Appeal No. UKEAT/0188/16/DA

# EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 11 April 2017

**Before**

**THE HONOURABLE MRS JUSTICE SIMLER DBE (PRESIDENT)**

**(SITTING ALONE)**

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MS L CAMPBELL — APPELLANT

(1) OCS GROUP UK LTD
(2) MR J MOFFAT — RESPONDENTS

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Transcript of Proceedings

JUDGMENT

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## APPEARANCES

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| For the Appellant | MR DANIEL MATOVU<br>(of Counsel)<br>Direct Public Access |
| For the Respondents | MR ANTHONY JOHNSTON<br>(of Counsel)<br>Instructed by:<br>Messrs Irwin Mitchell LLP Solicitors<br>Imperial House<br>31 Temple Street<br>Birmingham<br>B2 5DB |

**SUMMARY**

**PRACTICE AND PROCEDURE - Withdrawal**

Where a claimant withdraws a claim, it comes to an end and cannot be revived (Rule 51 of the **2013 Rules**). A tribunal must issue a dismissal Judgment following withdrawal unless either of the exceptions in Rule 52 apply. Tribunals are not under a mandatory obligation to invite representations from the parties before dismissing a withdrawn claim but depending on the facts and circumstances of the particular case, may in exercise of their power to manage proceedings fairly, and in accordance with the overriding objective, do so. Whether or not to do so is a matter of judgment falling squarely within the margin of a tribunal's discretion.

**THE HONOURABLE MRS JUSTICE SIMLER DBE (PRESIDENT)**

## Introduction

1. This appeal from Judgments of Employment Judge Zuke, with Reasons promulgated on 22 January 2016 and in a letter of the same date, raises the question whether a tribunal should afford a claimant who withdraws a claim an opportunity to be heard before dismissing that claim under Rule 52 of the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013** ("the 2013 Rules").

## Background

2. The appeal arises in the following circumstances. The Claimant (the Appellant here but referred to as "the Claimant" for ease of reference) commenced proceedings on 2 June 2014. The proceedings were resisted by the Respondents. On 14 December 2015, the five-day substantive hearing commenced and was adjourned at 11.30am to allow the Tribunal to read the witness statements and documents, and the parties were informed that the hearing would continue the following day at 10.00am.

3. By an email addressed to the Employment Tribunal and timed at 9.58pm that same evening the Claimant said:

> **"I am writing with regret that I am withdrawing my case … due to ill health and under medical advice. I attach a medical report from my practitioner.**
>
> **I can confirm that I have notified the Tribunal court as soon as it has become reasonably apparent that I cannot continue with the case and I can confirm that I have not acted in a malicious or unreasonable manner at any time throughout the process.**
>
> **I confirm I have complied with rules 30(2) and 92 of the [2013 Rules] by providing a copy of this letter and medical report to the Respondents."**

The medical report attached to that email, also dated 14 December 2015, was from Dr Kate Jackson of the Riverside Medical Centre. It referred to the Claimant's attendance at the surgery

on 14 December suffering from anxiety and stress and explained that these new symptoms had been brought on due to Tribunal proceedings that had reached a trial hearing stage. Dr Jackson continued:

> **"The patient suffers from poor mental health and the Tribunal proceedings have had to be postponed previously due to the deterioration of her condition in preparation for the hearing.**
>
> **Unfortunately, I have now advised the patient to withdraw from the case altogether if possible, as I believe the stress and anxiety cause further risk to her mental health.**
>
> **I do not feel she is currently - or at any time in the near future - able to give evidence or be subjected to cross examination."**

4. On 15 December, having received that email and attached medical report, the Tribunal hearing resumed. The Respondents attended, but the Claimant did not. The Tribunal considered the Claimant's email and attachment and concluded that it was "an unequivocal withdrawal of the claim". The Tribunal found nothing to suggest that it would be in the interests of justice not to dismiss the claim pursuant to Rule 52(b), and accordingly the claim was dismissed following withdrawal on 15 December. The Judgment dismissing the claim in its entirety is dated 16 December and was sent to the parties on 17 December.

5. Meanwhile, by letter dated 17 December the Claimant applied for reconsideration of the Judgment and requested that her withdrawal be rescinded. She explained:

> **"The letter sent to the Tribunal and the Respondents stating my decision to withdraw was made at a time when I was suffering from extreme stress and I was not in a right stable frame of mind and I was unwell. My mental capacity at the time of writing my withdrawal letter was impaired, which affected my judgment and as a result I made a decision while being mentally incompetent.**
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> **I was also advised by my medical practitioner, as the accompanying medical report confirms, but [I] was not legally represented at this time and therefore unaware of the legal ramifications of my letter."**

6. By a further letter, dated 21 December and written after she had received the Judgment dismissing her claim, the Claimant sought to clarify the grounds on which she was applying for reconsideration. She explained that having sent the letter dated 14 December 2015 indicating

withdrawal due to ill-health and under medical advice, she telephoned the Tribunal on 16 and 17 December prior to receipt of the Judgment seeking to retract her withdrawal. She said she was told by Tribunal staff that there was nothing she could do in those circumstances but as was the normal process a Judge would probably ask a clerk to contact her by formal letter to make sure that her withdrawal was genuine. She reported, however, in the letter that she was not contacted before receiving the Tribunal's Judgment dismissing her case on 18 December. She explained that she was suffering from stress, contributed to by emails from the Respondents in the days leading up to the substantive hearing dealing with disclosure, and that it was clear from her withdrawal letter that she was only seeking to withdraw under medical advice because of the stress she was under and her poor mental health. She said that in those circumstances her withdrawal was involuntary. Having explained the basis for her attempt to retract the withdrawal, she also asked for full written reasons for the Tribunal's decision.

7. The Respondents resisted the application by a detailed letter dated 22 December 2015, making the point that the power to reconsider applied only to the dismissal decision and not to the Claimant's withdrawal. So far as the dismissal decision is concerned, the Respondents objected to its revocation and said that there were no reasonable prospects of the dismissal being revoked because: first, the Claimant had mental capacity, contrary to her letter, but had in her own words made an error of judgment at best; secondly, though a litigant in person, she was an experienced HR professional with some understanding of the **2013 Rules**; thirdly, in light of the medical evidence, even if the dismissal were to be lifted allowing the claims to be resurrected, the Respondents made the point that there was no end in sight and no certainty about when in the future the Claimant may seek to pursue this claim afresh; fourthly, the Respondents referred to the severe prejudice they would suffer if the Claimant were permitted to resurrect the claim in fresh proceedings; and, finally, the Respondents relied on the

A overriding objective and said that it would not be in accordance with that objective to allow the application. The Respondents suggested that the application could be refused in writing under Rule 72, but in the event that the application was not refused under Rule 72 the Respondents did not consider that a hearing would be necessary to explore the question of reconsideration and suggested that could be dealt with by way of written representations.

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8. The next step in the chronology is the letter dated 22 January 2016 in which Employment Judge Zuke refused the request for a reconsideration in the following terms:

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> **"In letters dated 17 and 21 December the Claimant has applied for a reconsideration of the Tribunal's judgment dismissing her claim following its withdrawal. The Respondents have objected to the application in a letter dated 22 December.**
>
> **I refer to the reasons for the Tribunal's judgment dismissing the claim following its withdrawal by the Claimant.**
>
> **In *Khan v Heywood and Middleton Primary Care Trust* [2007] ICR 24 the Court of Appeal considered the effect of rule 25(4) [Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004; "the 2004 Rules"] the predecessor of rule 51 of the 2014 Rules [sic]. There is no material difference between the rules. It was held that where a claim has been withdrawn, it cannot be revived.**
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> **I have considered the two authorities referred to by the Claimant in her application. In my view neither assists her.**
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> ***Segor v Goodrich Actuation Systems Ltd* (UKEAT/0145/11/DM) concerned whether the Claimant had unambiguously withdrawn part of her claim at a hearing.**
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> ***Drysdale v Department of Transport* (UKEAT/0171/12/LA) concerned whether the Claimant's representative had the capacity to withdraw the claim on his behalf.**
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> **In the Claimant's case, she unambiguously withdrew her claim by email.**
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> **In these circumstances, in my view there is no reasonable prospect of the Tribunal revoking its judgment. I refuse the application for a reconsideration, pursuant to rule 72 [of the 2013 Rules]."**

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## The Principles Relating to Withdrawal and Dismissal of Claims

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9. Prior to the **2004 ET Rules**, claims that were withdrawn were not formally dismissed by employment tribunals as a matter of course, and often claims were not dismissed at all unless and until a respondent made an application to dismiss. The question arose in those circumstances whether a withdrawal constituted a decision that could not be re-litigated even if

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proceedings had not been formally dismissed. The **2004 Rules** introduced a more formal structure. By Rule 25 they provided, relevantly, as follows:

> **"(1) A claimant may withdraw all or part of his claim at any time - this may be done either orally at a hearing or in writing in accordance with paragraph (2).**
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> **(2) To withdraw a claim or part of one in writing the claimant must inform the Employment Tribunal Office of the claim or the parts of it which are to be withdrawn. Where there is more than one respondent the notification must specify against which respondents the claim is being withdrawn.**
>
> **(3) The Secretary shall inform all other parties of the withdrawal. Withdrawal takes effect on the date on which the Employment Tribunal Office (in the case of written notifications) or the tribunal (in the case of oral notification) receives notice of it and where the whole claim is withdrawn, subject to paragraph (4), proceedings are brought to an end against the relevant respondent on that date. Withdrawal does not affect proceedings as to costs, preparation time or wasted costs.**
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> **(4) Where a claim has been withdrawn, a respondent may make an application to have the proceedings against him dismissed. Such an application must be made by the respondent in writing to the Employment Tribunal Office within 28 days of the notice of the withdrawal being sent to the respondent. If the respondent's application is granted and the proceedings are dismissed those proceedings cannot be continued by the claimant (unless the decision to dismiss is successfully reviewed or appealed)."**

10. Accordingly, Rule 25(3) dealt with withdrawal and the fact that it would take effect on the date on which the notification of withdrawal was received. So far as dismissal is concerned, Rule 25(4) made clear that before any dismissal decision could be made by a tribunal an application would have to be made by the respondent within 28 days of withdrawal. No doubt such an application would have to be copied to the opposing party, who would then be on notice and have the opportunity to make representations before a Judge dismissed the proceedings.

11. The **2004 Rules** were considered in **Khan v Heywood & Middleton Primary Care Trust** [2006] EWCA Civ 1087. The claimant in that case sought to set aside the withdrawal of his claim, and the respondent applied to have the claim dismissed on withdrawal. Both the employment tribunal and the EAT held that there was no power under Rule 25 to revive a withdrawn claim. The Court of Appeal agreed but held that a withdrawal in and of itself was not a judicial act and therefore did not create any issue or cause of action estoppel, so that a

A fresh claim based on the same cause of action would not be barred in consequence of the withdrawal. On the other hand, if and when a respondent successfully applied to have the claim dismissed under Rule 25(4), that would involve a judicial act, and the claimant would then be estopped from bringing fresh proceedings based on the same facts.

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12. The **2013 Rules** clarified the approach that existed under the **2004 Rules** and to an extent codified the approach identified by the Court of Appeal in **Khan**. Rules 51 and 52 provide as follows:

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> **"51.** ***End of claim***
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> **Where a claimant informs the Tribunal, either in writing or in the course of a hearing, that a claim, or part of it, is withdrawn, the claim, or part, comes to an end, subject to any application that the respondent may make for a costs, preparation time or wasted costs order.**
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> **52.** ***Dismissal following withdrawal***
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> **Where a claim, or part of it, has been withdrawn under rule 51, the Tribunal shall issue a judgment dismissing it (which means that the claimant may not commence a further claim against the respondent raising the same, or substantially the same, complaint) unless -**
>
> > **(a) the claimant has expressed at the time of withdrawal a wish to reserve the right to bring such a further claim and the Tribunal is satisfied that there would be legitimate reason for doing so; or**
> >
> > **(b) the Tribunal believes that to issue such a judgment would not be in the interests of justice."**

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13. Accordingly, Rule 51 makes clear that a withdrawal may be notified orally at a hearing and takes effect upon the tribunal being informed by the claimant either in writing or in the course of the hearing of withdrawal. The effect of withdrawal, as before, is to bring the proceedings to an end subject only to any application that might be made by the respondent for costs. The claim cannot be revived, but that does not mean that absent dismissal a fresh claim on the same facts cannot be made.

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14. Unlike the position under the **2004 Rules**, Rule 52 of the **2013 Rules** does not require a respondent to make an application to the tribunal before it can dismiss a claim that has been

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withdrawn under Rule 51. Rather, the effect of Rule 52 is mandatory. Dismissal must automatically follow unless one of the specified exceptions applies. This is emphasised, as Mr Johnston points out, by the Presidential Guidance given to Employment Tribunals on General Case Management 2014, where at paragraph 14 of the section entitled "Concluding cases without a hearing" the Guidance states:

> **"Withdrawal under Rule 51**
>
> **14. When a claimant withdraws the claim comes to an end. The tribunal must issue a dismissal judgment under rule 52 unless for some reason this is inappropriate. …"**

15. No time limits are provided in Rule 52 within which the tribunal is required to act. Rule 52(a) requires the claimant to reserve his or her right to bring a further claim "at the time of withdrawal" so that a claimant who fails to do so will not be able to rely on Rule 52(a) subsequently and may find that the tribunal has automatically dismissed the claim. However, unless and until a tribunal has dismissed the claim (and no timeframe is specified by Rule 52(b)) the claimant can seek to rely on Rule 52(b) on the basis that although his or her rights to re-litigate at the time of withdrawal were not expressly reserved, it would be in the interests of justice for the tribunal not to dismiss the claim so that re-litigation in another forum may be permitted or because there is some other good reason for not dismissing that makes it in the interests of justice not to do so.

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

> **"11. What we should say, however, is this. A tribunal will always want to take care where a litigant, particularly one who is self-represented or who has a lay representative, seeks to concede a point or to abandon it. It may be a matter of great significance. Though it is always**

> **for the parties to shape their cases and for a tribunal to rule upon the cases as put before it, and not as the tribunal might think it would have been better expressed by either party, it must take the greatest of care to ensure that if a party during the course of a hearing seeks to abandon a central and important point that that is precisely what the individual wishes to do, that they understand the significance of what is being said, that there is clarity about it, and if they are unrepresented, that they understand some of the consequences that may flow. As a matter of principle we consider that a concession or withdrawal cannot properly be accepted as such unless it is clear, unequivocal and unambiguous."**

17. In **Drysdale v Department of Transport (Maritime and Coastguard Agency)** [2014] EWCA Civ 1083, the claimant's wife, Mrs Drysdale, announced that she wished to withdraw her husband's claim for unfair constructive dismissal in the course of the hearing when it became clear that the case would have to be postponed part-heard. The tribunal enquired whether she was making an application for her husband's claim to be withdrawn, and she replied that she was. The respondent then applied for the claim to be dismissed, and after a short deliberation that application was granted by the tribunal. The claimant then applied for a review of the tribunal's decision, which was refused, and the EAT dismissed his appeal.

18. On further appeal to the Court of Appeal the claimant's wife submitted that she had been tired, stressed and frustrated at the time of the withdrawal, all symptoms exacerbated by her underlying condition of diabetes. She argued that the tribunal should not have accepted the withdrawal so quickly and that it was not voluntary; further, the tribunal should not have dismissed the claim on the basis of her response to its enquiry in all the circumstances of this particular case. The Court of Appeal concluded that there was nothing in what occurred at the hearing to alert the tribunal to the possibility that Mrs Drysdale was or may have been indisposed so that her judgment was or could be affected. The tribunal was aware of her underlying medical condition, but neither she nor the claimant indicated at any stage during the hearing that she was feeling unwell. The Court reviewed the extent of the duty on tribunals towards litigants without legal representation in the context of applications to withdraw made at a hearing. Barling J, with whom Clarke and Arden LJJ agreed, held as follows:

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

19. It seems to me that the approach identified by both of those cases applies in the context of withdrawal and dismissal under Rules 51 and 52 of the **2013 Rules** as follows. So far as withdrawal is concerned, as Langstaff P made clear in **Segor**, tribunals faced with an application to withdraw should consider whether the material available amounts to a clear, unambiguous and unequivocal withdrawal of the claim or part of it. Though there is no obligation on tribunals to intervene in such a situation, whether by reason of the overriding objective or any principle of natural justice, tribunals are entitled to make such enquiries as appear fit to check whether a party who is self or lay represented intends to withdraw. If the circumstances of withdrawal give rise to reasonable concern on the tribunal's part, it is entitled to make such enquiries as appear appropriate to ensure that the purported withdrawal is clear, unambiguous and unequivocal.

20. However, as the Court of Appeal made clear in **Drysdale**, there is no obligation to enquire into the reasons for the decision to withdraw, and such an enquiry may be both unnecessary and inappropriate if it could be construed as an invitation to disclose privileged material relating to the merits or if it could amount to an intervention that may prejudice the interests of the parties generally or the opposing party in particular.

21. At the Rule 52 dismissal stage, unlike a withdrawal, which is the act of the party in question, dismissal is the act of the tribunal and involves a judicial determination. The purpose of dismissal under the **2004 Rules** was discussed by HHJ David Richardson in **Drysdale** (in the EAT) at paragraph 81:

> **"81. The purpose of dismissal under rule 25 was explained by the Appeal Tribunal in a passage in *Verdin v Harrods Limited* [2006] ICR 396 at paragraphs 35-40 - a passage approved by the Court of Appeal in *Khan* (see paragraphs 44 and 72). It is sufficient to quote paragraphs 39-40:**
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> > **"39. So a party who receives a notification of withdrawal of the whole proceedings, and wishes to establish once and for all that there is to be no further litigation on the same questions, may apply for dismissal. The subsequent hearing will then concentrate on the question, which Mummery LJ identified in *Ako* [*v Rothschild Asset Management Ltd* [2002] ICR 899]. Is the withdrawing party intending to abandon the claim? If the withdrawing party is intending to resurrect the claim in fresh proceedings, would it be an abuse of the process to allow that to occur? If the answer to either of these questions is yes, then it will be just to dismiss the proceedings. If the answer to both these questions is no, it will be unjust to dismiss the proceedings.**
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> > **40. I agree with a submission made by Mr Nicholls, that where one party withdraws the other party will generally be entitled to have the proceedings dismissed. This is because the party who withdraws will generally have no intention of resurrecting the claim again, or if he does will generally have no good reason for doing so. There is sometimes a temptation for a litigant, as the day of battle approaches, to withdraw a claim in the hope of being better prepared on another occasion. That will be unacceptable. Tribunals will no doubt be astute to prevent withdrawal being used as an impermissible substitute for an application for adjournment. Occasionally, however, there will be good reason for withdrawing and bringing a claim in a different way." "**

22. Mr Matovu contends that, save in circumstances where the parties are present so that all matters including dismissal following withdrawal can be ventilated and explored, a tribunal faced with withdrawal - even where that is clear, unambiguous and unequivocal and gives no intimation of any intention to resurrect the claim in fresh proceedings - must nonetheless give the parties the opportunity to make representations before taking the serious step of dismissing

A the proceedings under Rule 52. That, he submits, is consistent with the approach adopted under the earlier version of this Rule (Rule 25(4)) and is also consistent with the serious consequences of dismissal. He accepts that there is an opportunity to apply for reconsideration under Rule 70 and that if there are new matters that are brought to the attention of the tribunal those can be B reconsidered in the round to determine whether an earlier dismissal decision was correct or should be open to reconsideration.

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23. Although I accept that Rule 52 involves a judicial determination and that the principles of natural justice and the overriding objective both apply, there is nothing in the wording of Rule 52 itself that requires tribunals as a matter of course to invite representations from the D parties before concluding that the proceedings should be dismissed. The Rule is in mandatory form and simply requires a tribunal to dismiss the proceedings unless there is good reason not to do so. The draughtsman could have provided for notification of an intention to make such a decision to be communicated to the parties to enable representations to be made before the E decision to dismiss is made by the tribunal but chose not to do so. In the circumstances, I do not accept Mr Matovu's submission that tribunals are under a mandatory obligation to invite representations from the parties before any decision in the absence of the parties under Rule 52 F is made.

24. However, as Mr Matovu submits, tribunals are empowered to regulate their own G procedure and to conduct hearings in a manner considered fair having regard to the overriding objective. They are empowered to avoid undue formality and to question parties so far as appropriate in order to clarify the issues or elicit evidence. It seems to me that it is a matter for the judgment of the tribunal to decide whether it is necessary to make further enquiries of the H withdrawing party before making a dismissal decision. If there is material available that puts a

tribunal on notice that the party seeking to withdraw his or her claim intends to resurrect the claim in fresh proceedings, even though no such notification is given, or puts the tribunal on notice that the decision to withdraw the claim was ill-considered or irrational for some reason, or that there are other good grounds for suspecting that dismissal may not be in the interests of justice in the particular circumstances of the case, those would all afford a proper basis for enquiries to be made by the tribunal of the withdrawing party before moving to a decision to dismiss. Whether to make enquiries at all and the extent of those enquiries will depend entirely on an assessment of the facts and the relevant context and is a matter of judgment falling squarely within the margin of discretion of the tribunal, which will in most if not all cases have a better understanding and feel for the case than the EAT can itself ever have.

**The Appeal**

25. On behalf of the Claimant Mr Matovu accepts that no issue arises as to the legal meaning and effect of Rule 51. On withdrawal the claim comes to an end, and once brought to an end those particular proceedings cannot be revived. This appeal focuses instead on Rule 52. Mr Matovu challenges the original decision to dismiss the claim on withdrawal because the Employment Tribunal failed to afford the Claimant any opportunity to make representations in relation to Rule 52(b). Although the Employment Judge expressly stated that there was nothing to suggest that it would not be in the interests of justice to dismiss the claim, Mr Matovu relies on the fact that no enquiries were made of the Claimant beyond simply considering her email and the medical report from Dr Jackson attached to it. Neither of these indicated that she was abandoning her claim because she believed it had no merit. To the contrary, she made clear that the only reason for her withdrawal was her ill-health and the fact that she was acting under medical advice. Moreover, he relies on her subsequent actions in promptly seeking to retract

her withdrawal, which, he submits, shed considerable light on her state of mind and on the question whether she was suffering from acute stress and ill-health.

26. I do not accept these submissions in the context of this case. I have already concluded that there is no mandatory requirement on tribunals to afford the opportunity to a withdrawing party to make representations before deciding whether or not to dismiss under Rule 52. Moreover, in this case the contents of the Claimant's email of 14 December 2015 contained on any view a clear, unequivocal and unambiguous withdrawal of her claim. Both the timing of the email and the fact that its contents sought to raise matters potentially relevant to the question of whether any adverse costs consequences might flow from her withdrawal suggested, as the Employment Judge expressly concluded, that the Claimant had given thought to the matter and to the consequences of her decision. Looked at objectively, there was nothing in the circumstances or in the contents of the email or the medical advice to suggest that the Claimant's decision to withdraw was ill-considered or irrational. The Claimant did not express any wish to reserve her right to bring a further claim so that there could be no basis for consideration of her case under Rule 52(a).

27. I am also satisfied that there was no material available to the Tribunal on the morning of 15 December that could properly be said to have indicated that it would not be in the interests of justice to dismiss the Claimant's claim at that point. There was nothing to put the Tribunal on notice of any desire to resurrect the claim in fresh proceedings. The Tribunal had been dealing with this case, had presided over the matter at the substantive hearing and would have had a good understanding and feel for the case. The Employment Judge had observed the Claimant, who had managed to represent herself throughout the case and whose correspondence demonstrated an understanding of tribunal process and procedures. There was in those

A circumstances no failure by the Tribunal to take steps to ensure that the Claimant had made a properly considered decision to withdraw nor any error of law on the Tribunal's part in failing to invite her to make representations as to why a dismissal decision would not be in the interests of justice. Ground one of this appeal accordingly fails and is dismissed.

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28. By the second ground of appeal the Employment Judge's refusal to reconsider the dismissal decision is challenged on the basis that even if the Tribunal was entitled to make the decision it did on 15 December, it ought to have looked at all the circumstances of the case at the stage of considering reconsideration and not limited its consideration to what was expressed at the time of withdrawal. Mr Matovu contends that by dismissing the application for reconsideration, in effect out of hand, the Employment Judge prevented the Claimant from explaining her actions and her lack of understanding of the legal ramifications of her decision to withdraw and the stress and increasing pressure she was put under by the proceedings and by the Respondents as she contended. The Employment Judge's approach was too narrowly focused in those circumstances.

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29. Although Mr Johnston sought to argue that the Claimant's letter of 17 December 2015 did not contain a request for reconsideration of the decision to dismiss her claim but was limited to seeking reconsideration of the withdrawal, since there was no prospect of any reconsideration of the withdrawal and the Claimant's letters referred broadly to 'reconsideration of judgment', I consider that viewed fairly this is indeed what she was seeking. Moreover, the Respondents' letter of 22 December understood her application to be an application for reconsideration of the dismissal decision and made representations to the Tribunal on that express basis.

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30. Rule 70 of the **2013 Rules** gives tribunals power to reconsider a judgment where it is necessary in the interests of justice to do so. Here, the Employment Judge concluded that there was no reasonable prospect of revoking the decision under Rule 70 and therefore pursuant to Rule 72 the application for reconsideration was refused. As already indicated, the effect of Rule 51 is that withdrawal brings the proceedings to an end. There is no jurisdiction for a notice of withdrawal to be rescinded or revoked and no scope at all under the Rules for the Claimant to revive those claims. Absent dismissal, however, a fresh claim on the same facts could have been commenced by the Claimant, and therefore an application to reconsider the dismissal decision could have had a potentially real and practical effect in enabling her to continue to pursue her claims. The question accordingly is whether it can be said that the Employment Judge erred in law in refusing reconsideration because of what Mr Matovu described as an overly narrow approach.

31. I have concluded that the Employment Judge did, as Mr Matovu submits, focus on withdrawal rather than dismissal. This is indeed conceded by Mr Johnston on behalf of the Respondents. The Employment Judge made no reference at all to reconsideration of the dismissal decision made under Rule 52(b) or to the interests of justice test under that Rule. It may be, as Mr Johnston suggests, that the reason for that lies in the Claimant's letters, but, in my judgment, the Employment Judge ought to have considered and addressed the dismissal decision and the question whether there were reasonable prospects of that decision being varied or revoked. He did not go beyond simply concluding that the Claimant had unambiguously withdrawn her claim so that there was no reasonable prospect of the Tribunal revoking its judgment. That indicates to me that the Employment Judge did not consider the circumstances beyond those prevailing on 15 December when the Judgment dismissing the proceedings was entered on the basis of the Claimant's email dated 14 December.

32. Mr Johnston submits that notwithstanding this error the only and inevitable conclusion in this case is that there were no reasonable prospects of the dismissal decision being varied or revoked given that it is manifestly not in the interests of justice to revoke the dismissal decision. He submits that where a party withdraws citing ill-health and seeks to persuade the tribunal that in the interests of justice he or she should be allowed to present a fresh claim based on the same facts at some identified and undefined point in the future, it is open to the tribunal to say that is not a legitimate basis for not dismissing the proceedings. Here, he relies on the Claimant's own email, which shows she had time to reflect between visiting the GP and sending her email later that evening. She demonstrated some understanding of Rule 51 and a possible costs application that could be made against her, and she sought to head-off such an application in her email. Moreover, although she acted promptly, she did nothing on 15 December, when, if she was of the mind that she had made a mistake, she could have contacted the Tribunal or turned up at the hearing, but she did neither of those things. He submits that it is unnecessary to remit the matter to the Tribunal in these circumstances because the only and inevitable outcome is that there will be no reconsideration.

33. I am sympathetic to these submissions. It is unreasonable and unacceptable to use withdrawal as an alternative to adjournment. To withdraw proceedings with the intention of resurrecting the same claim in fresh proceedings in exactly the same forum is an impermissible substitute for an application to adjourn. The **2013 Rules** provide an appropriate mechanism, in Rule 30A for parties who are ill at the date of a hearing but wish to continue pursuing or defending their claims to seek to do so by applying for a postponement. The Claimant was well aware of the possibility of adjourning, having previously made an application to adjourn as indicated in Dr Jackson's letter.

34. However, this is a case where the Claimant produced medical evidence demonstrating that she was under stress and was unwell. The evidence she provided said in terms that she was withdrawing on medical advice and not for any other reason. She certainly did not seek to withdraw on the merits. It is plain that within a very short time she had second thoughts, perhaps having realised the consequences of what she had done, and she acted reasonably promptly, albeit not on 15 December. It may be that if she had been legally represented and had legal advice rather than relying solely on medical advice an application to adjourn would have been made on her behalf. I do not know what further facts might have been revealed if an opportunity had been given to the Claimant to make further representations in relation to reconsideration and these matters had been properly explored.

**Conclusion**

35. In the circumstances of this case and in the absence of any decision by the Employment Judge that there are no reasonable prospects of the application to reconsider being granted because it is inevitable that it is not in the interests of justice to allow the Claimant to present a fresh claim based on the same facts in this case, and, more particularly, in the absence of any consideration at all by the Employment Judge of anything that occurred after 15 December, I do not feel able to conclude that only one outcome is possible on these facts. In those circumstances, this appeal must be allowed, and the refusal to reconsider must be set aside.

36. Having heard representations as to disposal, it seems to me that this case should go back to Employment Judge Zuke, who has had conduct of it and will be able to deal with it more efficiently than a Judge coming to it afresh. Moreover, I agree with Mr Johnston that this is not a case where Employment Judge Zuke has demonstrated a closed mind; rather, he has not shown that he has applied his mind to the question of reconsideration of the dismissal decision

either because he did not apply his mind to it at all or because he did not set out any facts or reasons for reaching a conclusion on that issue. I have no doubt that he will approach the remitted question fairly and that it ought to go back to him in accordance with the principles established by **Sinclair Roche & Temperley v Heard and Anor** [2004] IRLR 763.

37. Accordingly the appeal is allowed on ground two. The dismissal of the reconsideration application is set aside and this issue is remitted to Employment Judge Zuke to consider afresh in light of this Judgment.