** [1996] IRLR 661, which held that, when faced with an Application to Amend, a Tribunal must carry out a careful balancing exercise of all the relevant circumstances, and exercise its discretion in a way that is consistent with the requirements of "relevance, reason, justice and fairness, inherent in all judicial discretions." The EAT considered that the relevant circumstances would include:-

    - The nature of the amendment,

    - The applicability of time limits, and,

    - The timing and manner of the application

35. In **Chaudhry v Cerberus Security and Monitoring Services Limited** [2022] EAT172, the EAT suggested a two point checklist that Tribunals might find helpful when considering applications to amend:

    (a) First identify the amendment or amendments sought which should be in writing

    (b) It is important to clarify the specific amendments that are sought because otherwise it will not be possible to balance the injustice and or hardship of allowing the amendment(s) against that of refusing them. Often there need not be an all or nothing decision because some amendments may be clearly identified and the case for allowing them may be compelling while others may be nebulous and the arguments for permitting them insufficient.

(c) Second, in express terms, balance the injustice and or hardship of allowing or refusing the amendment or amendments, taking account of all the relevant factors, including the extent appropriate to those referred to in **Selkent**

**The Nature of the Amendment**

36. When an Application seeks to make a substantial amendment, such as introducing a new cause of action, the Tribunal will exercise its discretion more carefully having regard to the wording of the Proposed Amendment.

**New Cause of Action**

37. A distinction falls to be made between amendments that:

(a) Seek to add or substitute a new claim arising out of the same facts as the original claims; and

(b) Those that add a new claim entirely unconnected with the original claim. In order to determine whether the Proposed Amendment is within the scope of an existing claim or constitutes an entirely new claim, the entirety of the claim form should be considered. In some cases the Application will merely be seeking to “relabel” a set of existing facts and may not therefore be as significant an amendment as at first seems; And a Tribunal may be expected to adopt a flexible approach and to grant amendments that, for example, only change the nature of the remedy sought.

**New Claims arising out of the same fact as the Original Claim**

38. Where new claims are very closely related to the claim originally pleaded and depend on facts that were substantially already alleged, that is likely to be a factor in favour of allowing amendment.

**Determining whether the Amendment seeks to bring a New Cause of Action**

39. In **Ali v Office of National Statistics** [2004] EWCA Civ 1363, the English Court of Appeal held that whether a claim form already contained a specific claim could only be judged by looking at the document as a whole and considering the name given to the claim as well as the factual details accompanying it. If a claim was put very generally for example discrimination, its Particulars would need to be specific enough to enable the employer to be clear about what allegations were being made against them.

**Time Limits**

40. Time limits are relevant if the claimant wishes to add by amendment what is an entirely new complaint.

**When should the Time Limit Issue be decided?**

41. In **Patka v British Broadcasting Corporation** UKEAT/0190/17, the EAT approved the Tribunal's decision to not decide whether the new claim was still in time when determining the amendment application. This followed a shift in the approach taken to amendment applications. The position previously established in the case of **Selkent,** was that:

> "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 the complaint is out of time and, if so, whether the time limit should be extended under the applicable statutory provisions."

42. In **Arney Services Limited and another v Aldridge and others** UKEATS/0007/16, the EAT in Scotland held that determining an amendment application is a single stage exercise and an amendment cannot be allowed "subject to time bar issues". The decision in **Arney Services** referred to earlier decisions explaining that the reason why consideration of time bar

issues was essential when determining an amendment application was because, once an amendment was granted, a respondent was prevented from raising a limitation defence.

43. However, in **Galilee v Commissioner of Police of the Metropolis** UKEAT/0207/16, the EAT in England reached a different view: namely, that a Tribunal can decide to allow an amendment, subject to limitation points (or, alternatively, it can postpone making a decision on the Application to Amend). This might be necessary in cases that require significant evidence in order to determine time points, such as whether there are any continuing acts or whether time should be extended in discrimination claims. Furthermore, the EAT held that amendments in pleadings in the Tribunal, which introduced new claims or causes of action, take effect for the purposes of limitation at the time permission is give to amend. **Galilee** is not authority for the proposition that time points cannot ever be considered as part of an amendment application at a Preliminary Hearing; it says, rather, that it is not mandatory to do so, and notes that it may be difficult to do so in certain cases where significant evidence is required.

**Timing and Manner of the Application**

44. Applications to amend the pleadings can be made at any stage in the proceedings and an Application will not generally be refused solely because there has been delay in seeking amendment. The extent of a party's delay, however, is a factor that the Tribunal may take into account. In general terms the party seeking Leave to Amend will need to show why the Application was not made earlier and why it is now being made.

**Summary of Submissions for the Claimant**

45. The claimant's primary submission was to the effect that the content of paragraph 23 of her tendered Further Particulars of Claim dated 14th February 2023 which are reflected verbatim in the Proposed

Amendment, does not advance a new claim and thus does not require to be the subject of an Application for or the granting of Leave to Amend.

46. Under reference to the averment contained in the ET1 under the heading "Pregnancy Discrimination":-

> "*Since my return to work in May 2022, I was asked twice if I planned to have any more children. I find this question inappropriate and uncomfortable."*

Miss Archibald submitted:-

(a) that that statement was to be seen as a reference to the contents of what were to become the subsequently created paragraphs 14 and 23 of the tendered Further Particulars.

(b) That she had reiterated and expanded on that statement in the "Claimant's Additional Information" proactively lodged by her on the 16th of November 2022 (see pages 30-34 of the Bundle) in the second paragraph of page 2 of that document:-

> *"On my return to work in May 2022, I was asked twice if 'I planned to have any more children' by the owner Tope. I find this question inappropriate and uncomfortable. I shouldn't have ever been asked this question or made to feel like I had to choose between having a family or my career, which I always performed well in. I do not believe this question would have been asked to a male counterpart*"

47. The claimant submitted that it had been open to, and implied that the onus had been on the respondent to request further specification of what she accepted was the vague and imprecise statement contained in the ET1, had they wished to do so. Thus, she submitted, that the respondent should be regarded as having been on notice from the raising of her ET1 as to the detail

of the allegations now set out at paragraph 23 of the tendered Further Particulars and which are repeated in the Proposed Amendment.

48. In the alternative, let it be assumed that the Tribunal considered that the matter did properly require to be the subject of Leave to Amend, the claimant submitted that the amendment should be allowed for the following reasons:-

(a) The content of the Proposed Amendment was foreshadowed by the statement which was contained in the ET1 Particulars of Claim, as supplemented by the additional information of 16th November 2023 (pages 30-34 of the Bundle), and had separately been mentioned by her in 3 pre litigation documents:-

(a) her email to the respondent of 7th September (page 54 of the Bundle)

(b) her email to the respondent of 9th September (page 55 of the Bundle); and

(c) the respondent's Minute of the claimant's grievance meeting held on 30th September 2022 at pages 79 and 80 of the Bundle

The claimant invited the Tribunal to apply the principles set out in the case of **Selkent Bus Company Limited v Moore** and the Presidential Guidance - General Case Management (England and Wales) dated 22nd January 2018.

49. The claimant submitted that no injustice or hardship would be caused to the respondent by permitting the amendment because the allegations which are the subject of amendment "had been included in her ET1 from the outset" and had separately been fully ventilated with the respondents prior to litigation being commenced. The respondent had already investigated the allegations as part of her grievance and so had had sufficient notice of them

and would not be put to any additional time, expense or prejudice if the amendment was permitted. Conversely, if she was denied permission to amend she would lose the opportunity to seek redress for an additional *prima facie* act of unlawful discrimination.

50. In so far as the Tribunal may take the view that the claimant was advancing a new claim requiring Leave to Amend and that the amendment includes a new claim which is out of time, all of which the claimant denied, she invited the Tribunal to exercise its discretionary powers under section 123 of the Equality Act 2010 to extend time limits to permit the amendment. She submitted, impliedly by reason of reliance on section 123 of the EqA, it would be just and equitable for the amendment to be permitted for the purposes of introducing a section 13 EqA complaint of Discrimination.

51. The claimant made no submission, either orally or in the written outline legal submission handed up by her, as to the extension of time under section 111(2)(b) of the Employment Rights Act 1996 in so far as Leave to Amend was sought for the purposes of reliance upon the 10th August 22 alleged exchange between the claimant and Mr Osazee in respect of the claimant's section 95(c) Constructive Unfair Dismissal claim.

52. The claimant drew the Tribunal's attention to the fact that the respondents had not taken objection to the inclusion in the Further and Better Particulars of 14th February 2023 in which the claimant asserts that on 30th June 2022 she told the respondent's Regional Manager David Quinn that she believed a decision taken to have a colleague continue to solely handle an account, which the claimant had in part handled prior to maternity leave, was related to her pregnancy/maternity leave and further, that David Quinn had confirmed the same at the meeting with her on the 10th of August 2022.

53. In relation to the Constructive Dismissal claim, the claimant submitted that she had made clear in her email to the Tribunal of 25th May 2023, commenting upon the respondent's objection to the amendment, that the amendment was sought for the sole purpose of advancing a claim under

section 13 of the Equality Act 2010 (page 87 of the PH bundle). She further submitted *"My constructive dismissal claim remains as pled in the form ET1"* but that, in respect of it, she also maintained that what she described as *"the events of the 10th of August 2022" were* for her the *"final straw"* prompting her resignation.

54. The claimant submitted that the effect of the amendment if allowed would not be one of significantly altering her claims. Her claims prior to the amendment, if allowed, were claims of Constructive Unfair Dismissal, and of section 13 and section 18 Equality Act Discrimination, and they would remain such in the event that Leave to Amend in terms of the Proposed Amendment was granted. The claimant also relied upon the Presidential Guidance in England and Wales to which she referred the Tribunal.

55. In conclusion the claimant submitted:

(a) That no new claim was being advanced and that her tendered Further Particulars of Claim dated the 14th of February 2023 should be accepted in their entirety without any need for Leave to Amend;

(b) That in the event that the Tribunal considered that Leave to Amend was required to include the terms of paragraph 23 of her 14th February FPCs, Leave to Amend should be granted on an application of the **Selkent** principles; and

(c) That should the Tribunal take the view that the matters giving rise to the amendment are out of time that it would be just and equitable to extend the time limits to permit the amendment in terms of section 123 of the Equality Act 2010.

**Summary of Submissions for the Respondent**

56. In relation to the applicable law the respondent's representative, Ms Macdonald, referred the Tribunal to the principles set out in **Selkent Bus Company Limited v Moore.** She submitted that in consideration of an Application to Amend the Tribunal should consider all of the relevant circumstances and carry out a balancing act weighing the relative prejudice and or hardship caused to the parties while making clear that the list was not exhaustive and that the overall assessment must be one which takes into consideration all the relevant factors, the EAT had considered that those relevant circumstances would include:-

- The nature of the amendment
- The applicability of time limits; and,
- The timing and manner of the Application

57. In relation to the nature of the amendment the respondent's representative submitted that although not substantial in its length, the amendment was not one which could be considered minor in character but rather, on its proper construction was one which sought to introduce a new cause of action requiring the proof of new facts not given notice of in the claimant's initiating Application ET1, even when read as supplemented by the additional information document proactively submitted by her on the 16th of November 2022.

58. Under reference to **Ali v Office of National Statistics,** she submitted that whether a claim form already contained a specific claim requires to be judged by looking at the claim form as a whole and considering the name given to the claim as well as the factual details accompanying it.

59. Applying that approach, Ms Macdonald submitted that the ET1 claim form could clearly be seen to contain no notice of a complaint of Direct Discrimination in terms of section 13 of the Equality Act 2010 allegedly evidenced by the respondent's Mr Osazee stating *"That was my next*

*question"* in response to a statement by the claimant that she *"would not be on maternity leave in the future",* and said to have occurred at a meeting between the claimant and the respondent's Regional Manager David Quinn ("DQ") and Managing Director Tope Osazee ("TO") on 10th August 2022. The statement contained in the ET1, upon which the claimant sought to rely for arguing the contrary, was a bald and now shown to be inaccurate averment; viz, *"Since my return to work in May 2022 I was asked twice if I planned to have any more children. I find this question inappropriate and uncomfortable".* It was a statement which was so lacking in specification that it could not properly be described as giving notice of the exchange set out in the Proposed Amendment, not least because, as the terms of the Proposed Amendment now make clear, no such question was actually asked of the claimant at the 10th August 2022 meeting.

60. While in her "Additional Information Document" of 16th November 2022 the claimant provided significantly more detail about the facts of her claim, beyond identifying that it was the respondent's Managing Director whom she asserted asked her twice if she planned to have any more children, the claimant did no more than reiterate verbatim the bald and unspecific averment contained in the ET1. In particular she made no mention of the allegation now contained in the Proposed Amendment.

61. Although asked to do so on a number of occasions in the course of giving her evidence, the claimant provided no clear or acceptable explanation as to why, all the information being in her possession at the time of raising her claim on 14th October 2022, and at the point of supplementing it on 16th November 2022, the terms of the Proposed Amendment which in the submission fell to be viewed as giving rise to a separate or additional instance of section 13 EqA Discrimination could not have been set out.

62. Ms Macdonald invited the Tribunal to reject the claimant's submission that she had *"demonstrated that there was a clear link between the averments in the ET1 and paragraph 23 of her tendered Further Particulars of Claim"* to which the respondents took objection. The statement in the ET1 was no

more than a vague assertion from which the respondent could not reasonably be expected to infer what could now be seen to be the new allegation of Direct Discrimination relating to the alleged comment on the 10th of August as set out in the Proposed Amendment. Nor, in her submission, could it be said that the new allegation arises out of the same facts as those given notice of in the original claim. Rather it was a claim which rests upon an offer to prove a specific factual allegation, that being a factual basis and allegation which did not exist in the ET1 as first presented, or as supplemented by the 16th November 22 additional information. Nor again could it be said to arise out of any of the facts which were pled in the ET1. Further, no clear link with averments in the ET1 could be demonstrated as the ET1 contained only an unspecified bald assertion.

63. The respondent's representative submitted, that the above was the reality of the position presented was underscored by the fact that in the ET1 under the heading "Maternity Discrimination" the claimant goes on to describe what was discussed at the meeting of 10th August 2022 and, while describing a number of matters, materially makes no mention of the allegation which she now sought to introduce in circumstances where there was nothing which would have prevented her from doing so when raising her claim, had that been her intention.

64. With reference to the pre litigation documentation upon which the claimant founds, Ms Macdonald submitted that a clear distinction requires to be drawn between that which parties may communicate in advance of litigation and that which they ultimately choose to include in an initiating Application. Under reference to **Chandhok v Tirkey** per the then President of the EAT Mr Justice Langstaff, she submitted that a respondent was required to answer only that which was included in a party's pleaded case and that while parties frequently communicate, pre litigation, about a number of matters, it is not to be assumed that all such matters will or do form part of a formal complaint to the Employment Tribunal, and that the respondent should not be put in the position of having to guess or speculate as to what the claimant

was complaining about and thus was entitled to respond, only, to those matters which were included in the pleaded case.

65. The respondent's representative separately submitted that the nature of the amendment was such that it changed the nature of the claims being made and thus fell to be considered as a new cause of action.

66. While acknowledging that other acts pled are said to be claims under section 13 of the Equality Act 2010, a further instance of section 13 Discrimination which depends for its establishment upon the proof of specific allegations not previously contained in the claim given notice of, fell to be regarded as a new cause of action. The same since each act of alleged direct discrimination is a standalone claim and requires consideration on its particular facts and circumstances and consideration of a relevant comparator, and that the inclusion of such an additional claim would add to the time spent at a Merits Hearing in addressing the allegation.

67. In relation to the effect of the Proposed Amendment upon the Constructive Dismissal claim, the respondent's representative drew the Tribunal's attention to the terms of paragraph 34 of the claimant's tendered Further Particulars of Claim of 14th February 2023 (page 45 of the Bundle) in which she states *"The claimant submits that she was entitled to terminate her employment in response to the series of events detailed above including the alleged acts of discrimination and what took place during the 10th August 2022 meeting ("the final straw"). It is submitted that these incidents taken together amounted to a breach of the implied duty of trust and confidence justifying the claimant's decision to resign".*

68. In the respondent's representative's submission the terms of that paragraph when read alongside the Proposed Amendment made clear, notwithstanding the claimant's apparent submission that the basis of her Constructive Unfair Dismissal claim remained unaltered by the amendment, that the claimant seeks to rely upon the Proposed Amendment not only for the purposes of adding a new allegation of Direct Discrimination but also as forming the basis

of, or at least contributing to the alleged breach of contract justifying her resignation in terms of section 95(1)(c) of the ERA.

69. That position differed starkly from the notice previously given by the claimant in her ET1. There, at section 8.2 page 7 of the Bundle under the heading "Constructive Dismissal", the claimant unambiguously specifies the matters which she relied upon in that regard including in particular those/that which she resigned in response to viz;- that a staff member (with whom her Line Manager was having a relationship) *"revealed to me some information which is very disappointing and illegal in which how the company operates which I was not aware of which left me no option but to resign and remove myself from the situation".* Those averments contain no reference to the claimant's resignation being in response to any of the events subsequently said to have occurred on the 10th of August 2022 and including the particular event given notice of in the Proposed Amendment.

70. In her 16th November 2022 "Additional Information Document", again under the heading "Constructive Dismissal" (page 32 of the Bundle), the claimant provided substantial additional specification of the matters described in the last paragraph of section 8.2 of her ET1 including; identifying the other party to the relationship which involved her Line Manager, listing the preferential treatment and giving notice of various issues which she said the relationship caused. At page 33 of the Bundle, she goes on to explain, under the heading "Fraud" the matters which, in her ET1, she refers to as *"the company was operating illegally'* being an allegation that a family member was on their payroll despite not working for the respondents. Those extensive averments of additional specification nowhere contain any indication that the claimant's resignation was in response to events of 10th August 2022, let alone in response to the specific allegation now set out in the Proposed Amendment.

71. There are no facts pled in the ET1 which give notice or otherwise imply that any comment such as that described in the Proposed Amendment was made on 10th August 2022 far less that any such comment had any bearing on the claimant's decision to resign.

72. The respondent's representative submitted that accordingly, in seeking to make the amendment in the context of alleging that the events of 10th August 2022 amounted to the *"final straw",* the claimant was also significantly altering the factual basis of her Constructive Dismissal claim.

73. In summary, in relation to the nature of the amendment, the respondent's representative submitted:-

(a) That the amendment sought was not foreshadowed in the initiating Application ET1, and that the vague single sentence relied upon for that purpose was wholly insufficient to suggest that it was.

(b) That the amendment, if allowed, would go far beyond a minor factual addition and was one that seeks not only to add a new act of discrimination but to significantly alter the basis of an existing claim.

(c) That it was accordingly a matter which could not simply be added without Leave to Amend as the claimant had primarily submitted and further, that it was a significant amendment adding a new cause of action based on facts not pled in the ET1, all of which constituted a significant factor which the Tribunal should give consideration to in deciding upon whether to allow the amendment, and it was one which indicated disallowance.

74. In relation to timing and manner of the Application, the respondent's representative submitted that whereas the claim was first presented on the 14th of October 2022, the claimant made her Application to Amend on the 24th of March 2023 and that it was only one month earlier on the 14th of February that she had first sought to give notice, in terms of her tendered Further Particulars of Claim, of seeking to rely upon the allegations in question. The

facts relating to those matters were facts all known to the claimant at the time of raising her claim and she had provided no clear explanation why she had not included these facts or that allegation in her ET1 in October of 2022, nor had she explained why when supplementing the terms of her ET1 with her "Additional Information Document" of 16th November, the claimant had not taken the opportunity to make any mention of the factual allegations which now form the subject of the Proposed Amendment. There had accordingly occurred a significant delay in the bringing forward of the amendment for which no reasonable explanation was before the Tribunal.

75. In relation to time limits, the respondent's representative submitted that if being brought now as a new claim of itself, the allegation which is the subject of the amendment would be out of time and thus that too was a factor for consideration. She went on to make reference to the conflicting case law as to the timing of the determination of a time bar issue in relation to amendment and, while also drawing the Tribunal's attention to parties' agreed position (recorded at paragraph (Sixth) of the Tribunal's 20th March 23 Orders) she submitted, following the approach taken in **Galilee v Commissioner of Police of the Metropolis** UKEAT/0207/16, that it would be proportionate, if the Tribunal was minded to allow the amendment, to do so reserving for determination at a Final Hearing after all of the evidence had been heard, the Preliminary Issue of whether the inclusion of the allegation was time barred as at the point of the Application being allowed.

76. Turning to the balance of prejudice the respondent's representative submitted that allowance of the amendment would cause prejudice to the respondent in consequence of the basis of the claim it had understood itself to be facing being significantly altered with the associated increase in cost and time required to address the same. That it was not in the interests of justice or of the Overriding Objective for the basis of a claim to be continually changing in circumstances where no reason as to why the facts which it is now sought be set out by way of amendment could not have been pled originally. On the other hand, she submitted that any prejudice to the claimant, associated with refusing leave, was limited as the claimant still had on the dependence and

was still at liberty to pursue her complaint of Constructive Unfair Dismissal on the grounds given notice of in her initiating Application ET1 and multiple other allegations of section 13 Direct and section 18 EqA Discrimination already included in her case. That in the circumstances, the balance of injustice and hardship lay in favour of refusing Leave to Amend and, in the alternative let it be assumed that the Tribunal considered the Leave to Amend be granted, that leave be allowed under reservation of, that is subject to, the issue of time bar, the same to be determined, as at the date of allowance of the amendment, at Final Hearing that the evidence has been heard.

**Discussion and Disposal**

77. The effect of the amendment upon each of the claimant's existing claims of section 13 and section 18 Discrimination and upon her existing complaint of Constructive Unfair Dismissal each fall to be considered.

**The Complaint of Constructive Unfair Dismissal**

78. The complaint of Constructive Unfair Dismissal as given notice of in the initiating Application ET1 of 14th October 2022, as supplemented by the claimant's Additional Information Document of 16th November 2022, does not contain the specific complaint (offer to prove) that the claimant, in terminating her employment on or about 30th August 2022 did so by reason, either wholly or partly of the allegation given notice of in the Proposed Amendment, nor does it contain notice of an offer to prove that she resigned in response to the same, for the purposes of section 95(1)(c) of the Equality Act 2010. That that is the case can be seen by looking at the claim form as a whole and upon a consideration of both the name given to the claim as well as the factual details accompanying it. For the avoidance of doubt, the Tribunal considers that the bald reference contained in the ET1 and reiterated and supplemented in the 16th November 22 Additional Details Document, are insufficiently specific to enable the respondent to be clear that the particular allegation now set out in the Proposed Amendment was being made, and made for the purposes of reliance upon section 95(1)(c) of the ERA.

79. The absence of that allegation from the ET1 does not appear to result from oversight as the claimant specifically sets out, under the heading **"Constructive Dismissal"** in her ET1, the matters which she relies upon in respect of section 95(1)(c) of the ERA and in response to which she offers to prove she resigned, and she expands upon those reasons at length in her Additional Information Document of 16th November. The acts or omissions of the respondents which are identified in the initiating and supplementing document are clear and on their face, comprehensive and when read together do not give rise to any ambiguity or require further specification. The claim given notice of can be wholly comprehended without the need to infer or read into it the particular allegation of conduct which is set out in the Proposed Amendment.

80. On the oral and documentary evidence presented and, in so far as it may be said to relate to the complaint of Constructive Unfair Dismissal, the Tribunal rejects the claimant's submission that in terms of its nature, the amendment is one which *"seeks only to add or to substitute a new claim arising out of the same facts as the original claim and that "I have demonstrated that there is a clear link between the averments in the ET1 and paragraph 23 of the FPC".* The Tribunal accepts the respondent's representative's submission that in so far as it relates to the Constructive Unfair Dismissal complaint, if allowed the amendment would change the nature and basis of the Unfair Dismissal complaint and would be dependent for its success on proof of new factual allegations not appearing in the initiating or supplemental documents and that as such, it falls to be regarded as a new cause of action in that it introduces new allegations of conduct as justifying, in whole or in part the claimant's resignation and significantly alters the factual basis of the Constructive Dismissal claim.

81. At paragraph 19 of the claimant's outline legal submissions (prepared with professional assistance), the claimant in denying that the amendment will significantly alter the factual basis of the Constructive Dismissal claim, states *"My constructive dismissal claim remains as pled in form ET1 and my Further*

*Particulars of claim. I maintain that the final straw was the events of 10th August 2022 and will be submitting contemporaneous documents at the Final Hearing which supports this position."* As the Tribunal has found in fact, the Constructive Dismissal claim as pled on form ET1 contains no reliance upon the particular allegation contained in the Proposed Amendment. Nor, in the context of and under the heading **"Constructive Dismissal"** does the ET1 contain any reference to reliance upon events said in terms to have taken place on the 10th of August. (The terms of paragraph 34 of the claimant's Further Particulars of Claim of 23rd March 22), make clear that the claimant founds upon, in addition to alleged acts of discrimination, *"what took place during 10th August 2022 meeting ("the final straw")".* While that averment does not specifically refer to the allegation appearing in the Proposed Amendment, absent the express exclusion from the reference of that allegation it falls reasonably to be read as giving notice of an intention to found upon all of what took place on the 10th of August which, in the event that the amendment were to be allowed would include that allegation. The Tribunal rejected the claimant's submission that the amendment if allowed will not significantly alter the factual basis of the claimant's Constructive Dismissal claim.

**Time Limits**

82. The time period, as extended in terms of section 207B(3), during which the claimant would have been entitled to raise a complaint of Unfair Dismissal which founded upon the allegation contained in the amendment expired, as found in fact above, before those parts of the claimant's Further Particulars containing reference to such reliance were first brought forward on the 14th of February 2023. Both as at that date and as at today's date, 12th June 2023, such a claim is, on its face, time barred and the claimant lacks Title to Present and the Tribunal Jurisdiction to Consider it in terms of section 111(2)(a) (as extended by section 207B(3) of the ERA).

83. The claimant made no express submission regarding reliance upon the saving provision of section 111(2)(b). Separately, on the explanation advanced by the claimant in evidence no basis upon which the Tribunal might sustain a finding in fact that it was not "reasonably practicable" for the claimant to have included the allegation within the extended time period was placed before the Tribunal, in the process of the claimant giving her explanation as to why the allegation was not included in either the initiating Application ET1 or supplemental additional information of 16th November 22.

84. The fact that the inclusion of the allegation for the purposes of sustaining the complaint of Constructive Dismissal is time barred is, while not determinative of the matter, is a significant factor to be considered when weighing the balance of injustice and or hardship and is one which indicates refusal of leave for that purpose.

85. The explanation given by the claimant for not including the allegation as one of the matters relied upon by her when resigning was that there was in her mind a distinction between Constructive Dismissal on the one hand and matters of discrimination on the other, the inference being that while she regarded the allegation to be one which could form the basis of a complaint of Direct Discrimination, she didn't consider that it related to her complaint of Constructive Unfair Dismissal.

86. The Tribunal found that explanation to be unconvincing in the context of the last paragraph of the initiating Application ET1 and in the multiple paragraphs of supplemental detail set out in the Additional Information Document of 16th November 22. The last paragraph of the ET1 clearly demonstrates an understanding, on the part of the claimant, of the provisions of section 95(1)(c) of the Employment Rights Act 1996 and of the need to give notice of the conduct of the respondents upon which she relied as justifying her resignation on 30th August 22, and including notice of the particular conduct in response to which she considered, as at the time of her resigning, she resigned in response to. The claimant having set forth her explanation for the timing of her seeking to introduce the allegation, the Tribunal was unable to

hold that that explanation allowed it to be satisfied that it was not reasonably practicable, for the purposes of section 111(2)(b) of the ERA 1996, for the allegation to have been presented before the expiry of the extended statutory period.

**The Balance of Injustice and Hardship**

87. In seeking to balance the relative injustice and hardship resulting to parties in the respective cases of allowance or non-allowance of the amendment, in so far as it is sought to be relied upon for the purposes of sustaining the complaint of Constructive Unfair Dismissal, the Tribunal considered that allowing the amendment would cause significant prejudice to the respondent by reason of their being required to respond to the complaint of Constructive Unfair Dismissal on a factual basis which had changed from that of which they had hitherto been given clear and unambiguous notice involving, as it would, increased costs both financial and in terms of time associated with their requiring to do so and in circumstances where the new factual basis being introduced would, if being raised as a new claim be time barred.

88. On the other hand, while refusing the amendment, in so far as it relates to the Constructive Unfair Dismissal claim would prejudice the claimant, that prejudice would be limited, as the claimant would remain at liberty to pursue her claim of Constructive Dismissal on the factual basis which she originally gave notice, together also with her multiple complaints of discrimination.

89. In **Chandhok v Tirkey** Langstaff P cautioned Tribunals not to be diverted into thinking that the essential case is to be found elsewhere than in the pleadings where he stated:-

> "The claim, as set out in the ET1, is not something just to set the ball rolling, as an initial document necessary to comply with time limits but which is otherwise free to be augmented by whatever the parties choose to add or subtract merely upon their say so … I readily accept the Tribunal should provide straightforward accessible and readily understandable fora in

> which disputes can be resolved speedily, effectively and with the minimum of complication … however, all that said at the starting point is that the parties must set out the essence of their respective cases on paper in respectively the ET1 and the answer to it … in summary, a system of justice involves more than allowing parties at any time to raise the case which best seems to suit the moment from their perspective … that is why there is a system of claim and response and why an Employment Tribunal should take very great care not to be diverted into thinking that the essential case is to be found elsewhere than in the pleadings."

90. The putative additional claim, although the same in nature as some of the claims already given notice of namely a complaint of Direct Discrimination in terms of section 13 of the EqA nevertheless would be dependent for its success upon proof of new allegations of fact not included in the ET1 when read with the additional information. In so concluding, the Tribunal rejected the claimant's submission that the bald and unspecific reference to having been asked twice if she intended to have more children was sufficient to give notice of the particular allegation contained in the Proposed Amendment. The Tribunal accordingly concluded that the addition of a new allegation was one that required to be the subject of an Application for Leave to Amend.

91. The Tribunal did not consider it consistent with the Overriding Objective to allow an amendment in June of 2023 which introduced a new factual basis for a complaint in circumstances where the introduction of such a basis would otherwise be time barred, and in which for reasons not clearly placed before the Tribunal the claimant had consciously excluded from the grounds of complaint of Constructive Unfair Dismissal of which she gave notice both as at first presenting her ET1 on 14th October 2022 and, as at the date of her supplementing that Application with substantial additional information on 16th November 2022.

92. On a consideration of all the relevant circumstances including those particularly identified in **Selkent Bus Company Limited v Moore** and on a carrying out of a balancing of the relative prejudice and or hardship caused to

parties on application of the **Selkent** principles, the Tribunal determined that the balance lay in favour of refusing the amendment, in so far as it may be said to relate to the complaint of Constructive Unfair Dismissal.

**The Proposed Amendment in so far as it relates to a Complaint of section 13 Direct Discrimination**

**The Nature of the Amendment**

93. As with its relation to the complaint of Constructive Unfair Dismissal the Tribunal was satisfied upon a consideration of the initiating Application ET1 as a whole and considering the name given to the claim as well as the factual details accompanying it, that the particular factual allegation set out in the Proposed Amendment and sought to be relied upon as an additional instance of section 13 EqA Direct Discrimination, was not a claim contained in the initiating Application ET1, either as first presented or as supplemented by the claimant's additional information of 16th November 2022. The Tribunal so concluded for the same reasons as it did so in respect of the Constructive Unfair Dismissal complaint and which are set out above.

94. The Tribunal likewise accepted the respondent's submission that each alleged act of Direct Discrimination is a standalone claim which requires consideration on its own particular facts and circumstances including the consideration of a relevant comparator, and that as such the amendment if allowed would have the effect of adding a new claim of section 13 EqA Direct Discrimination.

95. As to the timing and manner of the Application, the Tribunal's consideration of the same is as set out above in relation to the complaint of Constructive Unfair Dismissal. The Tribunal considered, let it be assumed that the claimant had regarded the allegation now given notice of in the Proposed Amendment as an instance of Direct Discrimination, that no real explanation as to why she did not expressly give notice of it in either the ET1 or her additional information was presented. Rather, the proposition advanced by the claimant was that the bald and unspecific statement contained in the ET1

*"Since my return to work in May 2022, I was asked twice if I planned to have any more children. I find this question inappropriate and uncomfortable.,* when taken together with the additional information that the questions were allegedly asked by the respondent's Managing Director, was sufficient to put the respondents on notice of the allegation now contained in the Proposed Amendment. That is a submission which the Tribunal rejected. It considered, otherwise, that no real explanation was placed before it either as to why the allegation was not included at first instance, or again on the 16th of November additional information, nor as to why notice of it, as an allegation being relied upon in the formal litigation, was only first given notice of in the Further and Better Particulars tendered by the claimant on 14th February 2023 some 4 months after the ET1 was first presented.

**Time Bar**

96. The new (additional) claim of section 13 EqA Direct Discrimination is time barred in terms of section 123(1)(a) as extended by section 140B(3) of the EqA and an issue arises as to whether the Tribunal should exercise its discretion to extend time in terms of section 123(1)(b) on the grounds that it considers it just and equitable in the circumstances to do so. That is a matter which previously would have and frequently continues to be, one determined as an integral part of the granting or refusing Leave to Amend.

97. On the authority of **Galilee v Commissioner of Police of the Metropolis** UKEAT/0207/16 it is open to Tribunals, in appropriate circumstances, to allow an amendment subject to the challenge of Jurisdiction by reason of asserted Time Bar reserving the same for determination on a Proof Before Answer basis at a Final Hearing. In the instant case the respondent's representative while submitting primarily that upon an application of the **Selkent** principles and on a balancing of relative injustice and hardship the Tribunal should refuse the Application for Leave to Amend, further submitted, in the alternative let it be assumed that the Tribunal were minded to grant Leave to Amend that it do so by adopting the approach in **Galilee v The Commissioner of Police of the Metropolis** and grant Leave to Amend

subject to, that is to say under reservation of the Preliminary Issue of, the challenge to the Tribunal's Jurisdiction by reason of asserted Time Bar for determination at Final Hearing after evidence.

98. Whether to so reserve or not reserve the question of time bar is a matter ultimately for the Tribunal. That proposition chimes with the then mutual position of parties as recorded at paragraph (Sixth) of the Tribunal's Case Management Orders of 20th March 2023.

99. The Tribunal was satisfied that the Proposed Amendment sought to add a new cause of action in the sense of an additional standalone complaint of section 13 EqA Direct Discrimination which was dependent upon proof of new factual allegations not given notice of as founded upon in the ET1. The Tribunal, however, did not consider that the new claim fell to be regarded as entirely unconnected with the original claim, in the sense that it arose from the circumstances of the treatment which the claimant asserts she was subjected to during the period of her pregnancy/maternity leave and in the period following her return from maternity leave, and related to maternity.

100. The Tribunal accepted the claimant's submission that the allegation, although, in the Tribunal's consideration, not previously given notice of as founded on in the proceedings before the Employment Tribunal, was one which was clarified and specified in paragraph 23 of the tendered Further Particulars and in terms of the Proposed Amendment. Having been so specified, it could be seen to be an allegation of which the respondent was already aware and which it had already investigated. In answer 9, in the paper apart to Response Form ET3, the respondent sets out its own averments in relation to the first of the two alleged instances of being asked if she intended to have more children to which reference is made in the ET1. The respondent has also had opportunity to investigate what is now clarified in the Proposed Amendment as being the second instance of questioning albeit, in the context of the claimant's grievance (see page 79 of the Joint Bundle last paragraph thereof).

101. In seeking to balance the relative injustice and hardship which would be caused to parties by the allowance or disallowance of the amendment as the case may be, the Tribunal considered that while the respondents would be prejudiced to the extent that they would require to cross examine the claimant and to examine the other two witnesses who were present as to whether the alleged statement was made by the claimant and as to whether the alleged reply was made by the respondent's Managing Director, (subject to the issue of time bar), the Tribunal did not consider that that prejudice would be substantial in the sense of adding significantly to the cost or time associated with enquiring into and determining the facts relating to the allegation at a Final Hearing, on the one hand. On the other hand the Tribunal considered that if the amendment were refused (and again subject to the issue of time bar) the claimant would be significantly prejudiced to the extent of losing the opportunity to seek redress in respect of, albeit an additional, *prima facie* act of unlawful discrimination. On an application of the **Selkent** principles and on balancing the relative injustice and hardship to parties associated with the allowance or refusal of the amendment, the Tribunal concluded that the balance of hardship lay in favour of allowing the amendment **but only in so far as it related to the introduction of an additional complaint of Direct Discrimination,** and subject to the challenge to the Tribunal's Jurisdiction by reason of asserted Time Bar.

- **Marianne Archibald vs Apex Resources - Case Ref - 8000110/2022**

- **Pregnancy discrimination**

**Employment Judge:** **J d'Inverno**
**Date of Judgment:** **27 June 2023**
**Entered in register:** **28 June 2023**
**and copied to parties**

**I confirm that this is my Judgment in the case of Archibald v Apex Resources Ltd and that I have signed the Judgment by electronic signature.**