

**EMPLOYMENT APPEAL TRIBUNAL**  
FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8JX

At the Tribunal  
On 9 October 2013

**Before**

**HIS HONOUR JUDGE PETER CLARK**

**(SITTING ALONE)**

---

MR T I GHOZNOVI

APPELLANT

(1) LONDON UNDERGROUND LTD  
(2) TRANSPORT FOR LONDON PENSION SCHEME

RESPONDENTS

---

Transcript of Proceedings

JUDGMENT

---

## **APPEARANCES**

For the Appellant

MS AMANDA HART  
(of Counsel)  
Instructed by:  
Thompsons Solicitors  
Congress House  
Great Russell Street  
London  
WC1B 3LW

For the Respondent

MS SAMANTHA COOPER  
(of Counsel)  
Instructed by:  
Transport for London  
Legal Services  
7<sup>th</sup> Floor, Windsor House  
42-50 Victoria Street  
London  
SW1H 0TL

## **SUMMARY**

### **PRACTICE AND PROCEDURE – Striking-out/dismissal**

Whether claim properly dismissed on withdrawal. It was not. Appeal allowed and order dismissing claim against second Respondent revoked.

## HIS HONOUR JUDGE PETER CLARK

### Introduction

1. This matter has been proceeding in the East London Employment Tribunal. The parties are Mr Ghoznvi (the Claimant) and (1) London Underground Ltd and (2) Transport for London Pension Scheme (the Respondents). The Claimant commenced employment with the first Respondent on 18 March 2002. He was dismissed on grounds of medical incapacity on 7 September 2011. His application for a payment under the personal accident scheme was refused by the second Respondent.

2. On 1 August 2012 the Claimant presented his form ET1 to the Tribunal. The nature of his claim was that he was entitled to a lump sum payment equivalent to one year's pay out of the TfL pension fund because he was incapacitated by an accident at work, namely an assault, which took place on 21 July 2002. The claims were resisted and came on for a Pre-Hearing Review before Employment Judge Burgher on 1 October 2012. At that hearing counsel for the Claimant, Ms Hart, acknowledged that his claim against the first Respondent was time-barred and that since the second Respondent was never his employer the Tribunal had no jurisdiction to entertain that claim. I am not now concerned with the claim against the first Respondent employer.

3. Ms Cooper, who also appeared below, accepts that Ms Hart informed the Tribunal that the Claimant wished to withdraw his claims, whilst indicating that he reserved the right to pursue them in the civil courts. Following the withdrawal indication, Ms Cooper then applied to have the claims dismissed under **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004** rule 25(4). The Judge made that order in relation to both the

Respondents by a Judgment with Reasons promulgated on 24 October 2012. He also ordered the Claimant to pay costs of £100, having found the claims to have been misconceived.

4. On 5 November 2012 the Claimant's solicitors applied for a review of the Judgment. They asked at paragraph 2 that the Judgment be varied. It presently reads:

**“The Claimant’s claim against Transport for London Pension Scheme be dismissed. The Tribunal does not have jurisdiction to consider such a claim brought by the Claimant as the TfL Pension Scheme was not his employer.”**

5. The variation proposed was that the Judgment should read, “The Claimant’s claim against the TfL Pension Scheme is withdrawn but not dismissed”.

6. The review application was summarily dismissed by the Employment Judge (see the Tribunal letter dated 25 January 2013, misdated 2012). This appeal was lodged on 7 March.

### **Withdrawal and dismissal**

7. Prior to the 2004 ET Rules there was no provision in the Rules equivalent to the order for discontinuance in civil practice (see Civil Procedure Rules (CPR), rule 38.7). Where a party wished to withdraw a claim, that could only be done by an order dismissing the proceedings under the old rule 15(2)(a) of the 2001 Rules. The difficulty that created was that it then became necessary to determine whether the claimant had intended to abandon the claim, as, for example, in **Barber v Staffordshire County Council** [1996] IRLR 209, in which case he was barred from bringing fresh proceedings on the same claim in any forum, or if he was simply withdrawing his claim in the ET whilst intending to bring the claim in another fora. By way of example, in **Sajid v Sussex Muslim Society** [2002] IRLR 113 the claimant brought, among others, a claim for breach of contract in the Tribunal whilst reserving the right to pursue the

UKEAT/0104/13/LA

balance of his claim over and above the £25,000 limit imposed by the **Employment Tribunals (Extension of Jurisdiction) Order 1994**. He then commenced High Court proceedings and withdrew his breach of contract claim in the ET. The Court of Appeal held that an ET order dismissing his claim on withdrawal did not raise a bar to his bringing High Court proceedings. A similar result obtained in **Ako v Rothschild Asset Management** [2002] IRLR 348.

8. Rule 25 of the 2004 ET Rules was designed to address this problem. A party may withdraw a claim, in which case it is discontinued in the ET but may be resurrected in fresh proceedings in a different forum. However, rule 25(4) permits the respondent to apply to have the claim dismissed following withdrawal. If the ET then dismisses the claim the claimant is precluded from bringing the claim elsewhere. The order dismissing the claim in the ET operates as a cause of action estoppel for all purposes, on a literal reading of rule 25(4).

9. In these circumstances, it seemed to me the question relevant to the present case is when and in what circumstances ought the ET to accede to a respondent's application for the claim to be dismissed. HHJ David Richardson provided an answer in **Verdin v Harrods Ltd** [2006] IRLR 339, paragraph 39, by posing two questions for the ET by reference to the Judgment of Mummery LJ in **Ako**: (1) is the withdrawing party intending to abandon the claim; and (2), alternatively, if the withdrawing party is intending to resurrect the claim in fresh proceedings, would it be an abuse of process to allow that to occur? If the answer to either question is yes, then it would be just to dismiss the proceedings; if the answer to both questions is no, it will be unjust to do so.

## **The Appeal**

10. Turning to those questions in the present case, it is clear: (1) that the Claimant did not intend to abandon the claim when he withdrew it (Ms Hart expressly reserved the right to pursue the claim before the civil courts); and (2) that the reason for withdrawing the claim against the second Respondent was that the ET had no jurisdiction to entertain it, since the second Respondent was not the Claimant's employer. The proceedings were thus withdrawn in the ET, effectively discontinued, to use the CPR term, in order that they could be brought in a forum that does have the necessary jurisdiction to consider it.

11. Unfortunately, that way of putting the case was not raised at the PHR in the review application nor indeed in the original grounds of appeal. However, having heard the submissions of counsel, I permitted an amendment to raise what I call the **Verdin** question in this appeal, for the reasons that I gave earlier in this hearing and need not repeat.

12. Ms Hart nevertheless pursues her original contention in the Notice of Appeal that the Judge had no jurisdiction to make an order dismissing the claim against the second Respondent under rule 25(4). I have considered her submissions in support of that proposition and find it to be wholly misconceived. On the face of it, rule 25(4) provides that where a claim is withdrawn it is open to the Respondent to make an application that the proceedings are dismissed, and the Employment Judge has the power to dismiss under that specific rule. Whether or not it is right to dismiss the proceedings is a quite separate matter; the fact that the Tribunal had no jurisdiction to entertain the claim against the second Respondent because it was not the Claimant's employer is a good reason for finding that it would not be an abuse of process to bring proceedings in a different forum having withdrawn proceedings in the Employment Tribunal, but that is a quite separate jurisdictional question to the one posed in the original UKEAT/0104/13/LA

grounds of appeal, namely: did the Judge have power to dismiss the claim under rule 25(4)? The answer to that is, of course he had the power, just as any claim that is found to fail because the Tribunal do not have jurisdiction, for example because it is time-barred, or in a case of ordinary unfair dismissal because the claimant does not have sufficient qualifying service for the purpose of section 108. In those circumstances, the claims are dismissed, because the Tribunal has no jurisdiction.

### **Conclusion**

13. It therefore follows, in my judgment, that this appeal succeeds solely on the amended ground of appeal to which I have earlier referred. The other grounds are dismissed. The result is that the appeal will be allowed and the order made by the Employment Judge under paragraph 2 of his Judgment will be amended so as to read, “The Claimant’s claim against Transport for London pension scheme is withdrawn”; the word “dismissed” will be deleted from paragraph 2 of the Judgment.