

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

At the Tribunal
On 28 March 2019

Before

THE HONOURABLE MRS JUSTICE ELISABETH LAING DBE
(SITTING ALONE)

MISS M MERVYN

APPELLANT

BW CONTROLS LIMITED

RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant

MISS MARION MERVYN
(The Appellant in Person)

For the Respondent

MR J BAX
(of Counsel]
Bennetts Solicitors Attorneys &
Notaries
Barley Wood Stables
Longlane
Wroughton
Bristol
BS40 5SA

SUMMARY

UNFAIR DISMISSAL – Constructive dismissal

PRACTICE AND PROCEDURE – Case Management

The Appellant, a litigant in person, claimed in her ET1 that she had been unfairly dismissed '(including constructive dismissal)'. The particulars attached to the ET1 apparently described a constructive dismissal claim. At a Case Management Hearing, she said that she had not resigned, a position which she maintained in correspondence during the litigation. The list of issues from the Case Management Hearing recorded that she had said that she had not resigned, and that the issues, in short, were whether she had resigned (the Respondent's position) or had been dismissed (her position). At the start of the substantive hearing, the Employment Tribunal ("the ET") confirmed with the parties that they agreed with the list of issues. They did. The ET found that the Appellant had resigned, and had not been dismissed. Her claim therefore failed. She was given leave to appeal on the basis that it was arguable that the ET should have considered her constructive dismissal claim. The Employment Appeal Tribunal held that, on the facts, the ET could not be criticised for not deciding the potential unfair dismissal claim. Such a claim was inconsistent with her position during the litigation, and inconsistent with the evidence she gave to the ET.

A **THE HONOURABLE MRS JUSTICE ELISABETH LAING DBE**

B 1. This is an appeal against a decision of the Employment Tribunal (“the ET”) sitting at Bristol. The ET consisted of Employment Judge Livesey, Mr E Beese and Dr C Hole. The ET sent its Judgment to the parties on 24 November 2017. The ET dismissed the Claimant’s claims for unfair dismissal and for sex discrimination.

C 2. The ET was asked to send Written Reasons for the decision. The ET sent those to the parties on 21 December 2017.

D 3. I will refer to the parties as they were below. Paragraph references are to the ET’s Judgment unless I say otherwise.

E 4. On this appeal the Claimant represented herself. The Respondent was represented by Mr Bax of counsel. I am grateful both to the Claimant and to Mr Bax for their written and oral submissions.

F 5. The issue on this appeal did not appear in the original Notice of Appeal. The original Notice of Appeal was considered by His Honour Judge Peter Clarke pursuant to Rule 3 of the **Employment Appeal Tribunal Rules 1993** (“the Rules”). He decided that the Notice of Appeal did not raise an arguable point of law.

G 6. The issue was identified at a Hearing under Rule 3(10) of **the Rules** by HHJ Eady QC. The Claimant was represented at that Hearing by Mr Strelitz counsel acting for her under the ELAAS scheme.

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7. The argument was that the ET had failed to engage with the Claimant's alternative case of constructive dismissal. It was argued that this has been referred to in the first and last paragraphs of the Claimant's Particulars of her complaint and answered by the Respondent in paragraph 23 of the grounds of resistance.

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8. The evidence given by the Claimant had included matters which might support a claim of constructive unfair dismissal. There was no record that the Claimant had withdrawn a pleaded claim of constructive unfair dismissal.

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9. In order to clarify the issues it is necessary for me to describe the history of the claim in some detail.

The ET1

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10. In section 8 of the ET1 the Claimant ticked the box, "I was unfairly dismissed (including constructive dismissal)." There were about two and a half pages of typed Particulars attached to the ET1. Paragraph 1 said, "On 14 November 2016 I had to walk out of my workplace due to stress. I have been working at BW Controls for 11 years. Lee Fowler has made it very difficult for me to carry out my job correctly and legally."

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11. Paragraph 2 said:

"Events leading up to this decision include being humiliated by Lee Fowler in front of a member of staff... this started happening in July 2016. When I let Lee Fowler have the information he requested, Lee said he did not agree and would ask "Julie" ... this happened on a number of occasions with Lee Fowler undermining my capabilities. On 14 November 2016 I notified Lee Fowler of discrepancies... he disagreed with me again and I asked, "are you calling me a liar" at this point he was halfway out my office door and walked away."

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A 12. Paragraph 3 said, “I notified a colleague Simon Hawkes that I was going home as I felt unwell. I believed I had been called a liar yet again.”

B 13. In paragraph 4, there is a reference to a sentence which starts:

“...When I protest about this Lee Fowler says it has been agreed by the accountant and that it is none of my business. Other duties that were not in my contract included making up to 30 - 40 drinks a day, cleaning, lifting and carrying heavy boxes upstairs. I am the only female in the building. ...I work through my lunch break but I am expected to deduct 30 minutes from my timesheet. I am the only person on the weekly payroll that does not receive an overtime rate.”

C 14. Paragraph 6 says that the Claimant left the building on 14 November 2016 and that she never spoke to anyone other than her partner. It refers to a text message which Julie Fowler sent her on 15 November 2016 asking if she was okay and she wanted to talk. Paragraph 6 then says
D that, “I replied back to Julie Fowler that I was not okay and would write a letter to Lee. I offered to bring in company property that was needed and asked for some personal items that belonged to me.”

E 15. Paragraph 7 refers to text messages on 15 and 16 of November 2016. The second sentence says:

F “...At this point I still was not well and suffering from stress things were said via text message that Lee and Julie Fowler interpreted as my resignation. Julie Fowler stated that I was no longer an employee of the company. I did not say I had resigned or followed it up with a resignation letter as Lee Fowler has said. The letter I sent to Lee Fowler on 17 November 2016 was a grievance letter as I was advised to send this by Citizens Advice and ACAS.”

G 16. Paragraph 9 states that neither Lee nor Julie Fowler had responded to the contents of the Claimant’s grievance letter “saying that I have not put anything in writing.”

H 17. Paragraph 12 says this:

“Lee Fowler also states on his letter that he accepts my “resignation” on 14 November 2016, as per my text 15 November and letter dated 17 November 2016? Lee Fowler also states that if I had not “resigned” he would have commenced disciplinary action as I left the building without permission. I notified Simon Hawkes a senior member of staff I was going home.”

A 18. Paragraph 16 says this, “I was forced to leave my workplace due the build up of stress making me ill. Ideally, why would I leave 5 weeks before Christmas and just before I was due to receive my bonus which could have been up to £2,000? I have received a bonus for every year for 11 years.”

B **The ET3**

19. Paragraph 9 of the Particulars attached to the ET3 referring to 14 November 2016 says this:

C “Later the Claimant shouted at another member of staff, Simon Hawkes, words to the effect of ‘tell him he can stuff the job up his arse’, this was within the hearing of the Respondent’s clients. At approximately midday the Claimant walked past Mr Fowler’s office and shouted, “stuff your fucking job” and left the premises a few minutes later. It is denied that the Claimant told Simon Hawkes that she was going home because she felt unwell.”

D 20. Paragraph 10 says this:

“On 15 November 2016, Mrs Fowler sent a text message to the Claimant asking if she was OK. In the text message correspondence that followed it was clear that the Claimant had resigned in that she said she would return company property, would take what was hers and asked for her P45. The resignation was further confirmed in the Claimant’s letter to the Respondent dated 17 November 2016.”

E 21. There are then several paragraphs setting out the Respondent’s factual case. Paragraphs 21 to 23 read as follows:

F “21. Further in the event that the Claimant had not resigned the Respondent’s avers that the Claimant’s behaviour on 14 November 2016 and matters discovered subsequent to her departure would have warranted disciplinary action.

22. At all material times the Respondent and its Directors acted with reasonable and proper cause in their dealings with the Claimant. It is denied that the Respondent is in breach of contract. It is further denied that the Claimant resigned in response to the actions of the Respondent or its Directors.

23. The claim for unfair dismissal/constructive unfair dismissal is denied.”

G **The Telephone Case Management Hearing**

H 22. On 8 December 2016 the ET sent a letter to the parties. It was headed, “Notice of Preliminary Hearing case management - by telephone.” The text under the heading in bold type said this:

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“An Employment Judge will conduct a preliminary hearing to identify the issues and to make case management orders including orders relating to the conduct of the final hearing. Your attention is drawn to the attached Agenda for guidance as to the types of Orders that will be considered and the information you will be required to provide at the preliminary hearing.”

The notice then set out the arrangements for the Telephone Hearing.

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23. On 30 January 2017, the Claimant wrote a letter to the ET. That letter referred to the completed agenda which the Claimant enclosed with the letter and said it was her response to the ET3 questionnaire and response from the Respondent. The Claimant asked the ET to put the letter on file.

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24. In paragraph 2 on the first page of that letter she said, “The claim is for unfair dismissal (Including Constructive Dismissal) and discrimination. There was no resignation on 14 November 2016 and no contact from my employer Lee Fowler until 25 November 2016.”

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25. There is then some text in which the Claimant responds I think to the factual allegations made by the Respondent in the ET3. In paragraph 8 she set out her recollection of events on 14 November 2016. In paragraph 9 she said this:

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“9. I sat in my office for a few minutes as I started to feel unwell; the build-up of stress was too much. I telephoned my partner Keith and told him I was coming home. I went upstairs to Simon Hawkes’ office and let him know that I was going home as I believed that I had been called a liar again. I asked him if he could answer the phone etc....”

She denied shouting “stuff your job” to anyone or shouting at Simon Hawkes.

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26. She referred to Julie Fowler’s text of 15 November in paragraph 10. She said that she had replied and said she was not okay and would write a letter to Lee Fowler. She said further on in that paragraph that she had offered to return the company property that was needed such as company debit card and keys.

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A 27. In paragraph 19 she referred to a letter and said that that letter was a grievance letter. It was not responded to by Mr Fowler. Paragraph 22 she said she had always acted in the interests of the company and has done so for the last 11 years. She then said, “I had to leave my office because of Lee Fowler’s unreasonable behaviour and making it impossible for me to carry out my work correctly and legally.” In paragraph 23 she said, “I am claiming unfair dismissal including constructive dismissal.”

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C 28. The agenda that was attached to the Claimant’s letter is at page 116 of the bundle and under the heading “2. The Claimant’s response” and in answer to the question what are the complaints (claims) are brought? The Claimant replied “unfair dismissal (including constructive dismissal) discrimination. Question 2.2 was is there any application to amend the claim or response? The Claimant’s answer was that, “No change unfair dismissal (including constructive dismissal) discrimination.”

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E 29. Under heading “4. The issues”, and in response to question 4.1, “What are the issues or questions for the Tribunal to decide”, the Claimant replied, “Unfair or constructive dismissal discrimination, Lee Fowler breach of contract, unfair treatment. Why did Lee Fowler not contact me for 14 days?” There are no other relevant entries in the agenda.

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30. The Respondent’s response to question 2.1 was:

G **“It appears that the Claimant brings a claim for Unfair Dismissal/Constructive Dismissal and Sex Discrimination. The Claims are not understood and the Claimant has failed to set out her claims in any particularity.**

31. In response to question 2.2 the Respondent says “no”.

H **“Although the Claim as drafted lacks sufficient particularity for the Respondent to properly understand the claim against it and in the event that the Claimant provides further and better particulars, the Respondent reserves the right to amend its Response.”**

A 32. In response to question 4.1 the Respondent said, “Was the Claimant dismissed? If so, was she unfairly dismissed? Did the Claimant resign? If so, can she claim constructive dismissal?”

B 33. On 8 February 2017, Employment Judge Reed (“EJ”) held a Telephone Case Management Hearing. According to the Respondent, the Claimant said at that Hearing that she did not resign and did not intend to resign.

C 34. The issues for Final Hearing were set out in the case management Order. The introduction in paragraph 2 stated, “The Claimant claims unfair dismissal and sex discrimination only.” Under **D** the heading “The issues” the Order said this:

“3. Dealing firstly with unfair dismissal, the claimant has suggested she was constructively dismissed but before me she was clear that she neither resigned nor intended to resign. Her case is that she was “actually” dismissed by the respondent. She says the respondent incorrectly interpreted her behaviour as amounting to resignation.

E **4. If she was indeed actually dismissed, that dismissal would have to be unfair, since there was no procedure attendant upon it. If, on the other hand, she resigned, her claim must fail, since she does not allege that she did so because of the respondent’s actions (indeed she says there was no resignation at all).**

5. It follows that although the pleadings go in some detail into the alleged misbehaviour of Mr Fowler, the tribunal will not need to hear evidence on that subject.”

F The ET in the remainder of the Order made Orders about disclosure which were tied to the issues which it had just identified.

G 35. In the course of the Hearing of the appeal this morning, Miss Mervyn told me that the Telephone Hearing was terrifying for her. She said it lasted just under an hour. It went too fast and the issues were not fully discussed. The Employment Judge she said did acknowledge that there was a constructive unfair dismissal claim in the letter dated 30 January, but he did not go **H** into any detail. It was quite a ‘short, sharp’ hearing.

A 36. "I stated that I went home ill on 14 November." That was in the letter of the 30 January and other documents. She said that "it all got confusing for me." She accepted that she had not challenged what had happened and said that she did not know that she could challenge the Decision. On the other hand she said she had not withdrawn any issue in her ET1.

B 37. She also said, "I take some responsibility for the Preliminary Hearing for what was said. I wasn't withdrawing any issues. The ET was not as helpful as it could have been to a person in my position." There was no appeal from the case management Order and no request to the ET to revisit it.

C 38. On 6 March 2017, the Claimant wrote her "response to case summary" to the ET. She said this:

"Please see my response to the Case Management Summary 8 February 2017

2. The claim is for unfair dismissal and discrimination.

The issues

E 3. On 14 November 2016 I went home ill. I notified Simon Hawkes that I was going home. I asked Simon Hawkes if he would answer the telephone etc. This is normal company procedure as stated by the respondent if someone was ill "As long as you let someone know that you are going home". The respondent argues that I resigned (This is denied) on 14 November 2016 yet did not follow basic in house, HMRC or ACAS guidelines regarding handling resignations.

F 4. I believe I was actually dismissed. The dismissal was unfair as the respondent has failed to follow any in-house, HMRC or ACAS guidelines regarding dismissals directly after I went home ill and issued my P45 dated 14 November 2016 sent 10 days later.

5. The behaviour of Lee Fowler was detailed to explain why I went home ill.

....."

The ET's Decision

G 39. In section 3 under the heading "The issues" the ET said in paragraph 3.1:

"3.1. The issues which fell to be determined have been discussed at a Case Management Preliminary Hearing which had been conducted by Employment Judge Reed on 8 February 2017. The issues identified within his Case Management Summary were confirmed by the parties at the start of the hearing."

H 40. Paragraph 3.2 said this:

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“3.2. In relation to the complaint of unfair dismissal, the Claimant had informed Employment Judge Reed that she did not resign and that the Respondent had dismissed her by treating her behaviour as a dismissal. The Judge stated, in paragraphs 3 and 4 of his Summary, that the Claimant had therefore either been dismissed (in which case, unfairly) or she had resigned (in which case, any claim of constructive unfair dismissal would have been likely to have failed because she did not allege she had resigned because of the Respondent’s actions). If the Claimant was dismissed, the Respondent sought to run arguments of contributory conduct and/or that a fair process would not have made any difference (the principle in the case of *Polkey*).”

41. Paragraph 4.1 under the heading “The facts” the ET said that it made the following factual findings on the balance of probabilities. It then said, “...We attempted to limit our findings to those matters which were relevant to a determination of the issues....”

42. The Claimant’s case at the hearing this morning was that she did not abandon anything at the ET Hearing. She had tried to put forward some issues at the hearing but was not permitted to do so. Mr Bax, who represented the Respondent at the hearing, does not accept that that is an accurate representation of the position.

43. In paragraph 4.21 and following the ET set out its findings about what had happened on 14 November 2016. Paragraph 4.22 the ET recorded that first part of the conversation had been agreed between the parties. The ET then said:

“4.22. As Mr Fowler then left, the Claimant said “*are you calling me a liar*”, to which he did not reply. Mr Fowler said that he had not heard her last comment and she accepted that he may not have done. Nevertheless, she believed that she was being called a liar in respect of the issue that she raised about Mr Perryman. She said she then spoke to Mr S Hawkes and told him she was leaving work because she felt unwell. She left, she said, having seen Mr Fowler and Mr Crawford together in Mr Fowler’s office. She did not speak as she walked past.”

44. In paragraph 4.23 the ET recorded the Respondent’s evidence about that and it was rather different. Mr Hawkes’ evidence was that the Claimant had told him to “stuff the job up his arse” and that she had then left having shouted “stuff your fucking job” near Mr Fowler’s office. In paragraph 4.24 the ET concluded that the Respondent’s account was more likely to have been true because it was consistent with the Claimant’s later text messages and because the ET found that Mr Hawkes and Mr Fowler were more reliable and witnesses.

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45. In paragraphs 4.25 and 4.29 the ET set out its findings under the heading “Subsequent events.” On 15 November Mrs Fowler sent a text message to the Claimant in which she asked if she was okay, *“Hi Marion, I understand you went home from work upset yesterday and haven’t been in today. Would you give Lee or I a ring when you get this message only on a personal note we wanted to know if you are okay. Regards Julie.”*

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46. The ET recorded that the Claimant replied 28 minutes later:

“Hello Julie I am not ok after 11 years of service I find myself in a position where I can no longer work for bw controls any more [sic]. I will forward a letter to Lee and return property that belongs to the company Keith will collect my property at the end of the week regards Marion.”

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47. In paragraph 4.26 the ET referred to a further exchange of texts on 16 November. The Claimant sent a text saying, *“Your things will brought in tomorrow and I will take what is mine. I will notify the accountant of the date and time I left so that anything that appears on the accounts after that is nothing to do with me. I would like my P45 to be issued this week.”*

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48. There was reply from Mrs Fowler, *“I am happy to meet with you only Marion, I will be in the office between 2pm and 3pm tomorrow. Lee has already authorised your salary to be paid until the end of the month and a P45 will be issued at that time if you are prepared to wait until then. Regards Julie.”*

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49. In paragraph 4.27 the ET referred to a letter which the Claimant had written to the Respondent on 17 November. The ET recorded if the Claimant had referred to that letter in her witness statement as a grievance, but it was not clear to the ET from the wording of the letter that that was how it had been intended. At the start of the letter she had stated that she had had to

A “walk out of my job.” She referred to advice that she had had from ACAS regarding a constructive unfair dismissal claim, said the ET.

B 50. The first sentence of that letter says, “*On Monday 14 November 2016 due to continued stressful events I had to walk out of my job.*” The Claimant then said that she had contacted Citizens Advice and ACAS and they had both advised then to write the letter to the Respondent.

C 51. The Claimant then described the events which had led up to the decision, various problems which had occurred in the course of her recent employment along the lines that were set out in the ET1. She then said, “I’ve always acted in the best interests of the company, ACAS are happy to represent me in a constructive dismissal case, should I wish to pursue this.” She finished the letter by saying that she would have been happy to give advice regarding the finance side of things as she took great pride in that part of her work:

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E **“...However, due to continued harassment and intimidation from Julie Fowler and false allegations about Keith from yourself, this would now never happen. Keith contacted you to be helpful, we are more than happy to return items that belong to the company and for me to collect mine, but Julie Fowler seems determined to keep moving the goalposts.”**

F 52. In paragraph 4.28 the ET said that the next day the Claimant had seen her GP who had signed her off sick and I was shown the certificate in the course of the Hearing. In paragraph 4.29 the ET quoted from a letter which Mr Fowler had written to the Claimant on 24 November accepting her resignation, which he described as having taken place on 15 November by text and by her letter of 17 November.

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H 53. Under the heading “Conclusions” in paragraphs 5.1 to 5.3 the ET correctly directed itself about the law in relation to dismissal and resignation. Under the heading “Unfair dismissal conclusions” the ET said this:

“5.4 Looking at the words used by the Claimant on 14 November and the text messages which were then sent, there could have been no doubt that the Claimant had indicated that she had

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resigned. Even the Claimant herself accepted in cross-examination that the text would reasonably have been interpreted as a resignation.

5.5 Even if the words used on that day could have been said to have been spoken in the heat of the moment, her text on the 15th either constituted or confirmed the Claimant's resignation. The subsequent events also corroborated the position; the text of 16 November at 6.18pm in which she asked for her P45[26] and the letter of 17 November [31] in which she says that she had "*walked out of her job.*"

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5.6 We struggle to explain why the Claimant had resigned in the circumstances, but we did not need to. Similarly, we would not have been able to have explained why, if we had found against the Respondent, it had chosen to dismiss her. The lack of obvious motive on either [side] was a curious feature of the case.

5.7 We also noted that the Claimant had struggled to identify the point at which she said she had been dismissed, on her own case; she initially claimed that it had been during a telephone call with which Mr Larder had with Mr Fowler on 16 November, but she then claimed it had been in the text message for that day at 17.39pm [26], when she had been wished good luck for the future.

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5.8 Accordingly, the Claimant's complaint of unfair dismissal failed. She was not dismissed and she did not claim that any resignation had amounted to a constructive unfair dismissal."

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54. I was referred by the parties to the ET's notes of the evidence which was given at the ET hearing. It is convenient to mention those passages now. Page 142 of the bundle is a passage from the cross-examination of the Claimant. About halfway down the page she said that she had not told Mr Fowler to stuff his job. Mr Larder had told her "Stuff it. You're not well."

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55. She is recorded as saying that she went to Mr Hawkes' office at about 11.10. She said that she did not feel well and was going home. She said that she believed she had been called a liar. She suffered from anxiety in the past. She said she had felt ill. She had had anxiety in the past.

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56. Further down the page she is recorded as saying that she walked past Mr Fowler's office and said nothing. She had not told Mr Hawkes that she did not want to work there; that she had not told him to stuff his job up his arse. She said that she just needed air because of her anxiety. She had not gone to work the next day and that she had had no reason to leave her job.

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A 57. Over the page on page 43 of the bundle, she was asked about the text message sent at
17.39 which is in the list of text messages on page 154 of the bundle. She is recorded as saying,
“My reply ≠ of resignation. It was stress.” She is recorded as accepting “anybody would think
B = a resignation but they ought to check” and again, “anybody would think it to have been a
resignation.”

C 58. She asked for her P45 she said because she knew she had been dismissed. “I was
dismissed because of what happened when Mr Lauder telephoned the office between 3.04 and
4.40pm.” She is recorded as saying “walk out ≠ resignation” so in other words walking out does
not amount to a resignation. She is then recorded as saying “Didn’t resign. Nowhere does it”
D and the note tails off.

59. Her closing submissions which are at page 152 in the bundle, include this about halfway
down the page, “Didn’t resign on 14 November. No evidence of my resignation (docs). Didn’t
E leave other than because ill. Had spoken to JH. R believed I resigned by texts on 15 November.
I was dismissed by text on 16 November.” Referring to the text message sent at 17.39 she is
recorded as submitting “R should have questioned the text message because I indicated that I was
F not okay.”

G 60. In the hearing this morning in the course of her reply Miss Mervyn said, “In my own mind
at the time I didn’t think I had resigned.” I asked her whether up until the stage when she was
cross-examined she had told anyone that she had resigned and she agreed that she had not. She
had not said that she had resigned either on 14 November or on 15 November.

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Submissions

A 61. The Claimant submits that in its letter of 9 March the Respondent acknowledged that in
her letter of 6 March she had simply made “comments” and had not withdrawn her constructive
B dismissal claim. I note that in that letter the Respondent does indeed refer to the Claimant’s
comments in her letter of 6 March, but the Respondent does not make any reference to the
constructive dismissal claim having been withdrawn or not withdrawn.

C 62. She submitted that none of the issues in her agenda had been withdrawn at the Case
Management Hearing. She referred me to the Particulars of her claim which were attached to the
ET1, which I have already summarised. She submitted that the ET had found that she had
resigned and that the ET had acknowledged her constructive dismissal claim at paragraph 4.27
D of the Decision and that, in the light of those two matters, the ET should have considered whether
she had resigned when she was entitled to as she was a self-represented litigant at the Hearing.

E 63. She submitted that the ET had failed to engage with her constructive dismissal claim. It
had been excluded by the case management Order dated 8 February 2017 and she had not been
allowed to adduce any evidence about it at the Hearing. Her principal argument was that the ET
should have considered her alternative pleaded case as she was a self-represented litigant.

F 64. She further asserted in her oral and written submissions that the President had decided at
the Directions Hearing that the text quoted on page 5 of her skeleton argument beginning “Hello
G Julie...” was a constructive unfair dismissal resignation. Mr Bax did not accept that the President
had made any such Decision at the Directions Hearing. I consider it unlikely that the President
did make a final Decision on what was to be an issue on the full appeal.

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A 65. She relied in particular on the text message which she sent that is the message sent at 17.39, which was referred to by the ET in its Decision:

“Hello Julie I am not ok after 11 years of service I find myself in a position where I can no longer work for bw controls anymore. I will forward a letter to Lee and return property that belongs to the company Keith will collect my property at the end of the week regards Marion.”

B 66. The summary in her first skeleton argument reads as follows:

“As an unrepresented party at a telephone Preliminary Hearing in relation to 14 November 2016, my statement at the Tribunal Hearing, as stated at the Directions Hearing and detailed in Judge Livesey’s notes;

The Respondent had created a hostile work environment that made me leave my job, I was suffering from stress.”

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67. In effect, as I have already indicated, the Claimant’s core submission was that having found as a fact that she had resigned, the ET was obliged to go on to consider whether she had resigned in circumstances in which she was entitled to do so.

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The Respondent’s submissions

E 68. In writing, Mr Bax submitted that the original Notice of Appeal did not refer to constructive dismissal and it repeated the Claimant’s belief that she had been dismissed. He submitted that the ET1 is not clear as to whether the Claimant is alleging that she resigned in response to a fundamental breach of contract by the Respondent or whether the Respondent dismissed her. Paragraph 7, in particular, suggests that the Claimant did not intend to resign.

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G 69. The ET3, however was clear that the Respondent’s case was that the Claimant had resigned, although he accepted that the ET3 also included an alternative case which was a response to a constructive unfair dismissal claim. He submitted that the notice of Hearing made it clear that the purpose of the Preliminary Hearing was to decide the issues in the case. He referred to the Claimant’s letter of 30 January. In that letter she had denied resigning and she had stated that her letter dated 17 November 2017 was not a resignation letter but a grievance letter.

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70. He submitted that the proper analysis from section 95(1)(a) and (1)(c) of the **Employment Rights Act 1996** was that the Claimant had to rely on one or other of those limbs of section 95(1).

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She could not rely on both simultaneously and it was a proper use of the Case Management Hearing to identify which of the two limbs of section 95(1) the Claimant was in fact relying on.

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71. He contended that at the Preliminary Hearing the Claimant had clearly said that she did not resign and had not intended to. That had been her position throughout the ET proceedings and it was confirmed in her letter of 6 March 2017.

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72. Employment Judge Livesey had confirmed what the issues were at the start of the hearing. The Claimant's annotations to the text messages, which had been provided for the Final ET Hearing, and are at pages 156 to 158 of the bundle, confirm that her position was that she had not resigned. Her position had been that the letter of 17 November was not a resignation letter but a grievance letter.

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73. He also referred to the Claimant's letter of 25 November 2017 in which the Claimant had asked rhetorically, "Do you have a copy of a written resignation letter signed by me? I would like a copy if possible. I am sure HMRC will be asking for copy." He contended that the Claimant had maintained the same position in evidence and submissions and that position was that she had not resigned and did not intend to do so. I have already referred to the relevant passages in the Chairman's notes of evidence recording both the Claimant's evidence and closing submissions.

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74. He submitted that the Claimant did not present any case at the Final Hearing; that she had resigned in response to a fundamental breach by the Respondent. He referred me to the

A Decision of this Tribunal in Land Rover v Short UKEAT/0496/10, a decision of former President Langstaff J. In that case the former President considers how an ET should approach an agreed list of issues which had been agreed between the parties that might reasonably be open to different interpretations.

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75. Langstaff J said at paragraphs 32 to 33, “It was trite law that it was the function of an Employment Tribunal to determine claims which the Claimant had actually brought, rather than the claims which he might have brought, and that accordingly the Claimant was limited to the complaints set out in the agreed lists of issues.” He refers to paragraph 51 in which the former President said that “it is part of the requirements of natural justice that a party should know the case they have to meet.”

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76. Mr Bax also referred to a Decision of the Court of Appeal in Parekh v London Borough of Brent [2012] EWCA Civ 1630. In paragraph 31 the Court of Appeal said:

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“If the list of issues is agreed, then that will, as a general rule, limit the issues at the substantive hearing to those in the list... As the ET that conducts that hearing is bound to ensure that the case is clearly and efficiently presented, it is not required to stick slavishly to the list of issues agreed where to do so would impair the discharge of its core duty to hear and determine the case in accordance with the law and the evidence... case management decisions are not final decisions. They can therefore be revisited and reconsidered, for example if there is a material change of circumstances.”

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77. At paragraph 32 of the Decision in the Court of Appeal said:

“... if a list of issues is agreed, it is difficult to see how it could ever be the proper subject of an appeal on a question of law. If the list is not agreed and it is contended that is an incorrect record of the discussions, or that there has been a material change of circumstances, the proper procedure is not to appeal to the EAT, but to apply to the employment tribunal to reconsider the matter in the interests of justice.”

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78. In the light of the facts of this case and the law as set out in the passages to which he referred me, Mr Bax submitted that the Claimant’s concessions at the Case Management Hearing removed constructive dismissal from the list of issues. There was no ambiguity and it was

A confirmed by the Claimant. The Claimant did not challenge the case management Order. Moreover, Employment Judge Livesey had confirmed what the issues were at the start of the Hearing. The Claimant did not at that point then say, “but I resigned in response to a fundamental breach of contract” or anything like that.

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79. The point that is taken now on appeal is not supported by her evidence or by her final submissions to the ET. Indeed, the point is contradicted by that evidence and those submissions.

C He submitted orally that the Claimant had been clear throughout what her case had been and to allow the Claimant now to run a constructive unfair dismissal case would be completely inconsistent with the evidence which she had given to the ET.

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80. The Respondent was entitled to know what case it had to meet. It had prepared its case on the basis of the list of issues. The Claimant had agreed those issues and was bound by them. In any event, the ET had briefly considered the issue of constructive dismissal in paragraph 5.8, “...she did not claim that any resignation had amounted to a constructive unfair dismissal.” He submitted overall that there was no error of law by the ET.

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F **Discussion**

81. There are three issues. First, did the Claimant make the claim of constructive dismissal in her ET1? Second, if so, did the list of issues made as a result of the Telephone Hearing bind the ET at the Substantive Hearing? Third, if not, was the ET obliged to consider that claim, or at least did the ET err in law in not exploring with the Claimant whether she intended to abandon the constructive dismissal claim she had made in the ET1?

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H **Introduction to the issues**

A 82. It is clear that even when dealing with a litigant in person an ET must be careful not to invent a case for that litigant, which the litigant has not advanced or “to step into the factual and evidential arena” (see **Muschett v HM Prison Service** [2010] EWCA Civ 25; [2010] IRLR at paragraph 31).

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D 83. The Court of Appeal held in **Mensah v East Hertfordshire NHS Trust** [1998] IRLR 531 (on different facts) that the ET is not under a general duty to hear every allegation in the ET1 unless it has been abandoned, even if the Claimant is a litigant in person (Judgment paragraphs 14 and 15). The Court of Appeal nevertheless recognised in paragraphs 28 and 35 that it was for the judgment of the Industrial Tribunal (as it then was) in the particular circumstances of the case before it whether of its own motion to investigate a pleaded complaint which it was for the litigant to prove, but which the litigant was not in fact setting out to prove.

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G 84. There must be some doubt whether that proposition can extend to a case in which the complaint which the litigant is not setting out to prove is inconsistent with the complaint which he is setting out to prove. On the other hand the ET does have a duty, if it is obvious from the ET1 that a litigant in person is relying on facts that could support a legal claim, to ensure that the litigant in person does understand the nature of that claim. In addition, if the ET decides that the litigant in person has decided not to advance that claim, the ET should be confident that the litigant in person has withdrawn that claim advertently.

H 85. In paragraph 11 of its judgment in **Segor v Goodridge Actuation Systems Limited** UKEAT/0145/11 the EAT said:

“11. The 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 the 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 care to ensure that if a party during the course of a hearing seeks to abandon a central and important point that that

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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” see also paragraphs 32 to 33 of the judgment.

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86. I bear in mind that lawyers in this field well understand the concept of constructive dismissal and the difference between constructive dismissal and an ordinary dismissal. They understand that constructive dismissal involves a resignation in response to a fundamental breach of contract of employment by the employer. A person with no legal training might well find this bewildering. A person with no legal training might well think that if she wanted to make an unfair dismissal claim, the last thing that it would be in her own interests to concede would be that she had resigned rather than having been dismissed.

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The First Issue

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87. I have quoted from the particulars attached to the ET1. They are only two and a half pages long. Mr Bax accepted on its face the particulars of the ET1 did look like a constructive dismissal claim. He accepted that the ET1 described an employee walking out of the job because the job had become intolerable.

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88. In my judgement, the factual allegations made by the Claimant in the ET1 did raise a potential constructive dismissal claim. It is true that she did not put the correct legal label on her claim in her particulars or indeed apply any legal analysis to the claim, but she was not legally represented. Had she received legal advice, it is likely she would have been advised to frame her claim as a constructive dismissal claim. However, Mr Bax is right to point out that there are aspects of the ET1 which do not make this as clear as it might be.

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The Second Issue

A 89. I was referred by Mr Bax to the decision of former President Elias J (as he then was) in
Hart v English Heritage (Historic Buildings and Monuments Commission for England)
[2006] IRLR 915. It is clear from that decision that an EJ can revisit the decision of another EJ
B made at a case management discussion (in that case a decision dismissing an application to amend
a claim), even in the absence of a change of circumstances, in an exceptional case, bearing in
mind the overriding objective to deal with cases justly, and even in order to consider an argument
which ought to have been advanced earlier.

C 90. The Court of Appeal held in **Parekh** (see paragraphs 28 and 29 of the Judgment) that in
drawing up the list of issues the ET is not exercising a power conferred by Rule 10. The list of
D issues is no more than a useful case management tool. The ET at the hearing is not bound to stick
slavishly to it. Case management decisions can be revisited (judgment paragraph 31). The
position may be different where professional advocates are employed and they agree a list of
E issues; see **Scicluna v Zippy Stitch Ltd & Ors** [2018] EWCA Civ 1320.

F 91. The Court of Appeal has recognised in **Brangwyn v South Warwickshire NHS
Foundation Trust** [2018] EWCA (Civ) 2235 at paragraph 34 that it is open to an ET at a Final
Hearing to revisit and to amend the list of issues. I note that the ET in this case recognised that
it did have power to revisit the list of issues because it asked the parties at the start of the hearing
whether they still agreed with that list. The ET was right in my judgement to recognise this.

G **The Third Issue**

H 92. The ET1 is what gives the ET jurisdiction to decide a dispute; see **Chapman & Anor v
Simon** [1994] IRLR 124. The ET does not have jurisdiction to consider a claim not made in the
ET1 nor does it have a general duty to consider everything raised in the ET1 (see **Mensah**) even

A when the Claimant is a litigant in person. The question on the facts of this case is whether, where
a potential constructive dismissal claim is made in the ET1, as I consider it was here, and it is a
potentially central aspect of the claim, rather than the peripheral matter, the ET should consider
B that claim or satisfy itself that the litigant in person has advertently withdrawn that claim.

C 93. Here, the ET1 described facts which could properly be analysed as a constructive
dismissal claim. The Claimant however had not analysed them in that way and according to the
case management Decision had clearly said that she had not resigned. Nevertheless, she was a
litigant in person.

D 94. Should the ET, on these particular facts, either have gone on to consider a constructive
dismissal claim or satisfied itself that the Claimant had withdrawn the claim and had understood
that she had withdrawn it? That might be the case because of the technical nature of the
relationship between dismissal and constructive dismissal. It is clear from the ET1 that the
E Claimant felt that she had been dismissed, but that she was not able to articulate that claim in
legal terms.

F 95. I have not found this an easy issue to decide. On the one hand the Claimant was not
represented and the ET1 appears to describe what in some ways might be seen as a paradigm case
of constructive dismissal. On the other hand, perhaps because the Claimant had not had any
G advice about her position, her clear stance throughout the litigation was that she had not resigned.
It was still her position when she gave evidence to the ET and when she made her closing
submissions.

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A 96. In that situation I consider that the ET cannot be criticised for not doing more than it did
to investigate the Claimant's claim. It would have been impossible for the ET to investigate this
B issue without pressing the Claimant on the fundamental aspect of the way that she put her case
and had been clearly putting her case for some considerable time, which was that she had not
resigned. There was no constructive dismissal claim available to her unless she had resigned.

C 97. I do not consider that the ET could properly have done so without descending into the
arena. The ET would in effect have had to ask the Claimant to retract from a fundamental factual
plank of her claim as it had developed in the correspondence in the Case Management Hearing
and as it was expressed in her evidence and closing submissions.

D 98. In those circumstances, I do not consider that the ET was under any duty to probe any
further than it did do. I therefore consider that the ET cannot be criticised and did not err in law
in adopting the approach which it did approach to this case. I therefore dismiss this appeal.

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