EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4110679/2021 and 4110680/2021

Preliminary Hearing (open) held at Dundee on 31 August 2023

Employment Judge McFatridge

Mrs Ariane MacAulay and Mr Walter MacAulay	**Claimants Represented by: Mr Russell, Solicitor**
Parsley Box Ltd	**Respondent Represented by Ms McDonald, Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is that the further particulars submitted by each claimant separately on 24 May 2023 amount to an application to amend their respective claims and that in each case the application to amend is allowed.

REASONS

1. The claimants submitted claims to the Tribunal in August 2021 on a single multiple claim form in which they ticked the box for disability discrimination. The precise procedural history regarding the submission of their claim is somewhat complicated and is summarised below in the paragraph headed "Tribunal file". In any event due to a delay at the Employment Tribunal due to administrative error the claim was not processed and was not

forwarded to the respondent until 7 November 2022, some 15 months after it had been submitted. Thereafter, the respondent submitted a response in which they sought further particularisation of the claims. In any event they denied discrimination. A preliminary hearing took place on 18 January 2023 following which the claimants were ordered to produce further and better particulars of their claim no later than 1 March 2023. This was to include details of each incident relied upon and details of the statutory basis for each allegation in terms of the Equality Act 2010. The claimants did not comply with the order within the relevant timescale. There was some correspondence between the claimants and the Tribunal whereby the claimants sought orders that the respondent provide various documents in advance of the further particulars being provided. The Tribunal responded to the effect that it was up to the claimants to specify their claim and that until this was done it would be inappropriate to consider the granting of any further orders. On 23 March 2023 the respondent applied for strike out of the claims. Thereafter the claimants indicated that they would be seeking legal advice. The Tribunal indicated that they would defer consideration of the strike out application until after the claimants had been given a further opportunity to comply with the orders. On 27 April 2023 the claimants' current representatives wrote to the Tribunal confirming that they had been instructed and requesting copies of the ET1s and the note from the preliminary hearing in January. The claimants' representatives applied for and were granted a further extension and finally on 24 May 2023 the claimants' representative provided further particulars of the claim. In an email dated 16 June 2023 the respondent's representative objected to these particulars being received on the basis that they amounted to impermissible amendments of the claim. A preliminary hearing took place on 26 June 2022 following which the Tribunal fixed an open preliminary hearing to take place on 31 August in order to decide:

(1) Whether the claimants' further particulars submitted on 24 May 2023 be accepted as further and better particulars of the claim or rejected on the basis that they amounted to an amendment of the claim.

(2) Whether if such particulars amounted to an application to amend, whether the application to amend should be granted in whole or in part.

2. The preliminary hearing took place before me on 31 August. Before going on to summarise the parties' submissions it is as well to set out my findings regarding the Tribunal file. This was discussed by me during the hearing and I shared the contents of the Tribunal file with the parties' representatives.

Tribunal file

3. Each claimant submitted a multiple claim form to the Tribunal. Mr MacAulay submitted his claim form on 4 August 2021 in which he was the lead claimant and his wife was mentioned as an additional claimant. These claims were allocated the number 4110649/2021 and 4110650/2021. On 5 August Ariane MacAulay submitted a claim which I understand to be in very similar terms in which she is the lead claimant and Walter MacAulay mentioned as an additional claimant and this was given the reference 4110679/2021 and 4110680/2021. These were given the numbers 4110679/2021 and 4110680/2021. The Tribunal administration identified that these claims appeared on the face of it to be duplicates of each other and on 10 August 2021 they wrote to both claimants in the following terms:

> *"The Tribunal has noted that claims 4110649/2021 and 4110650/2021 submitted by Mr W Macaulay on 4th August 2021, appear to be identical to claims 4110679/2021 and 4110680/2021 submitted by Mrs A Macaulay on 5th August 2021.*
> *Legal Officer Doherty says the claimants are to confirm if they wish all claims to proceed or, if they are identical, to confirm if they wish claims to be withdrawn.*
> *If the latter, they should confirm which case numbers are to be withdrawn."*

It would appear that subsequent to this due to an administrative failure by the Tribunal the matter was overlooked until on 22 October 2022 Mr MacAulay wrote to the Tribunal enquiring how the cases were

proceeding. The Tribunal then wrote to the parties on 28 October 2022. Again I will set out the full terms of this letter. It states:-

> *"**APOLOGY FROM THE TRIBUNAL***
> ***Employment Tribunals Rules of Procedure 2013***
> *I refer to the above named proceedings and acknowledge your correspondence of 22 October 2022.*
> *Your correspondence has been referred to Legal Officer D Ellison who has directed I write as follows:*
> *Due to an administrative error the above-named cases were closed following no response to our letter dated 10 August 2021.*
> *I would like to express our deepest apologies for the mistake and understand the frustration this may have caused. The Tribunal is eager to progress your claims however there is still the outstanding matter raised in Tribunal letter 10 August 2021 (enclosed).*
> *If the claimants could provide us a response to this letter within 7 days the Tribunal will progress the appropriate claims on reply.*
> *Once again, I am sorry for the inconvenience caused by our negligence.*
> *Yours faithfully".*

4. Subsequent to this Mr MacAulay wrote to the Tribunal on 31 October 2022. The letter states

> *"I refer to your letter dated 28th October 2022 and accept your apology. I also refer to your letter of 10th August 2021.*
> *Mrs MacAulay and I would like to proceed with claims 4110679/2021 and 4110680/2021 submitted by Mrs MacAulay on 5th August 2021. Please withdraw the duplicate claims 4110649/2021 and 4110650/2021 submitted by Mr W MacAulay on 4th August 2021."*

On 8 November 2022 the Tribunal wrote to the parties acknowledging that these duplicate claims were withdrawn but confirming that they were not dismissed because the Legal Officer believed that to issue such a judgment would not be in the interests of justice because the claims were being pursued under the other case numbers.

5. At the hearing on 31 August I invited the claimants' representative to make their submissions first. The respondent's representative then made her submissions. During the course of her submissions it became clear that the copy of the ET1 which the claimants' representative had been sent by the Tribunal was a copy of the ET1 for claims 4110649/2021 and 4110650/2021 which were the claims which had been formally withdrawn on 31 October 2023. This led to me sharing the contents of the Tribunal file with the representatives. I was entirely satisfied that for some reason the claimants' representative had been given a copy of the wrong ET1. Although I have not seen a copy of this ET1 I accepted his submission to the effect that this ET1 which had originally been submitted by Walter MacAulay did contain some kind of statement on page 6 to the effect that he was claiming by virtue of association with his wife albeit it was accepted that at no point was the box ticked for marriage or civil partnership discrimination.

6. I will set out the parties' submissions in brief terms and then deal with them further in the discussion below.

Claimants' submissions

7. The claimants' primary position was that in respect of both applicants no amendment was necessary. It was his position that the claims set out in the further and better particulars were foreshadowed in the original ET1 claim form. It was accepted that these claims had required further particularisation, the claimants were unrepresented at the time they submitted their claim. The respondent had quite properly requested further particulars in their response and this was now being provided.

8. The claimants' representative set out the history of the matter and the unfortunate error by the Tribunal which led to the claim not being served on the respondent until some 15 months after it had been lodged with the Tribunal.

9. With regard to the specific claims he indicated that in the original ET1 (which was the one now withdrawn in the circumstances narrated above) Mrs A MacAulay had ticked the box for disability discrimination. In section 8.2 she gives a brief narrative setting out her cancer diagnosis and

treatment. She then refers to her performance being satisfactory or better. She was then dismissed out of the blue which she took great exception to. In the view of the claimants' representative there was a clear link between the disability and not accepting that the reasons for dismissal were genuine. There was some reference to Mrs MacAulay having to take time off for her cancer treatment.

10. With regard to Mr MacAulay again the only box ticked was for disability discrimination. As noted above the claimants' representative indicated that on the copy ET1 which he had which was the one lodged on 4 August which had subsequently been withdrawn there is a note in the box before section 8.2 which states

> *"Discrimination by association with my wife who was dismissed at the same time."*

It was his position that whilst there was no suggestion that the box for marriage or civil partnership discrimination had been ticked the language used of association was closer to marriage than disability. The claimant was not saying that he was dismissed because of his wife's disability, he was stating that he was dismissed because of his association with his wife who was unlawfully dismissed because of her disability. The claimants' representative summed this up by saying that Mr MacAulay's position was that if he had not been married to Ariane MacAulay then he would not have been dismissed. It was the position of the claimant's representative that anyone reading the ET1 such as the respondent would have been aware that marriage discrimination was what was being alleged.

11. As noted above during the course of the respondent's submission in answer it was noted that in actual fact whilst this reference to 'association with my wife' may have been in the ET1 which was sent in on 4 August it was not in the ET1 sent in on 5 August which is the one currently before the Tribunal. In addition to this it is clear that the respondent would never have seen the original ET1 submitted on 4 August since this one was withdrawn before service. Once the matter had been explained the claimant's representative conceded that this made it more difficult for Mr MacAulay to argue that a claim of marriage discrimination was already

before the Tribunal however he did not consider it to be impossible. It was however his position that so far as Mrs Ariane MacAulay was concerned she had done what many claimants do and submitted a fairly generalised claim of disability discrimination. Now that she was represented this had been properly particularised as involving claims of direct discrimination (section 13 Equality Act), discrimination arising from disability (section 15 Equality Act) and a claim of a failure to make reasonable adjustments (section 20, 21 Equality Act). In their original claim form the claimants make reference to one of the perceived reasons for Mrs MacAulay's dismissal being the claimants' absences as a result of her treatment. It is the claimant's position that these absences arose from her disability. Furthermore, the claimants' representative has now clarified that the claimants' position is that the respondent operated a PCP relating to attendance and that it would have been a reasonable adjustment to alter that PCP in respect of Mrs MacAulay.

12. With regard to the legal position the claimants' representative referred to the case of ***Parekh v London Borough of Brent [2012] EWCA civ 1630*** as being authority for the proposition that formal requirements for pleadings in the Employment Tribunal are minimal. The Court of Appeal also stated that in the earlier case of ***Sougrin v Haringey Health Authority [1992] IRLR 416*** that a Tribunal should not take a narrow legalistic view of the terms in which a complaint is couched. The claimant's representative also referred to the well known more recent case of ***Zhang v Heliocor Limited [2022] EAT 152*** to the effect that in a situation such as this the Tribunal's first job is to look at the particulars of the claim already presented and decide whether or not permission to amend is in fact required. In summary, the claimants' representative indicated that the claimants did their best within their knowledge and capabilities to set out their claims. This was that Ariane MacAulay believed she had been discriminated against on the grounds of her disability in respect of her dismissal and Walter MacAulay believed that he had been dismissed because of his association with Ariane MacAulay. His position was that but for the connection of marriage he would not have been dismissed. The claimants' representative indicated that this was not a straightforward matter but that given the whole circumstances the claims

currently being made were foreshadowed in the ET1 albeit imperfectly expressed the Tribunal required to bear in mind the overriding objective to do justice between the parties.

13. The claimants' secondary submission was that if I was not with him and the further particulars were to be taken as an amendment then given the usual ***Selkent*** principles the amendment should be allowed. He indicated that the Tribunal required to examine the original claim to see if it provided a causative link with the new claims. He referred to the case of ***Housing Corporation v Bryant [1999] ICR 123*** and he considered that the situation here could be distinguished. In this case Ariane MacAulay claimed discrimination without specifying the specific sections of the Equality Act. In his view this was a fundamental matter of further specification as opposed to adding in additional claims where parties were legally represented from the start of the process. He also referred to the case of ***Evershed v New Star Asset Management Holdings [2010] EWCA Civ 870***. The Tribunal should look to see if the new claim is sufficiently similar to that originally pled, if it is that supports the granting of the amendment where the thrust of the complaints is essentially the same. In his view the further and better particulars require no new factual enquiry. The new claims will look at the same factors. They require to consider Ariane MacAulay, her disability and treatment, performance and reason for dismissal. They will require to consider Walter MacAulay's association with his wife and whether the reason from the respondent was genuine or as alleged discriminatory. In his view this was a key factor. He referred to the case of ***Abercrombie v Aga Rangemaster Ltd [2014] ICR 2004*** where it was noted that if the new pleadings would involve substantially different areas of enquiry then the less likely new claims would be allowed. He referred to the helpful summary of the factors to be taken into account in the case of ***Vaughan v Modality Partnerships [2021] IRLR 97***.

14. With regard to the list of matters to be taken into consideration mentioned in the cases of ***Selkent Bus Company v Moore [1996] ICR 836*** and ***Ladbrokes Racing v Trainer UKEATS/0067/06*** he noted that insofar as the manner of the application was concerned the application was made by

the claimants' present solicitors at the first opportunity once documents received and instructions taken. This was within four weeks of advising the Tribunal, they had just been instructed but at that stage no preparatory work had been done. It was his view that no delay to the proceedings would be caused by the amendment being allowed. It was also his position that there would be no additional costs. The respondent had requested further and better particulars and would have had to respond to these in any event. There will be the same witnesses and costs. In the view of the claimants' representative the respondent's costs are actually now likely to be less given that the claimant is now represented and the delays which usually accompany this are less likely to happen. Furthermore, it was the claimants' representative's view that if there were any evidential issues in this case they would arise from the unfortunate delay between August 2021 and November 2022 which was due to the Tribunal and not the claimants. It would be inequitable for the claimants to be penalised for this.

15. With regard to time limits it was the position of the claimants' representatives that it would be just and equitable to extend any relevant time limits. He noted that it would be open to the Tribunal to allow the amendment whilst reserving the issue of time limits.

16. He referred briefly to the case of ***Kumari v Greater Manchester Mental Health Foundation Trust [2022] EAT 132*** and noted that the Tribunal is entitled to take account of its assessment of prospects. He did not invite the Tribunal to make any strong assessment at this stage. In his view any such assessment would favour the claimants since on the face of it Mrs MacAulay was dismissed by the respondent completely out of the blue whilst undergoing treatment for cancer. There was at no time any concerns raised about her performance and on the contrary she was performing well as noted in an appraisal right before dismissal. Mr MacAulay's position was that he was not subject to any alleged performance issues being alleged against his wife. He was aware of no issues in relation to his own performance and was dismissed for no other reason that he was married to Mrs MacAulay. It was his view that these

claims were at the very least arguable and that it would be in the interests of justice for them to proceed.

Respondent's submissions

17. The respondent's representative indicated that it was important to deal separately with the application in respect of each claimant since their situation was different. So far as Ariane MacAulay was concerned it was her position that the claim form disclosed a claim of direct discrimination under section 13 of the Equality Act. The claimant was quite clearly saying that she had been dismissed because of her disability and this amounted to less favourable treatment. Further particularisation was required in the sense that a comparator had not been identified but the claimant had now provided this information. The further and better particulars however go on to introduce entirely new claims of discrimination arising from disability under section 15 and a claim of a failure to make reasonable adjustments in terms of section 21. These are new causes of action. There are new factual allegations made in relation to the claimant having disability related absences and in relation to the PCPs. While she appreciated that the claimant was not represented at the time these were not facts raised by her. She relied heavily on the case of ***Ali v The Office for National Statistics [2005] IRLR 201***. In that case the Court of Appeal had held that a claim of indirect discrimination was entirely different from a claim of direct discrimination. It was her position that the claim made in the claim form was entirely different from the claims under section 15 and section 21 that the claimant now wished to make. In her view if the further and better particulars were accepted then he disputed that there would be no additional work required by the respondent. The new allegations would require significant additional documentation and a much greater factual analysis would be required. The scope of the enquiry and the costs would be greatly increased.

18. With regard to Mr MacAulay the respondent's representative identified that the actual ET1 in this case being the ET1 submitted on 5 August did not contain any reference to association with Ariane MacAulay. It was at this stage that I intervened and clarified the position as set out above. In those circumstances it was clear that Mr MacAulay had ticked the box for

disability discrimination but then effectively not provided any narrative whatsoever. It was clear that the claim of discrimination on grounds of marriage or civil partnership was an entirely new claim and could only be incorporated by amendment.

19. On the assumption the Tribunal accepted that amendment was required she referred to the case of ***Vaughan*** above and stated the Tribunal required to look at the overall justice or injustice to the parties. She repeated her view that the nature of the amendment was such that it was not simply a reclassification of facts. It was a new cause of action for which new facts were being pled. It was also her view that the amendment was substantially out of time. The claimants had been dismissed on 20 April 2021. The new claims came in the further particulars the claimants sent to the Tribunal on 24 May 2023. We were now in August 2023. Whilst making no specific averments regarding any witnesses who were no longer available she indicated that *"a lot had been going on in the company."* She stated that there was no good reason given for the lateness of submission of the further particulars. The claimants had been given a clear steer as to what was required at the preliminary hearing in January. It was clear they had not sought legal advice until after the deadline for providing further particulars had expired. She indicated that the last possible date on which any discrimination could have occurred was the date of dismissal in April 2021. It would not be just and equitable to allow the claims to be made at this point. She indicated that the respondent had already incurred considerable costs in respect of the time taken to deal with the various iterations of the case. There would be additional costs if the amendment were allowed. On the other hand if the amendment were not allowed then Mrs MacAulay would still have a section 13 claim which she could pursue. It was however her view that Mr MacAulay's claim had been inept from the start and that any claim of disability discrimination by association would have no prospect of success given that the sole claim being made was one of direct discrimination.

Discussion and decision

20. I considered the arguments in this case to be fairly well balanced. I considered that the appropriate approach to take was to consider the

situation in the light of the overriding objective. The Tribunal has a discretion to allow further and better particulars of claim and to allow an amendment of claim in terms of the Tribunal's general case management powers. Whilst they are two separate decisions there is a degree of overlap since issues relating to the extent a claim is foreshadowed in the original ET1 may be relevant to the question both of whether the new particulars amount to an amendment in the first place and also whether if they do, that amendment should be permitted.

21. In the case of Ariane MacAulay it appears to me that what we have here is, absent the delay caused by the Tribunal's error, a fairly standard case where an unrepresented claimant submits a claim of discrimination in fairly generalised terms. A preliminary hearing is fixed following which the claimant is given a brief introduction to discrimination law by the Employment Judge and then told to provide further and better particulars of their claim clearly setting out which sections of the Equality Act they are relying upon. The sole complicating factor in this case is that due to the Tribunal's error we are dealing with this application some two and a quarter years after the date of dismissal rather than only a few months after the date of dismissal. In her original claim form Mrs MacAulay does make reference to various disability related absences. It is correct that the main thrust of what she says is that she must have been dismissed because of her disability because she can't think of any other reason but in my view there is enough in the original claim form to put the respondent on notice that the way they handled her absences is a point of issue and that if she was dismissed because of her absences then the claimant is saying that this was unlawful discrimination. If Mrs McAulay's further particulars simply clarified that she was now claiming under s15 and s20 as well as s13 then there would be no doubt in my mind that her further particulars could be accepted as such but in this case I believe she goes beyond that.

22. There is a fine line in this type of situation between providing further particulars of a claim and amending so as to include new heads of claim. In this case I consider that the balance does just fall on the side of considering Mrs MacAulay's application to amount to an amendment. The

main reason for this being that in her further particulars she has provided additional factual averments which were not in the initial ET1 as well as clarifying that if her dismissal was not an act of direct discrimination then it may have been an act of discrimination arising from disability. In this connection I note that the claimant's position essentially was that she did not know the reason for her dismissal and did not understand what it was. Her position set out in the claim form is that she had received a satisfactory, indeed complimentary appraisal a couple of days before being told that she was being dismissed on grounds of capability. I note that in the period immediately after the preliminary hearing in January the claimant sought to obtain documents from the respondent in relation to what the actual reason for dismissal had been. These documents were never provided. The claimant's representative indicated in submissions that neither claimant had ever received a letter setting out the reason for dismissal and that there had been absolutely no procedure carried out.

23. In those circumstances I can quite see that an unrepresented claimant would simply put down the claim that they thought most likely which was that Mrs MacAulay had been dismissed because of her disability. A lawyer drafting this on the other hand may wish to cover the possibility that, against the factual background set out in the claim form that the claimant had had disability related absences that any dismissal based on these absences would also amount to unlawful discrimination and indeed that if the respondent operated a PCP of requiring a certain level of attendance then this was a PCP which ought to have been adjusted.

24. Having decided on balance that amendment is required I am in absolutely no doubt that the amendment in respect of Mrs MacAulay should be allowed. Whilst the case of ***Vaughan*** suggests that Tribunals should ever be mindful that the core test in considering applications to amend is the balance of injustice and hardship in allowing or refusing the application I consider that the ***Selkent*** factors also provide a useful checklist of the matters to be taken into account in the Tribunal's considerations when deciding whether or not to exercise our discretion as to whether to accept an amendment. Whilst the case of ***Ali*** does make it clear that a claim of direct discrimination is not to be taken as the same as a claim of indirect

discrimination I consider that the situation in ***Ali*** was entirely different. In that case the claimant had initially claimed direct discrimination, he won his case at Tribunal. This decision was overturned on appeal and remitted back to a second Tribunal. The claimant then sought to amend his claim so as to include a claim of indirect discrimination based at least in part on new information which had come out at the first hearing. It was this decision which the Court of Appeal considered amounted to allowing an amendment which in terms of the ***Selkent*** rules had been inappropriate.

25. Looking at the nature of the amendment I consider that whilst it just falls over the boundary of setting out new heads of claim and providing new factual averments these are all very much foreshadowed in the ET1 and the amendment is to all intents and purposes a tidying up exercise. With regard to the timing of the amendment I do not consider that the delay which the claimants were responsible for was in any way excessive. Mrs MacAulay attended the preliminary hearing and was ordered to produce further particulars. Initially she sought to obtain further information from the respondent about the reason for her dismissal and various other matters. Once she realised she was out of her depth she instructed a solicitor. I do not consider that there was any delay on her part.

26. Whilst both parties referred to the time limit contained in section 123 of the Equality Act it is my view that whilst this is highly relevant section 123 applies to issues of jurisdiction. In this case the Tribunal already has jurisdiction. The claim is about a dismissal and was clearly raised within the appropriate time limit. The issue before me is a case management one where I am required to apply the overriding objective. This is probably a distinction without a difference but I consider it appropriate that I make my position clear on this. I should say that in the event I am wrong I would have no doubt that it would be just and equitable to extend time given the circumstances here. As noted above the claimants were not responsible for the delay between August 2021 and November 2022 when the claim was eventually served. It would be extremely unjust to penalise them because of this. Whilst there is no doubt that it is better for a hearing to be held sooner than two and a half or three years after the dismissal, the respondent has not sought to make any specific averments about any

particular piece of evidence which will no longer be available. It was no doubt annoying for the respondent to be first advised of the case some 15 months after it had been lodged but apart from general issues of delay there has been nothing specific alleged which would make it more difficult for them to defend the claim. I also take on board the claimants' point that the respondent have considerable resources and had been legally advised from the outset. So far as the balance of prejudice is concerned I also consider that if the amendment is not allowed in respect of Mrs MacAulay that not only the claimants would suffer considerable injustice but the cause of justice itself would be hampered. The Tribunal would be left with a case where essentially only half of Mrs MacAulay's case could be heard. The claimant would only be able to lead evidence to the effect that she was dismissed directly because of her disability. She would not be able to lead evidence or counter any argument from the respondent to the effect that she was dismissed for disability related absences albeit this would clearly be impermissible unless the respondent are in a position to objectively justify this. Looking again at what the case of ***Vaughan*** states should be my primary aim in this case I have absolutely no doubt that there would be much greater injustice to Mrs MacAulay if the amendment is not permitted than to the respondent if it is. With regard to the additional work and expense to which the respondent will be put I have to say that I tend to agree with the claimants' representative that this will be fairly minimal. The additional work will be more than offset by the fact that now the claimants are represented the hearing can proceed in a much more focused way than if matters had continued and the hearing proceeded on the basis of the original ET1 submitted by Mrs MacAulay.

27. With regard to Mr MacAulay I have to proceed on the basis of the ET1 claim form which is still before the Tribunal. This makes no reference to Mr MacAulay's claim being based on his association with his wife. What we have is a multiple claim form which makes various averments in relation to Mrs MacAulay having been dismissed because of her disability and a note that Mr MacAulay was also dismissed at the same time. Mr MacAulay has only ticked the box for disability discrimination.

28. It is true that at the preliminary hearing it is noted that Mr MacAulay was claiming associative discrimination based on his association with his wife. Nothing however was said to the effect that he was claiming discrimination on the basis of the protected characteristic of marriage or civil partnership. It is my view that it is clear that if he wishes to make such a claim then he requires to amend and that his further particulars are to be treated as an application to amend.

29. With regard to the nature of the amendment this is clearly a new head of claim. Unlike in the case of Mrs MacAulay however very little in the way of new facts requires to be averred. What the claimant is saying is that he does not believe he would have been dismissed if his wife Ariane MacAulay had not been dismissed. He says that the respondent had no other basis to dismiss him other than the fact he was married to Ariane MacAulay who they had decided to dismiss and that he would argue that there was no other basis or grounds to dismiss him. It is clear that Mr MacAulay intends that by demonstrating there was no basis to dismiss him and proving the allegations against him were simply not true he will invite the Tribunal to make the inference that he was dismissed because of his marriage to Mrs Ariane MacAulay.

30. With regard to the balance of prejudice it appears to me that if the amendment is allowed then the only thing that the respondent loses is the windfall benefit of being able to strike out Mr MacAulay's claim on fairly technical grounds without having to defend the allegation being made. On the other hand, it appears to me that if the amendment is not allowed the prejudice to Mr MacAulay would be severe. It is clear that he considers that he has been treated unlawfully. This is clear in the original ET1 albeit he has not specifically said that this amounted to discrimination on grounds of marriage/civil partnership. The respondent's representative indicated that if the amendment were not allowed they would be seeking strike out of his claim. Whilst I made the point that the claimants' representative may seek to challenge this and proceed with a claim of disability discrimination by association (which may be competent given that I have allowed the amendment in respect of Mrs Ariane MacAulay) there is a considerable likelihood that the claimant would not be able to

pursue the claim which he considers he has. Once again I think there will also be considerable prejudice to the interests of justice in that the hearing will require to tread a careful path to exclude argument relevant to the claim of marriage discrimination and indeed deal with the intricacies of the law of disability discrimination by association where it is now clear that Mr MacAulay's view at the time was that he had been dismissed because he was married to his wife. Again looking at matters overall in the way that the case of ***Vaughan*** suggests one does I consider that it is appropriate to allow the amendment. As with Mrs MacAulay I considered the lapse of time in this case to be unfortunate but I consider that it would be both just and equitable and in the overall interests of justice for the amendment to be allowed despite the lapse of time since the dismissal of Mr MacAulay.

31. To summarise my decision is that in each case the further and better particulars provided amount to an application to amend the claim and in each case I have allowed the amendment. Both parties were of the view that once I had issued my judgment the appropriate next step would be to fix a short telephone case management preliminary hearing. It would be helpful if the parties could contact the Tribunal within the next 14 days to give their availability for such a hearing.

Employment Judge: **I McFatridge**
Date of judgment: **13 September 2023**
Date sent to parties: **19 September 2023**