Appeal No. UKEAT/0250/16/LA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 5 October 2017

Before

THE HONOURABLE MRS JUSTICE SLADE DBE

(SITTING ALONE)

MR D BAKER — APPELLANT

ABELLIO LONDON LIMITED — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR CHRISTOPHER MILSOM (of Counsel) Bar Pro Bono Unit
For the Respondent	MS ALICE MAYHEW (of Counsel) Instructed by: Backhouse Jones Solicitors The Printworks Hey Road Clitheroe Lancashire BB7 9WD

SUMMARY

UNFAIR DISMISSAL - Reason for dismissal including substantial other reason

UNFAIR DISMISSAL - Reasonableness of dismissal

PRACTICE AND PROCEDURE - Withdrawal

The Employment Judge erred in holding that the employer was correct to consider that it was obliged by section 15 of the **Immigration, Asylum and Nationality Act 2006** to hold that it was unlawful to employ someone who, although he had the right to work and reside in the UK, did not provide the employer with documents other than a passport to prove that right. Section 15 did not apply to the Claimant as he was not subject to immigration control within the meaning of section 25. In any event, the reference in section 15(3) to seeking documents from an employee provides the employer excusal from a penalty. It does not impose an obligation on the employer to obtain these documents.

The decision that the employer had established that the dismissal of the Claimant for failing to provide such documentation fell within **Employment Rights Act 1996** section 98(2)(d) was set aside. **Bouchaala v Trusthouse Forte Hotels Ltd** [1980] ICR 721 applied. The Employment Tribunal did not err in holding that dismissal because of a genuine but mistaken belief that employment of the Claimant was illegal fell with **Employment Rights Act** section 98(1)(b). **Hounslow London Borough Council v Klusova** [2008] ICR 396 applied. The decision that the dismissal was fair was set aside. The Employment Judge erred in dismissing the claim for deduction from wages. The dismissal of a claim following a withdrawal is a two-stage process. A party withdraws a claim under ET Rule 51. A judicial decision is required under Rule 52 to dismiss a withdrawn claim. Refusal to do so will be rare but where, as here, the only basis for withholding pay was obviously erroneous and irrational, an Employment Judge, properly directing themselves in law, would have held that applying Rule 52(b) it was not in the interests

of justice to dismiss the withdrawn claim. **Campbell v OCS Group UK Ltd** UKEAT/0188/16 applied. The issues of fairness of the dismissal and the deduction from wages claim were remitted to a differently constituted Employment Tribunal.

THE HONOURABLE MRS JUSTICE SLADE DBE

1. This is an appeal from the Judgment of an Employment Tribunal ("the ET"); Employment Judge Webster sitting on her own, sent to the parties on 11 April 2016. The Employment Judge dismissed the claim by Mr Baker ("the Claimant") against his former employer, Abellio London Ltd ("the Respondent"), for unfair dismissal. The Claimant's claim for unlawful deduction from wages was dismissed upon withdrawal by the Claimant.

2. The issues raised by the appeal are whether the ET was wrong in law to find that the reason for the Claimant's dismissal was that his employment was in contravention of an enactment, **Employment Rights Act 1996** section 98(2)(d) ("ERA"), as established by the Respondent; that the ET was wrong in law to find that in the alternative that the dismissal was for an acceptable some other substantial reason; further, if the Respondent had established a fair reason for dismissal, that the dismissal was fair in all the circumstances; and further, the ET was wrong in law to dismiss the claim for unlawful deduction from wages.

Outline Facts

3. The Respondent is a bus company operating public transport services in the London area. It has about 2,500 employees. The Claimant was employed by the Respondent from 23 July 2012 as a bus driver until his dismissal. The Employment Judge held that his employment came to an end on 14 April 2015, although it is not clear where this date comes from. The Claimant was dismissed on 3 July 2015.

4. The Claimant is a Jamaican national who has lived in the United Kingdom since childhood. It was agreed before the ET and it has not been disputed that he has the right of

abode under the **Immigration Act 1971** ("IA"). The Respondent has always recognised that he has the right to work in the United Kingdom.

5. In 2015 the Respondent became aware that another employee, a Mr Frimpong, did not have the correct documentation to work for them. They decided to carry out an audit of their workforce to ascertain whether they had any other employees who did not have the correct documentation. The Respondent asked the Claimant to produce one of a list of documents which included his passport. The Claimant explained that he had the right of abode and the right to work in the United Kingdom but he did not have a passport. His Jamaican passport had expired on 19 August 2000.

6. The Respondent invited him to a meeting on 24 February 2015 and asked him to produce evidence of his right to work. He was told to go home to produce evidence and that he would not be paid until he had done so. The Claimant then was seen by Mr Batchelor, Director of Operations and Manager of the Respondent. He explained to Mr Batchelor that he did not have enough money to obtain the requisite proof to work. He was then lent the sum of £350 by the Respondent.

7. The Claimant applied for a passport. The Respondent informed the Claimant that the passport alone would be insufficient for them and that visa documentation would be required as well. The Claimant did not accept that a visa would be needed. He maintained that he had the right to be in the United Kingdom as if he was a United Kingdom citizen. The Employment Judge observed that this is correct but she stated, at paragraph 22, "*the right to live here is not the same as having proof of his right to work*".

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8. The Claimant obtained a new passport on 11 May 2015. He took it to Ms Haywood, Head of Human Resources. The Employment Judge recorded at paragraph 23 that she "*sought legal advice from the Home Office as to whether this was sufficient evidence under the relevant legislation. The Home Office advised that it was not*". The Employment Judge observed that the guidance at pages 60 and 178(a) of the **Immigration, Asylum and Nationality Act 2006** ("IANA"), section 30 confirmed the advice the Respondent was receiving from the Home Office.

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9. The Claimant went to Toynbee Hall for advice. In response to a letter from them, Ms Haywood replied on 12 May 2015:

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> **"I have been advised by the Home Office that whilst you do have the right to reside and work in the United Kingdom, unfortunately your current documents do not provide Abellio, your current employer, with a statutory excuse to allow you to work for our Company under the Immigration, Asylum and Nationality Act 2006."**

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The Claimant was told that he must complete a No Time Limit application and submit it to the relevant authority with his passport.

10. The Employment Judge recorded that the Claimant gave evidence before her that he did not apply for the NTL for two reasons: first, he could not afford it and, second, he did not need it as he was allowed to work under the **1971 IA**. The Employment Judge at paragraph 25 did not accept that the Claimant did not have to have this documentation to prove he had a right to work.

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11. At paragraph 26 the Employment Judge found that the Claimant would have had sufficient funds to make an application had he not spent the loan on food and bills. She held:

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> **"26. … because of his fundamental misunderstanding of the difference between having the right to work and having proof of the right to work as required by the current legislation, he failed to understand the seriousness of his predicament and the company's predicament."**

12. By letter dated 30 June, Mr Batchelor invited the Claimant to a meeting on 3 July to discuss his continued employment. Mr Batchelor wrote on 30 June:

> **"You were informed at the meeting on the 22nd May that we have been advised by the Home Office that whilst you do have the right to reside and work in the United Kingdom, unfortunately your current documents do not provide Abellio, your current employer, with a statutory excuse to allow you to work for our Company under the Immigration, Asylum and Nationality Act 2006."**

He continued:

> **"It is likely that if you do not bring with you the required paper work that allows you the right to work your employment with Abellio will be terminated with immediate effect."**

13. The Claimant did not attend the meeting at which the termination of his employment was considered. However, Toynbee Hall wrote on that day, namely 3 July 2015, as follows:

> **"… He [that is the Claimant] has also sought confirmation from the Home Office and has been assured that he has the right to stay and work in the United Kingdom. In addition, since his last visit to us, we understand that Abellio has received confirmation from the Home Office that he has the right to live and work in the UK, but that because he lacks the correct documentation, you remain unwilling to allow him to return to work. …"**

14. By letter dated 6 July 2015 Mr Batchelor dismissed the Claimant. He wrote to him on that date as follows:

> **"As you know, you attended a meeting on the 12th May with Nicola Hayward, HR Business Partner who advised you that whilst you have the right to reside and work in the United Kingdom, your current documents do not provide Abellio, your current employer, with a statutory excuse to allow you to work for our Company under the Immigration, Asylum and Nationality Act 2006.**
>
> **It was pointed out to you at the meeting on the 12th May that if you complete the NTL (No Time Limit) application form and submit this along with your new passport to the relevant authority, and once you have received a letter acknowledging receipt of your application, Abellio can undertake a check to confirm the application is in progress, which in turn will provide us with the required time-limited statutory excuse (6 months) to allow you to work until your biometric residence permit is received. …"**

Mr Batchelor continued:

> **"Taking all this into account, my decision is to terminate your employment as you are not entitled to work in the United Kingdom and you have failed to attend the meeting scheduled for 3rd July 2015 with myself. I can only assume you do not have the documents required by law to work in the UK as you have failed to produce them.**

> **Due to the seriousness of this and given that it is a requirement by law to have the necessary documentation to work which you have failed to provide, your employment is terminated on today's date by reason of [illegality]."**

15. The Claimant appealed against his dismissal. The appeal was heard by Lene Madsen, Senior HR Advisor. By letter dated 22 July the Claimant was told:

> **"As an employer we have a responsibility to ensure that our employees have the right to work in the UK and we are expected to have full documentation on file to show that the required checks have been carried out.**
>
> **This is a legal requirement [placed] on employers by UK immigration law.**
>
> **Whilst we have evidence that you have the right to work and stay in the UK, you haven't provided us with the required paperwork that would provide the company with a 'statutory excuse' to keep you employed, and you still don't have this.**
>
> **In conclusion, I find the decision to dismiss you was correct. Your appeal is therefore unsuccessful and you remain dismissed."**

The Decision of the Employment Judge

16. The Employment Judge held at paragraph 3: "*During the hearing the claimant withdrew the claim for unlawful deduction from wages*". At paragraph 39 she held that she had:

> **"39. … considerable sympathy for the claimant who has clearly misunderstood the law as it applies to him and as a result he has not complied with his employer's requests. It is a complicated concept that even if you have the legal right to work, an employer is legally obliged to obtain proof of that right to work and that proof must be in the format required by the current legislation."**

17. The Employment Judge continued:

> **"40. For example, where someone is British, having been born here and lived here their entire lives will have the right to work here. However, in accordance with the Code of Practice, without a birth certificate or passport an employer would not be able to comply with the legislation imposed upon it because the employee would not be able to prove that they had the right to work. A British person without either of those documents would have to apply for them in order to get or keep their job. If an employer employed a British person without having seen their passport or birth certificate then they could be illegally employing someone and could be fined up to £20,000 and potentially have criminal liability.**
>
> **41. As the claimant is not British, but Jamaican, his passport is not, under the current legislation, sufficient evidence that he can work, nor is his birth certificate. It is not in dispute that he has the right of abode as set out in the Immigration Act 1971.**
>
> **42. However the government Code of Practice dictates that he has to also provide evidence of his status in the form of an endorsement in his passport e.g. a stamp or the No Time Limit form to prove he can work. (Document 6, List A, Code of Guidance). If the respondent or any employer does not obtain that evidence from their employee then they could be fined up to £20,000 and/or face criminal liability. There are no allowances made or exceptions to that rule for someone who is lawfully in the UK under the 1971 Act as the claimant is."**

18. The Employment Judge then continued:

> **"45. I find that the employer has established that the reason for the dismissal was s98(2A(d)) ERA 1996, namely that his employer could not continue to employ him without contravening its obligations under the Immigration and Asylum Act 2006 to obtain specific documentary proof that the claimant had the right to work in the UK. In accordance with that legislation, if they had continued to employ him then they would have been potentially liable for a substantial fine or criminal prosecution.**
>
> **46. Before dismissing for that reason, the respondent investigated its obligations and the claimant's immigration status. They requested guidance from the Home Office and they gave the claimant several opportunities to demonstrate what he was doing to obtain the relevant proof of his right to work.**
>
> **47. I conclude that they did follow a fair process throughout. They held several meetings and remained in regular contact with the claimant. They explained, both verbally and in writing, the importance of obtaining the relevant proof and the legal obligations they had to comply with. …**
>
> **49. Their decision to dismiss fell within the range of reasonable responses given that he had been given a significant period of time to obtain the relevant documents and had been given funds to obtain them. …**
>
> **50. In these circumstances I consider that the respondent's decision to dismiss by reason of legality falls within the range of reasonable responses for an employer in all the circumstances. They had given him the opportunity to continue working, they had loaned him the money to obtain the necessary proof, they have explained the process to him and he refused to comply with their requests and showed no sign that he would comply any time soon. They had a positive legal obligation to obtain that evidence before they could continue to lawfully employ him and so I consider that their decision fell within the range of reasonable responses.**
>
> **51. If I am wrong in that then I find that the respondent fairly dismissed for some other substantial reason namely that he claimant refused to obtain the relevant evidence to prove that he could work. The claimant was given ample time and support to apply for the relevant document and failed to do so. He demonstrated at the appeal hearing and before the tribunal today that he did not think he had to and could not afford to obtain the relevant proof and so the tribunal finds it was within the range of reasonable responses to dismiss the claimant for failing to provide the documents."**

Grounds of Appeal

Ground 1

19. Ground 1 of the appeal asserts that the Employment Judge was wrong to find that the Respondent has established a fair reason for dismissal under section 98(2)(d). Section 98(2)(d) provides as follows:

> **"(2) A reason falls within this subsection if it -**
>
> **…**
>
> **(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment."**

A The enactment relied upon by the Respondent and by the Employment Judge was section 15 of the **Immigration, Asylum and Nationality Act 2006** ("IANA"). The Employment Judge set out section 15 of the **IANA 2006**, which provides as follows in material part:

> **"15. *Penalty***
>
> **(1) It is contrary to this section to employ an adult subject to immigration control if -**
>
> **(a) he has not been granted leave to enter or remain in the United Kingdom, or**
>
> **(b) his leave to enter or remain in the United Kingdom -**
>
> **(i) is invalid,**
>
> **(ii) has ceased to have effect (whether by reason of curtailment, revocation, cancellation, passage of time or otherwise), or**
>
> **(iii) is subject to a condition preventing him from accepting the employment.**
>
> **(2) The Secretary of State may give an employer who acts contrary to this section a notice requiring him to pay a penalty of a specified amount not exceeding the prescribed maximum.**
>
> **(3) An employer is excused from paying a penalty if he shows that he complied with any prescribed requirements in relation to the employment."**

20. What is also material but not set out or referred to in the Judgment of the Employment Judge, is section 25 of the **IANA** which provides as follows:

> **"25. *Interpretation***
>
> **In sections 15 to 24 -**
>
> **(a) "adult" means a person who has attained the age of 16,**
>
> **…**
>
> **(c) a person is subject to immigration control if under the Immigration Act 1971 he requires leave to enter or remain in the United Kingdom, …"**

21. Mr Milsom (counsel for the Claimant) and Ms Mayhew (counsel for the Respondent) agreed that, applying the case of **Bouchaala v Trusthouse Forte Hotels Ltd** [1980] ICR 721, a genuine but erroneous belief by employers that they would be in breach of a duty or a restriction imposed by or under any enactment could not be a reason falling within **ERA** section 98(2)(d). Both counsel agreed that the issue in ground 1 is whether, as a matter of statutory construction, it was contrary to section 15 to employ someone who, although they had a right to work and reside in the United Kingdom, did not provide to the employer documents other than

A a passport to prove that right. In other words, in this particular case, whether someone, namely the Claimant, who was not subject to immigration control because under the **IA** he did not require leave to enter or remain in the United Kingdom, the employer was bound by section 15 to be exposed to certain liabilities. Mr Milsom contended that the answer is clear. Section 15 applies to the employment of an adult subject to immigration control. The definition in section 25 provides by (c) that "*a person is subject to immigration control if under the Immigration Act 1971 he requires leave to enter or remain in the United Kingdom*". The Claimant was not subject to immigration control.

22. It was agreed, and the Home Office confirmed to the Respondent, that the Claimant had the right to work and reside in the United Kingdom. He did not require leave to enter or remain in the United Kingdom. Section 15 did not apply to his employment. It is said that the Employment Judge plainly erred in holding at paragraph 45 that the Claimant could not continue to be employed without the employer, the Respondent, contravening its obligations under the **IANA** to obtain specific documentary proof of his entitlement to work.

23. Mr Milsom also pointed out that the reference to the requirements on an employer in section 15 is the excusal provision in section 15(3). It is only if there is a breach of section 15(1) that section 15(3) comes into play. Section 15(3) provides an excusal from a penalty if the employer obtains from the employee documents in List A in the schedule to the **Immigration (Restrictions on Employment) Order 2007**. In this case, there was no breach as the employee was not subject to immigration control.

24. Ms Mayhew valiantly attempted to uphold the finding of the Employment Judge that the employment of the Claimant was in breach of section 15. She submitted that an employer

cannot know if an employee is subject to immigration control unless that employee provides the documents requested.

Ground 1 - Discussion and Conclusion

25. The Employment Judge plainly erred in holding at paragraph 45 that an employer was obliged under the **IANA 2006** to obtain specific documentary evidence that the Claimant had the right to work in the United Kingdom. The Employment Judge relied on section 15. Section 15 provides liability to a penalty for an employer if he employs a person subject to immigration control as defined in section 25. The Employment Judge failed to refer to the all-important section 25. In accordance with section 25, a person is subject to immigration control if, under the **IA**, he or she requires leave to enter or remain in the United Kingdom. It was agreed by the parties that the Claimant was not such person. Section 15 did not apply to the employment of the Claimant by the Respondent, as he was not subject to immigration control within the meaning of the **Act**.

26. Even if the Claimant had been subject to immigration control, section 15(3) does not impose a requirement on an employer to obtain certain documents. It gives the possibility of excusal from penalty if certain documents are obtained from the employee. The Employment Judge erred in holding that the reason for the dismissal fell within **ERA** section 98(2A)(d).

Ground 2

27. The Claimant contends that a similar error also affects the conclusion of the Employment Judge, in paragraph 51, that the Claimant was dismissed for some other substantial reason. It is said that whilst the Respondent may have believed the documentation was required, there were no reasonable grounds for that belief. Ms Mayhew contented that a

mistaken belief can found the basis of a reason for dismissal falling within some other substantial reason. Counsel relied on the authority of **Bouchaala v Trusthouse Forte Hotels Ltd** [1980] ICR 721. In particular, Ms Mayhew referred to paragraph 2 of the headnote in which by a majority the EAT in that case held that a "*genuine but erroneous belief that it was impermissible to continue to employ a person because of an enactment prohibiting further lawful employment could be "some other … reason" for a dismissal*". As the Industrial Tribunal (as it then was) had found that the employer's belief constituted a substantial reason for dismissing the employee, they had justified the dismissal under what was then section 57(1)(b) of the **Act**.

28. Ms Mayhew also relied on **Hounslow London Borough Council v Klusova** [2008] ICR 396 in which the Court of Appeal held that a genuine but mistaken belief that continued employment of the employee would contravene a statutory restriction could amount to some other substantial reason for dismissal.

Ground 2 - Discussion and Conclusion

29. The some other substantial reason expressed by the Employment Judge in her Judgment was, at paragraph 51, "*that the claimant refused to obtain the relevant evidence to prove that he could work*". However, on a fair reading, I take this to mean a finding that the Respondent believed it would be a contravention of the law if they employed the Claimant without being provided with the documents which they believed to be required. In my judgment, on the basis of **Bouchaala** and **Klusova**, this can amount to some other substantial reason for dismissal within section 98 of the **ERA**, and in this regard the Employment Judge made no error of law in so finding.

Ground 3

30. Mr Milsom contended that the Employment Judge erred in finding that the dismissal was fair. He contended that the erroneous finding that the continued employment of the Claimant would have been unlawful undermines the Employment Judge's finding that the dismissal was fair. Although enquiries were made of the relevant authorities, there was no evidence of what was asked and whether full information was given to those authorities. Further, there was no documentary evidence about what was asked and what answers were given. It was submitted by Mr Milsom that the decision to dismiss was taken on a fundamentally mistaken basis and could, therefore, not be fair. It would be contrary to common sense and common justice, it was said, if it were held to be so.

31. Ms Mayhew points out that the Respondent made enquiries at the Home Office and relevant authorities and it was not necessary that those enquiries be evidenced in writing. There was sufficient oral evidence that such enquiries had been made and what answers had been given. Further, Ms Mayhew contended that the Claimant was given ample opportunity and time to produce the documentary evidence of what was asked of him. Unlike the **Klusova** case, a fair procedure had been adopted by the Respondent and it was contended by Ms Mayhew that the decision on fairness of the dismissal should remain in place.

Ground 3 - Discussion and Conclusion

32. In my judgment, the reasonableness of the belief which was the reason for the dismissal should be taken into account in cases such as this where the dismissal was based on a belief which is mistaken. Whilst the Respondent contacted the Home Office and the UK Border Agency, no particulars are given of what those authorities were told by the Respondent, what exactly was asked of those authorities or the precise reply. The outline of the replies were

given and what the Respondent understood they had to obtain. Whilst oral evidence is acceptable, absence of letters or emails makes it difficult to know exactly what was asked and what was said. For example, was information given by the Respondent to the Home Office or the Border Agency to enable them to make the correct assessment that the Claimant did not require leave to enter or remain in the United Kingdom? Giving this information could make all the difference between whether section 15 applied or not and whether section 15(3) could be in play or not.

33. Even though the Respondent was given certain information by the Border Agency and the Home Office, in deciding the reasonableness of the dismissal the ET should have taken into account whether or not full information was given to those authorities and whether those authorities had all the material on which they could consider whether section 15 was in play or not. In my judgment, whether the Respondent gave the authorities facts relevant to whether the Claimant was subject to immigration control would have been material to the weight which an Employment Judge could place on enquiries made by the Respondent of the Home Office and their responses. The Employment Judge did not refer to section 25 and this point did not appear to be considered by her. The assessment made by this Employment Judge of the reasonableness of the decision to dismiss was defective.

34. Whilst the procedure adopted in considering the dismissal of the Claimant may well have been fair, the failure of the Respondent to produce evidence of giving full information to the relevant authorities or of taking reasonable steps to ascertain the position under section 15, having regard to the all important section 25 may well affect the conclusion of an Employment Tribunal on the fairness of the Respondent's decision to dismiss for an erroneous belief. Accordingly, in my judgment, the decision of the Employment Judge that the dismissal was fair

cannot stand. This EAT does not have sufficient information to substitute a decision on that point and the issue of fairness of the dismissal for a mistaken belief will be remitted. I will hear submissions at the conclusion of this Judgment as to the Employment Tribunal to whom the issue under **Employment Rights Act 1996** section 98(4) is to be remitted.

Ground 4

35. Mr Milsom contended that the ET erred in dismissing the claim of the Claimant for wrongful deduction from wages. It was submitted that there was no unequivocal withdrawal of the claim of wrongful deduction from wages, Mr Milsom submitted that in those circumstances the Employment Judge erred in holding that there had been a withdrawal of that claim. The claim itself was based on the failure to pay the Claimant during the period of his suspension and failure to provide notice monies when he was dismissed without notice.

36. Following the Rule 3(10) Hearing before Mrs Justice Laing, the solicitor for the Respondent, the Claimant and the Employment Judge gave their recollections of what was said at the hearing before Employment Judge Webster and any notes on the issue of withdrawal. It was the Claimant's position that he personally had not withdrawn his claim and it was not done in his presence. He suggested that his brother had been called into the Employment Tribunal room just after lunch and it may have occurred then. However, the statements of the Employment Judge and of the solicitor for the Respondent were to different effect. The Employment Judge recorded that she had identified the issues to be heard at the outset of the hearing and that those issues did not include any issue which would have been relevant to determination of the claim of wrongful deduction from wages. Employment Judge Webster is categoric in her statement that there had been a withdrawal of the claim; otherwise she would not have so held in her Reasons.

37. Mr Milsom contends on the basis of **Segor v Goodrich Actuation Systems Ltd** UKEAT/0145/11 (10 February 2012, a judgment of the former President, Mr Justice Langstaff), that an abandonment of a claim must be clear, unambiguous and unequivocal. It is said by Mr Milsom that there is no evidence of such unambiguous and unequivocal abandonment. Accordingly the Employment Judge erred in dismissing the claim as there had been no unequivocal withdrawal.

38. Further, is it is said that in accordance with Rule 52 of the **Employment Tribunals (Constitution and Rules of Procedure) Rules 2013**, **Campbell v OCS Group UK Ltd** UKEAT/0188/16, a judgment of the current President, Mrs Justice Simler, and in accordance with the overriding objective, if circumstances give rise to a reasonable concern which should trigger an ET to make enquiries then those enquiries should be made as to whether a party does really want to withdraw a particular claim. If the ET is put on notice that a withdrawal is inconsidered or irrational then it is said that, in accordance with paragraph 24 of the judgment of Simler P, an ET should make such enquiries before accepting an apparent withdrawal of a claim.

39. Ms Mayhew submitted that it is unrealistic to expect an Employment Tribunal or an Employment Judge to be able to assess at the outset of a hearing whether a withdrawal of a claim is irrational or unreasonable and that, as in this case, if at the outset of a hearing a claim is withdrawn, it would be placing an unrealistic burden on an ET to keep that withdrawal under review before dismissing it. In response, Mr Milsom made the point that whilst there may be a withdrawal at an early part of proceedings, the decision to dismiss comes at the point of an ET reaching decisions on the other applications which are being heard, namely at the conclusion of

A the hearing, and that, therefore, an ET does have the power and should keep under review the appropriateness of the withdrawal.

B 40. Mr Milsom recognised that it will be in a very rare situation that an Employment Judge uses powers under Rule 52 not to dismiss a claim which is withdrawn, but it is said that in this case the circumstances are such that the withdrawal of the claim for unlawful deduction from wages is inconsistent with a conclusion that the decision of the ET was erroneous and

C inconsistent with a finding that the basis on which the Respondent did not pay the Claimant was undermined. The Respondent failed to pay wages on a mistaken basis in law.

D 41. Ms Mayhew contended that the evidence of withdrawal was overwhelming, the Employment Judge was right to accept the withdrawal. To impose an obligation on her to have refused to accept the withdrawal or not to dismiss the claim having been withdrawn is

E unrealistic. The application to withdraw was made at the outset of the hearing and at that point the Employment Judge could not have been in a positon to refuse to accept the withdrawal of the claim.

F *Ground 4 - Discussion and Conclusion*

42. The **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013** provide in Rules 51 and 52 as follows:

G **"51.** ***End of claim***

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.

52. ***Dismissal following withdrawal***

H **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."**

43. In my judgment on the material from the solicitor for the Respondent and the Employment Judge, taking into account the statement of the Claimant, it has been established that the deduction from wages claim was withdrawn and the Employment Judge did not err in so finding. The claim for deduction from wages was for the period of suspension without pay and for the notice period. The reason salary was not paid during the suspension was because the Respondent considered that the employment of the Claimant was unlawful. It has been held that the Employment Judge erred in holding that such employment was unlawful. No other basis for withholding pay was relied upon by the Respondent. As a matter of contract it may well be that the Claimant would have been or would be entitled to pay for that period of suspension without pay.

44. The legislation has provided for a two-stage process by Rules 51 and 52. The act under Rule 51 is an act of a party to proceedings. The step under Rule 52 of dismissal is a judicial act. Rule 52(b) provides that there should not be a dismissal if the Tribunal believes that to issue such a judgment would not be in the interests of justice.

45. It will be in a very rare case that an Employment Judge does not dismiss a claim following its withdrawal. I see some force in the argument advanced by Ms Mayhew that at the outset of a hearing an ET could not know or may not know whether it is irrational or illogical for a Claimant to withdraw a particular claim or that it would be not be in the interests of justice to do so.

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46. However, Mr Milsom is right when he submits that the decision to dismiss is usually taken at the end of proceedings when Orders are made. The dismissal of the claim does not have to be carried out at the same time as its withdrawal. The Judgment of this Employment Judge records that it was during the hearing that the Claimant withdrew the claim for unlawful deduction from wages. In the Judgment the Employment Judge recorded that the claim for unlawful deduction from wages is dismissed upon withdrawal. That is the usual formulation. The expression dismissed upon withdrawal does not, by its wording, indicate that the dismissal follows exactly at the time of the withdrawal; withdrawal is a precondition for dismissal. Even if the submission of Ms Mayhew that in this case the dismissal took place at the same time as the withdrawal, as to which there is no evidence one way or the other and that it took place at the outset of the hearing, for reasons set out below that decision was reached based on an error of law and is to be set aside.

47. Had the Employment Judge correctly directed herself on the illegality or otherwise of continuing to employ the Claimant on the material before her on the only basis upon which the employer said that they were not paying the employee, it is most unlikely - in fact almost inconceivable - that there would have been a finding other than that the Claimant was entitled to be paid during the period of suspension; there being no other contractual or statutory provision relied upon to excuse non-payment during that period. Accordingly if the Employment Judge had reached a correct decision on illegality bearing in mind that the only basis upon which wages had not been paid was alleged illegality and that there was no such illegality the Employment Judge would have been faced with two inconsistent approaches: an entitlement to wages because the only basis on which wages were withheld was erroneous and a withdrawal of an unanswerable claim. Bearing in mind that the Claimant was represented by his brother, not a legal representative, and faced with an obviously inconsistent position, in my judgment,

an Employment Judge acting reasonably and within the scope of their discretion would undoubtedly have concluded that it was not in the interests of justice to dismiss the claim. In the words of Simler J in **Campbell**, the withdrawal of the claim would be apparently and obviously ill-considered or irrational. In those circumstances, as clearly set out by Simler P in paragraph 24, the Tribunal would be put on notice that the decision to withdraw the unlawful deduction from wages claim was clearly within the scope of those descriptions. In those circumstances the judicial decision making under Rule 52(b) would be triggered. Although it is very rarely triggered, Rule 52 is there for a reason. By Rule 52(b), an ET is given a discretion to be exercised judicially in the interests of justice not to dismiss a claim on its withdrawal.

48. This is one of those rare cases, and I am conscious that a decision under Rule 52(b) is for an ET exercising its discretion but the facts in this case on this particular issue are so clear, that I am exercising the powers of this EAT under the **Employment Tribunals Act 1996** section 35 to make a decision that an ET would make in these circumstances. I, therefore, substitute for the dismissal of the claim of unlawful deduction from wages a decision that there is no such dismissal of the claim.

49. Although the outcome of the deduction from wages claim is probably pretty clear it may not be so inevitable that I am able to substitute a decision that it succeeds. The effect of this Judgment is that the claim is reinstated and is to be determined by an Employment Tribunal.

50. The appeal succeeds to the extent outlined in the Judgment. The Claim is remitted to an Employment Tribunal to determine:

(1) the fairness of the dismissal under **Employment Rights Act 1996** section 98(4), it having been established that the reason for dismissal falls within section 98(1)(b); and

(2) the claim for deduction from wages.

51. The unfair dismissal and deduction from wages claims are remitted to a differently constituted Employment Tribunal who may give directions as to any evidence to be adduced in addition to that which lead to the unchallenged findings of fact in the Judgment of Employment Judge Webster.

52. The transcript of the extempore Judgment has been amplified to incorporate subsequent matters raised by counsel at the hearing.