Appeal No. UKEAT/0104/19/RN

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON, EC4A 1NL

At the Tribunal
On 12 September 2019

Before

HEATHER WILLIAMS QC (DEPUTY JUDGE OF THE HIGH COURT)

(SITTING ALONE)

MISS M PAUL — APPELLANT

VIRGIN CARE LIMITED — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MISS PAUL (The Appellant in Person)
For the Respondent	MRS SARAH FRASER-BUTLIN (of Counsel) Instructed by: DAC Beachcroft LLP Portwall Place Portwall Lane Bristol BS1 9HS

SUMMARY

PRACTICE AND PROCEDURE – Withdrawal

During a Preliminary Hearing to consider whether any of the claims should be struck out as lacking reasonable prospects of success or made the subject of deposit orders, the Claimant, who was unrepresented, indicated she was withdrawing her claim for automatically unfair dismissal pursuant to regulation 7(1)(b) **Transfer of Undertakings (Protection of Employment) Regulations 2006.** The Employment Tribunal dismissed this claim upon her withdrawal and made deposit orders in relation to her other claims.

The Claimant appealed contending that the Tribunal had erred in law in dismissing her automatically unfair dismissal claim as the Employment Judge had failed to ensure that she had made an informed choice when she withdrew this claim and/or had exerted unfair pressure on her to do so.

The appeal was dismissed. Having regard to all the circumstances, the withdrawal of the automatically unfair dismissal claim was clear, unambiguous, and unequivocal and there was nothing to reasonably suggest otherwise to the Employment Judge. In so far as he questioned the Claimant as to why she said her dismissal was linked to the TUPE transfer, the Employment Judge acted properly and understandably, given the strike out application he had to determine and with a view to understanding the way she put her claim. The questions he asked were fair and clear, and the Claimant was given an appropriate opportunity to consider whether or not to withdraw this part of her claim, in circumstances where it was clear what the implications of that were for its future pursuit. There was no unfair pressure put on her to do so.

HEATHER WILLIAMS QC (DEPUTY JUDGE OF THE HIGH COURT)

Introduction

1. This is an appeal brought by Miss Paul who was the Claimant below. Virgin Care Limited, the Respondent to this appeal, was the Respondent below. For clarity, I will continue to refer to the parties as they were known below. Before me, the Claimant has represented herself and the Respondent is represented by Mrs Fraser-Butlin, who also appeared below. They have both made clear and helpful submissions to me.

2. The appeal is from the decision of Employment Judge Harper sitting alone at the Bristol Employment Tribunal ("the ET"), sent to the parties on 4 January 2018. The judgment provided, "The claim of alleged automatic unfair dismissal under Regulation 7 **TUPE** is dismissed upon the Claimant's withdrawal."

3. By an Order sealed on 17 November 2018 following a Rule 3(10) hearing, Laing J permitted the Claimant to amend her proposed grounds of appeal and to proceed to the extent she directed with two contentions, namely that the Employment Judge had erred in law: (1) in failing to take care to ensure the Claimant had a free and informed choice when she withdrew her claim for automatic unfair dismissal; and (2) in exerting unfair pressure on her which caused her to withdraw her claim for automatic unfair dismissal. Laing J also ordered the Claimant to serve an affidavit detailing the improper conduct she relied upon.

4. The Claimant duly served an affidavit sworn on 3 December 2018 and filed amended grounds of appeal. Thereafter, by an Order sealed on 3 April 2019, HHJ Shanks directed the appeal be set down for a full hearing on the basis of these two amended grounds of appeal.

5. The Respondent contests the appeal and in addition to resisting the substantive grounds, submits that the Employment Appeal Tribunal ("the EAT") should decline to hear the appeal, as the issues it raises are academic. In the event, Mrs Fraser-Butlin accepted it would be sensible for me to hear all the submissions relating to the appeal before making a decision on that point.

Material facts and circumstances

The Employment Tribunal claims

6. From 2005, the Claimant was employed by Devon County Council. She was an Enabler within the Council's Family Support Services Department. This involved looking after children for short periods during the day to give their parents a break. She was assigned children who were located around Devon and she travelled by car from her home in Tiverton. On 1 April 2013, her employment transferred under the **Transfer of Undertakings (Protection of Employment) Regulations 2006** ("TUPE") to the Respondent, Virgin Care Limited. Given the date of the transfer, the **Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 2014** did not apply in her case.

7. In June 2015, the Claimant was given a final written warning over an incident with a boy, CB, she was looking after. She was suspended whilst that matter was investigated. Following her return to work, a dispute arose over her mileage claims. The Respondent maintained she could only be reimbursed for trips to clients, to the extent that the mileage

exceeded the distance from her home to the Exeter office. The Claimant disputed this claiming she was entitled to reimbursement in full for her mileage; in consequence, she became reluctant to take on clients living further away.

8. This led to further disciplinary proceedings, and the Claimant was dismissed on stated grounds of misconduct via a letter dated 23 September 2016. On 22 December 2016 the Claimant presented a claim to the ET. Her particulars of claim comprised claims for disability discrimination (relying on a mental impairment of work-related stress); for 'ordinary' unfair dismissal; and for automatically unfair dismissal, relying on regulation 7(1)(b) of **TUPE** on the basis that the reason or primary reason for her dismissal was a reason connected with a transfer to the Respondent that was not an ETO reason entailing changes in the workforce. Hereafter, I will refer to the latter as the automatically unfair dismissal claim.

9. The Claimant also included claims for breach of contract and/or unlawful deduction from wages, alleging she had not been paid the mileage allowance she was entitled to or Saturday overtime. She contended the Respondent had purported to vary her contract in these respects and that the variation was void pursuant to regulation 4(4), **TUPE**. At this stage, the Claimant had legal representation. The Respondent defended the claims, denying them all and contending that the Claimant was fairly dismissed for a conduct reason.

10. A case-management hearing took place on 12 June 2017. Following that hearing, the Claimant, who was still represented at this stage, amended her particulars of claim by withdrawing her disability discrimination claim (which was then dismissed) and by particularising the contractual entitlement she relied on, saying she had been paid for mileage on the more generous basis up until the transfer of her employment. The document also

clarified that she disputed that conduct was the reason for her dismissal. She contended the Respondent had sought to secure the dismissal of employees who had transferred from Devon County Council. This amendment was made approximately six months before the December 2017 hearing.

11. There was then a case-management hearing conducted via telephone on 2 November 2017. By this time, the Claimant was representing herself, as she could not afford to continue legal representation. The issues between the parties were clarified and listed in the ET's Order and a preliminary hearing was directed at the Respondent's request, to determine whether to strike out the claims, or any of them, on the basis they had no reasonable prospect of success or to order the Claimant to pay a deposit as a condition of continuing to advance the claims.

The hearing on 20 December 2017

12. The hearing ordered on 2 November 2017 took place on 20 December 2017. It was during the course of this hearing that the Claimant indicated she was withdrawing the automatically unfair dismissal claim and the ET made the order dismissing that claim which is the subject of this appeal. The hearing was recorded and there is a transcript approved by the Employment Judge. It appears from the transcript that the hearing lasted approximately two hours and 20 minutes, including an adjournment period during which the Employment Judge considered the decision he would make on the strike out and deposit applications.

13. In order to put the passages from the transcript that I will come on to in context, I will first refer to the Claimant's affidavit of 3 December 2018, which indicates the gist of the allegations that she makes in this appeal. She said:

> **1. "The judge did not ensure that I understood the legal implications of withdrawing the claim for automatic unfair dismissal.**

2. The judge did not inform me that I had the right to refuse to withdraw the claim of automatic unfair dismissal.

3. The judge dealt with this matter last, after questioning me on several parts of my claim that I was not expecting to be dealt with during this preliminary hearing.

4. The judge did not clarify the meaning of automatic unfair dismissal or the TUPE regulations, although I had tried hard to understand them.

……

7. The only thing the judge did say with regards to my decision to withdraw the claim or not was, 'This is just about you'.

8. The judge confused me with this statement, and it totally threw me…"

14. The transcript indicates that at the outset of the hearing, the Employment Judge checked that the Claimant had had an opportunity to read the Respondent's submissions (page 1, lines 18 – 20). The Employment Judge explained the issues that were before him that day, in particular, whether any of the claims should be struck out; and he explained the sequence in which he would hear submissions (page 2, lines 2 – 8).

15. Mrs Fraser-Butlin then made her submissions on behalf of the Respondent in a clear and concise fashion. Amongst other points, she highlighted that the policy relating to the reimbursement of mileage had changed in 2001 and therefore predated the transfer, which occurred in April 2013 (page 3, lines 7 - 12 and lines 21 to 26). She went on to submit that there was nothing to connect the dismissal to the transfer and that the automatically unfair dismissal claim should be struck out (page 3, lines 21 to 26 and page 5, lines 3 – 6).

16. The Employment Judge gave the Claimant the opportunity to respond to the submissions. Her response begins on page five of the transcript. She addressed the regulation 4(4) **TUPE** point and the related breach of contract issues. She addressed the ordinary unfair dismissal claim and, in particular, points around the earlier final written warning, which she

challenged. During the course of her submissions on these points the Employment Judge asked a number of clarification questions, which she responded to.

17. I then come on to the passage in the transcript that deals directly with the issues before me. Both parties have made reference to aspects of it and I will quote in full from page 15, line 18 to page 17, line 10:

> **"Judge Harper: I do not know if you are going to go on to deal with it, but you have not dealt at all with your allegation that you were dismissed as a result of the transfer. Do you continue with that claim? (Lines 18 – 20)**
>
> **Miss Paul: "Well, only because everyone else has left and they were put under a lot of pressure through threats of disciplinaries and paperwork and various other little niggles that we never had prior to Virgin taking over, that none of my colleagues are left apart from one. Everyone has left. (Lines 21 – 24)**
>
> **Judge Harper: But how do you, I mean, what we have to deal with is your case, not other people's cases. How do you say that you bring an unfair dismissal claim because of the transfer? (Lines 25 – 27)**
>
> **Miss Paul: Because of them preventing me claiming the mileage, although my DCC colleagues were still able to. (Lines 28 – 29)**
>
> **Judge Harper: How is that as a result of the transfer? (Line 30)**
>
> **Miss Paul: Well, for some reason, they discriminated against me as a DCC contract employee, to no longer claim my mileage, whereas my other colleagues were still claiming their mileage. So, that was the start of it, and that's when I joined UNISON - (Lines 31 – 34)**
>
> **Judge Harper: Yes, but they did not dismiss you. (Line 35)**
>
> **Miss Paul: Not initially. (Page 16, line 1)**
>
> **Judge Harper: You were dismissed for alleged misconduct. (Line 2)**
>
> **Miss Paul: Yes, initially they put me on the final written warning, which I believe is unfair. (Lines 3 – 4)**
>
> **Judge Harper: But the claim you are bringing, as I understand it, and to adopt the Respondent's terminology, you are bringing what we call an ordinary unfair dismissal, which is what you and I have been discussing for the last few minutes; it is a conduct thing. But as I understand it, you are also saying that you claim what we call automatic unfair dismissal because you say that you were dismissed because of the TUPE transfer. (Lines 5 – 10)**
>
> **Miss Paul: Well, I can't say that definitely, because I couldn't, that is not for me to judge, I presume, and I presume that is what the barrister's put in there. I can't say it's directly related to that, all I can say is all my colleagues have left, and I was the one who was sacked. (Lines 11 – 14)**
>
> **Judge Harper: That is why I am asking you, in fact, whether you actually proceeded with that allegation of automatic unfair dismissal because of TUPE. It is a matter for you. I can't advise you, I can't advise them either. (Lines 15 – 17)**
>
> **Miss Paul: Probably, I don't know. I would say probably it is just normal unfair dismissal then and breach of contract. (Lines 18 – 19)**
>
> **Judge Harper: So, you understand the point that I have made? (Line 20)**

Miss Paul: Yes, I do, yes. I see what you were saying, yes, I can't prove that it is definitely to do with that then. (Lines 21 – 22)

Judge Harper: So, you think it would be fair or unfair for me to record that you do not proceed with the automatic unfair dismissal claim, alleging that you were automatically unfairly dismissed because of the TUPE transfer? And we just deal with, let us call it an ordinary one, for the sake of jargon. (Lines 23 – 26)

Miss Paul: Unfair dismissal and breach of contract? (Line 27)

Judge Harper: Yes. So, would you be happy for me to record that you withdraw the allegation of automatic unfair dismissal? Are you all right? (Lines 28 – 29)

Miss Paul: Yes. (Line 30)

Judge Harper: So, I am just going to write down something and as I write it, I am going to read it out, so that this is your opportunity to comment that I have correctly, or incorrectly, recorded something. Okay? So, as a result of dialogue between Judge and Claimant, the Claimant agrees to withdraw her claim alleging automatic unfair dismissal arising from TUPE transfer. For the avoidance of doubt, this leaves an allegation of ordinary unfair dismissal and unpaid wages, effectively, and mileage. Okay, are you happy with that I have correctly recorded – (Line 31 – Page 17, line 3)

Miss Paul: Does that include the time and a half? Will the courts consider that as well? (Line 4)

Judge Harper: I have included that in the unpaid wages, so, you are happy that I have correctly recorded that? (Lines 5 – 6)

Miss Paul: Yes. (Line 7)

Judge Harper: Because this is your opportunity to tell me I have got it wrong. All right? (Lines 8 – 9)

Miss Paul: Yes." (Line 10)

18. I make clear at this stage that there are two respects in which the Claimant does not accept that the transcript is accurate. I will return to those points during the Discussion and Conclusions section of my judgment.

19. After the exchanges I have quoted, the Employment Judge gave the Claimant an opportunity to add anything else she wanted to say in relation to the Respondent's submissions. He then questioned her about her financial position, as relevant to a potential deposit order, and she answered the questions he asked her about that.

20. The Employment Judge then had a short adjournment to consider the submissions. He then gave his decision. He said that whilst the position had come very close to him making an order striking out the claims, he was not going to do so, but he did think the claims were thin

and, for that reason, he was going to order a deposit to be paid. He said that, having regard to the Claimant's finances, he would order a deposit of £150 in total to be paid, comprising £50 for to the ordinary unfair dismissal claim (given the final warning and her difficulty in asserting anything other than conduct was the reason for the dismissal), and £50 for each of the two contractual claims relating to Saturday overtime and to mileage. He said he considered it would be very difficult for the Claimant to link the changes in the mileage allowance to the **TUPE** transfer. During the course of giving this judgment, the Employment Judge referred to the Claimant having withdrawn the automatic unfair dismissal claim.

21. Following this ruling, there was a detailed discussion relating to case-management orders and preparation for the substantive hearing. The discussion ranged over matters such as disclosure, the trial bundle, the hearing venue, the time estimate for the hearing, and witnesses. The Claimant participated in that discussion.

22. During the course of this discussion, the Employment Judge mentioned more than once the withdrawal of the automatically unfair dismissal claim. At one point he said, "Of course, one of the heads of claim, the **TUPE** head has gone now…" (page 25, lines 5 – 6). Later Mrs Fraser-Butlin pointed out that this claim would need to be removed from the list of issues. She then said, "I need to ask you to dismiss that specific point". The Employment Judge replied, "Yes, it will be done" and Mrs Fraser-Butlin clarified that it was just the automatically unfair dismissal claim that should be struck out (page 31, lines 21 – 25). The Claimant did not raise any query on those occasions.

23. There is one further passage I need to refer to from the transcript. I will come back to it when I set out my conclusions. During the case-management discussions, Employment Judge

Harper said to the Claimant, "Do you have any special requirements? I mean, you have conducted yourself very competently, if you do not mind me saying, without any difficulty. Have you got any requirements that we, the Tribunal, need to take into account?" Miss Paul replied, "Just obviously the time it is going to take me to reduce down my evidence." (page 26, lines 6 – 9) She went on to refer to the page limit on the trial bundle. She did not make any reference, either in answer to that question or otherwise, to having any special requirements.

The April 2018 final hearing

24. In April 2018, the Claimant's remaining claims were heard by the ET sitting at Exeter. In a decision sent to the parties on 9 May 2018, the ET dismissed both the complaint of ordinary unfair dismissal and, finding there was no breach of regulation 4 of **TUPE**, the claims for breach of contract and/or unlawful deduction from wages in relation to mileage and payment for Saturday overtime. The ET ordered the Claimant to pay costs in the sum of £3,000, having regard to her means.

25. As regards the mileage policy, the Tribunal found that the policy had been changed to the less generous basis in August 2011, that is to say, about two years before the transfer. Accordingly, the ET found that the change did not relate to the transfer (paragraphs 31 and 67 of the ET's decision). The ET found that, in practice, the old arrangements in relation to the mileage allowance had continued to apply to the Claimant until this was noted in 2015 following her return to work after suspension. The Claimant's unwillingness to abide by the new mileage policy was found to be a key issue for the Respondent, which led to the disciplinary investigations and, in turn, resulted in her dismissal (paragraphs 32 - 41 and 70 of the ET's decision).

26. In relation to the ordinary unfair dismissal claim, the ET found the Claimant was dismissed for misconduct, primarily because of her entrenched position in relation to the mileage allowance and also for a breach of confidentiality. The Tribunal concluded that the dismissal was procedurally and substantially fair, and in so doing emphasised the extant final written warning.

The appeal in UKEATPA/0512/18/RN

27. The Claimant attempted to appeal the ET's May 2018 judgment. The appeal was rejected pursuant to Rule 3(7). The Claimant submitted her Rule 3(10) application out of time and the Registrar declined to extend time. The Claimant's appeal against that decision was heard by Laing J and was unsuccessful. The Claimant's subsequent attempt to seek permission to appeal from the Court of Appeal was also unsuccessful. Accordingly, the current appeal has to be considered on the basis of the ET's May 2018 decision.

The Burns/Barke questions

28. In his Order sealed on 3 April 2019, HHJ Shanks directed that the Employment Judge be invited to answer the questions set out in the Claimant's email sent on 29 January 2019 and in the Respondent's document dated 30 January 2019. The questions reflected the issues raised in the amended grounds of appeal and in the Claimant's affidavit. The Employment Judge responded to indicate that he relied on the approved transcript of the hearing, to which I have already referred.

Relevant law

Academic appeals

29. It has been held on a number of occasions that it is not right for the EAT to hear an appeal which does not determine any issue between the parties and does not involve any practical results between the parties, see, for example, **IMI Yorkshire Limited v Olenda** [1982] ICR 69 and **Biwater Limited v Bell** EAT/218/89. However, as the EAT's discussion in both of these cases indicates, the assessment of whether an appeal should proceed will inevitably be fact sensitive and context sensitive. It is also recognised that, even where an appeal does not determine issues and does not involve practical results between the parties, exceptionally, the courts have the right to exercise jurisdiction, for example, where there is a public interest in doing so, see **Don Pasquale (A Firm) v Customs and Excise Commissioners** [1990] 1WLR 1108 CA at 1110G - H.

The ET's responsibilities in relation to unrepresented litigants

30. In **Drysdale v The Department of Transport (The Maritime and Coastguard Agency)** [2014] EWCA Civ 1083, the Court of Appeal reviewed earlier authorities and provided a summary of the principles concerning the nature of the assistance an ET should give to litigants appearing before it, particularly unpresented litigants. Barling J gave the lead judgment. At paragraph 49, he set out those principles as follows:

> **"49. From the authorities to which Mrs Drysdale referred (see above) I derive the following general principles:**
>
> **(1) It is a long-established and obviously desirable practice of courts generally, and employment tribunals in particular, that they will provide such assistance to litigants as may be appropriate in the formulation and presentation of their case.**
>
> **(2) What level of assistance or intervention is "appropriate" depends upon the circumstances of each particular case.**
>
> **(3) Such circumstances are too numerous to list exhaustively, but are likely to include: whether the litigant is representing himself or is represented; if represented, whether the representative is legally qualified or not; and in any case, the apparent level of competence and understanding of the litigant and/or his representative.**

(4) The appropriate level of assistance or intervention is constrained by the overriding requirement that the tribunal must at all-time be, and be seen to be, impartial as between the parties, and that injustice to either side must be avoided.

(5) The determination of the appropriate level of assistance or intervention is properly a matter for the judgment of the tribunal hearing the case, and the creation of rigid obligations or rules of law in this regard is to be avoided, as much will depend on the tribunal's assessment and "feel" for what is fair in all the circumstances of the specific case.

(6) There is, therefore, a wide margin of appreciation available to a tribunal in assessing such matters, and an appeal court will not normally interfere with the tribunal's exercise of its judgment in the absence of an act or omission on the part of the tribunal which no reasonable tribunal, properly directing itself on the basis of the overriding objective, would have done/omitted to do, and which amounts to unfair treatment of a litigant."

31. **Drysdale** was a case where the Claimant, represented by his non-legally qualified wife, had withdrawn his claim during the substantive liability hearing. His appeal against the dismissal of the withdrawn claim failed; the Court of Appeal found there had been no error of law on the part of the ET. In paragraph 61, Barling J said:

"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."

32. The Court of Appeal noted there was nothing to alert the ET that the decision to withdraw was other than voluntary or was made for some other reason that required the Tribunal to exercise greater caution than would normally be the case. The Court emphasised that the way the ET had conducted the relevant part of the hearing was a matter for its judgment and fell within the margin of appreciation it was to be accorded.

33. One of the cases cited in **Drysdale** was **Gee v Shell UK Ltd** [2003] IRLR 82 CA, which concerned an allegation of unfair pressure by an ET in the context of giving a costs warning. The Court of Appeal found that the EAT had correctly concluded that the ET had put

unfair pressure on the Claimant, which had caused her to withdraw her complaint of unfair dismissal, by warning her that she risked a substantial costs order if she persisted in her claim and the Tribunal ruled against her. The Court of Appeal observed that a Tribunal should only give cost warnings where there was a real risk that an order for costs would be made against an unsuccessful Claimant at the end of the hearing and must be careful not to put unfair pressure on a litigant in person. The Claimant's amended grounds of appeal quote from Scott Baker LJ's judgment at paragraph 21: "In my judgment a Tribunal must be particularly careful not to place unfair pressure on a litigant in person. A party who is legally represented has the opportunity for his representative to put any remarks by the Tribunal in context." At paragraph 29, Scott Baker LJ continued, "The ultimate question is whether an applicant has been denied a fair hearing." In his judgment, at paragraph 40, Simon Brown LJ said:

> **"The all-important dividing line… was between on the one hand "robust, effective and fair case management" and on the other "inappropriate pressure and unfairness". As, however, the judge recognised, that line cannot be a sharp one: costs warnings cannot properly be characterised as having applied "inappropriate pressure" or as being "unfair" unless no reasonable tribunal would have given them. Given the obvious need for "robust and effective case management" which might sometimes positively require a costs warning, there must be a wide margin of appreciation (a substantial area of discretionary judgment) open to the tribunal as to when and in what terms the warning should be given. It seems to me that only if it is perfectly plain to the reviewing court (be it the EAT or the Court of Appeal) that the tribunal has overstepped the bounds of propriety will an appeal on this basis succeed."**

34. In that case the Claimant succeeded in her appeal, in essence, because the ET had given a costs warning in a situation where it was, in fact, relatively unlikely that any costs order would have been made, had the Claimant continued with her claim.

Abandonment of a claim

35. In **Segor v Goodrich Actuation Systems Ltd** [2012] UKEAT/0145/11/DM, Langstaff P presiding, the EAT held that in the particular circumstances of the case the ET had failed to take the correct approach in law in determining whether there had been an abandonment of the claim. The EAT stressed that a Tribunal needed to be able to soundly reach the conclusion that

an abandonment was clear, unambiguous, and unequivocal (paragraphs 11 and 33); and that this could not be said of what had occurred before the ET (paragraph 34). In that case a very surprising concession had been made by the Claimant's lay representative part of the way through the hearing before the ET. In the context of this issue the EAT also said at paragraph 32, "We consider it important for a Tribunal to pause, and check and note with clarity and care what precisely is being said."

36. The **Segor** approach was followed in **Campbell v OCS Group Limited & Anor** [2017] UKEAT/0188/16/DA by Simler P (as she then was) sitting alone. She said at paragraph 19:

> **"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."**

The parties' submissions

37. From the Claimant's amended grounds of appeal (which were settled by Mr Mehta of Counsel), her skeleton argument and her affidavit (which the Claimant prepared herself) and her oral submissions to me today, her contentions can be summarised as follows: (1) there was a special responsibility on the Employment Judge, given that she was a litigant in person, to ensure she understood the implications of withdrawing her claim for automatically unfair dismissal; (2) he failed to discharge this responsibility and failed to ensure that she understood what she was agreeing to at the time; (3) he also failed to inform her that she had a choice whether to withdraw this claim or not; (4) she was confused and uncertain as the Employment Judge did or should have appreciated; (5) further or alternatively, the Employment Judge put undue pressure on her to withdraw her automatically unfair dismissal claim; (6) the Employment Judge should have been sensitive to her mental health issues, which have been

raised in her particulars of claim; and (7) in consequence, she made the wrong decision in withdrawing her automatically unfair dismissal claim.

38. The Respondent's submissions in response can be summarised as follows: (1) the appeal is academic as the factual findings made by the ET in the May 2018 judgment preclude any successful automatically unfair dismissal claim based on regulation 7(1)(b) of **TUPE** and there is no matter of general public importance that warrants the determination of this appeal; (2) in any event, the authorities show that a Tribunal has a wide margin of appreciation in assessing the appropriate level of assistance or intervention that a litigant in person requires; (3) the Claimant's withdrawal of her automatically unfair dismissal claim was clear, unequivocal, and unambiguous, as the transcript shows. She was aware of the difficulty with this claim, namely, that she could not identify the link between her dismissal and the transfer, and the Employment Judge checked that she understood and agreed with what he was recording; (4) the Claimant's decision to withdraw this claim accorded with the reality of the difficulties that existed with this part of her case; (5) the Claimant did not display or raise confusion or mental health issues during the hearing; she appeared able to deal with the matters raised; and (6) the Employment Judge did not put her under any unfair pressure.

Discussion and conclusions

Is the appeal academic?

39. Whether an appeal has become academic in the sense that the EAT should refuse to hear it is inevitably a fact-sensitive question. In both **IMI Yorkshire Imperial Ltd v Olender** and **Biwater Ltd v Bell** (which I have already referred to), the appeal had become entirely academic from the point of view of at least one of the parties. In the first of these cases, it was

academic as the employer had already complied with the ET's judgment in the employee's favour. In the second case, it was academic because the claim had now settled.

40. By contrast, in the present case, there remains from the Claimant's perspective, a live, unresolved issue as to whether she was treated lawfully and appropriately at the hearing on 20 December 2017. I say this acknowledging that the practical consequence of the May 2018 ET decision is that she cannot now successfully advance an automatically unfair dismissal claim based on regulation 7(1)(b) of **TUPE**, even if this appeal were to succeed, because of the unassailable findings made in May 2018 that the change in the mileage policy was not related to the transfer, and, also, that she was dismissed legitimately for conduct reasons. Further, in addition to the Claimant's perspective, there is, in my judgment, a public interest in the EAT hearing and determining what has already been assessed (albeit prior to the availability of the transcript) as an arguable instance of a failure to accord appropriate treatment to a litigant in person.

41. I also consider that I should be slow to take the course urged on me by the Respondent in circumstances where Laing J specifically considered the potentially academic nature of the appeal at the Rule 3(10) hearing in November 2018 but was persuaded to permit the matter to proceed. Thereafter, the matter has proceeded on the basis of being set down for a full hearing, and the parties have prepared accordingly. There were two features, in particular, that Laing J identified as persuading her in this respect. Firstly, at that point, the Claimant had an extant application for permission to appeal to the Court of Appeal in relation to the substantive May 2018 decision made by the Tribunal. Plainly, that factor no longer applies. However, secondly, she considered, "It is nonetheless important, from the public's point of view that any arguable procedural irregularities are corrected by this tribunal and that the Claimant's rights should, in

any event, irrespective of the merits of the underlying appeal, be vindicated in that respect," (page 11 of the transcript).

42. I agree. I do not suggest that all alleged procedural irregularities arising at case-management hearings would necessarily have a requisite public interest dimension, but given the particular procedural irregularities that are alleged in this context, I do consider that element is present. Indeed, I venture to suggest that it is in the interests of both parties for this matter to be substantively determined.

43. Therefore, for these reasons, I reject the Respondent's submission that I should decline to consider and rule on the substantive appeal.

The substantive grounds of appeal

44. I will consider both grounds of appeal (identified in the introduction to this judgment) together because of the factual overlap.

45. The principles identified in **Drysdale v The Department of Transport (The Maritime and Coastguard Agency)** (above) emphasise that the level of assistance or intervention that is appropriate for an ET to provide to a litigant in person will depend very much on the circumstances of the particular case. The principles also emphasise that this determination is very much one for the ET hearing the case to make and that the EAT will not normally interfere unless the Tribunal has exercised its judgment in a way that no reasonable Tribunal would do. More specifically, where a claim is withdrawn, the ET will need to be satisfied that the decision was clear, unambiguous, and unequivocal, but the level of inquiry required of the ET in any particular instance will depend upon whether the circumstances are such as to give rise to a

reasonable concern that this may not be the case, see the passages I have already cited from **Segor v Goodrich Actuation Systems Ltd** and from **Campbell v OCS Group Ltd.**

46. In this instance, I note a number of circumstances as being of particular relevance.

(a) The Order made following the case-management hearing on 2 November 2017 indicated in terms that the hearing on 20 December 2017 would consider whether all or any of the claims should be struck out. I have already noted that the Claimant accepted at the start of the hearing on 20 December 2017 that she had had advanced sight of the Respondent's skeleton argument. The Employment Judge went on to outline the purpose of the hearing. Further, the transcript shows that the pertinent issue in relation to the automatically unfair dismissal claim, namely whether the dismissal was linked to the **TUPE** transfer, was clearly identified in Counsel for the Respondent's oral submissions and then clearly raised by the Employment Judge with the Claimant. Accordingly, in my judgment, the Employment Judge had no reason to suspect the Claimant was taken by surprise, or, indeed, confused when she was asked to address this point; at least not unless she indicated this was the case or acted in a way that positively gave rise to that possibility.

(b) Similarly, the point in question did not involve an appreciation of complex legal materials or legal concepts. The question was simply why the Claimant said her dismissal was linked to the **TUPE** transfer. On several occasions, the Employment Judge put this very question to her simply and clearly. There were four instances of this in the passage from the transcript I quoted earlier, respectively at page 15, lines 19-20, lines 26-27, line 30, and then page 16, lines 9 – 10.

(c) I consider that when the Employment Judge raised the automatically unfair dismissal claim with the Claimant during her submissions (at page 15, line 18 onwards in the passage I have already quoted from the transcript), this was done to assist her by way of a prompt to remind her that this was an issue the Respondent had raised and that she might want to address. She was not *required* to do so, as she has suggested in this appeal; the Employment Judge was simply giving her an opportunity to articulate her response and giving her the opportunity to explain how she put her case on this issue, in other words, to tell him how and why she said her dismissal was linked to the **TUPE** transfer. I am also quite satisfied that his questions that followed the initial exchange on this topic were asked with a view to understanding how the Claimant put her case, so he could fairly and accurately evaluate the competing submissions.

(d) The Claimant has highlighted, particularly in her affidavit, the passage which appears in the transcript at page 15, lines 21 to 27 where the Employment Judge encouraged the Claimant to focus on her own case, when she made reference to other employees ("But how do you, I mean, what we have to deal with is your case, not other people's cases. How do you say that you bring an unfair dismissal claim because of the transfer?"). In my judgment, there is nothing remarkable in the Employment Judge seeking to understand how the Claimant said *her* dismissal related to the transfer, in particular in circumstances where the Respondent was advancing a potentially distinct conduct reasons for her dismissal.

(e) Importantly, the Claimant accepted during the exchanges I have quoted and in response to the Employment Judge's questions, that she could not say her dismissal was directly related to the transfer (page 16, lines 11 – 14 of the transcript).

(f) After receiving this response, it is unsurprising that the Employment Judge asked the Claimant if she was proceeding with the automatically unfair dismissal allegation. He did so in a context in which he explicitly indicated, "It is a matter for you". In light of both the general context and what followed immediately thereafter, I do not accept that the Employment Judge's conduct was such as to create the impression that the Claimant had no choice over whether to withdraw this allegation. In the oral submissions made to me today, the Claimant placed particular emphasis on the proposition that she felt she could not stand up to the Employment Judge and communicate a contrary decision, when he was indicating that he thought she should withdraw the automatically unfair dismissal claim. She said to me, "I didn't have the opportunity to say yes or no, and I didn't think I had a choice." However, the transcript shows that there were various occasions during the hearing when the Claimant questioned or clarified observations made by the Employment Judge. It also shows that she felt able to persist with her allegations where she considered it appropriate to do so, perhaps most notably in relation to a proposition that documentation relating to her earlier final written warning was forged, despite the Employment Judge giving her (in appropriate terms), a costs warning in relation this (page 9, lines 22 - 35 of the transcript). She nonetheless proceeded with that allegation and included it in the case she presented at the substantive merits hearing in April 2018.

(g) The Respondent also relies on the exchange recorded in the transcript at page 16, lines 15 - 20 as showing that the Claimant understood the matter the Employment Judge was raising with her. However, this is where the Claimant takes issue with the accuracy of the transcript. She denies saying the words that are attributed to her in lines 18 and 19 ("I would say, probably, it is just normal unfair dismissal then and breach of

contract."). She told me she would not have used those kinds of legal descriptions in relation to her claims and that the Employment Judge must have said this. Whilst transcripts are not infallible, even when approved by the Judge in question, it appears unlikely that that phrase was said by the Employment Judge rather than by the Claimant. The transcript version is also reflected in Mrs Fraser-Butlin's own notes, which were taken contemporaneously and which both parties agreed I could refer to. Furthermore, the next words said by the Employment Judge, "So, you understand the point that I have made" follow more naturally if the Claimant had just spoken, rather than if the Judge was tacking this on to saying that the case was probably just normal unfair dismissal and breach of contract. If it was the Claimant speaking at this time, as per the transcript, then this was an indication that she understood the point raised and its significance. However, even if I assume for present purposes, in the Claimant's favour, that she did not say the disputed words and they were said by the Employment Judge, it does not affect my overall conclusion in light of the other features that I highlight.

(h) Immediately after the passage I have referred to, the Claimant was asked if she understood. She is quoted as saying, "Yes, I do, yes, I see what you are saying, yes. I can't prove that it is definitely to do with that then." She told me she thought the transcript was inaccurate in that she did not say yes as many as three times; it was more likely that she said it once. However, she does not dispute that when asked by the Employment Judge if she understood, she said that she did. The fact that she then goes on to say, "I can't prove that it is definitely to do with that, then," read in context, shows a clear understanding that the difficultly she was presented with was that she could not show the transfer was linked to the dismissal. Furthermore, when answering my questions during the appeal hearing today, the Claimant positively accepted that she did

understand this point; putting rather more emphasis instead on the proposition that she, nonetheless, felt she did not have a choice.

(i) When the Employment Judge asked whether the Claimant was withdrawing her automatically unfair dismissal claim, he read aloud what he was noting in that regard, and he told the Claimant twice that she had the opportunity to indicate whether his note was correct or not (page 16, line 31 - page 17, line 10 of the transcript). The Claimant then agreed that what he had read out was correct. Not only did this indicate to the Employment Judge that the Claimant was confirming the withdrawal of her claim, but I accept Mrs Fraser-Butlin's submission, that the way this was conducted amounted to the pause and careful check envisaged by the EAT in **Segor v Goodrich Actuation Systems Ltd.**

(j) Deciding to withdraw the automatically unfair dismissal claim was a manifestly sensible course for the Claimant to take, given the lack of apparent link between the transfer and the dismissal. The situation is quite factually distinct from that which occurred, for example, in **Segor**, where the ET were very surprised by the apparent concession made midway through the hearing in a way that seemed to undermine that Claimant's case.

(k) The relevant exchanges in this case took place approximately halfway through the hearing and at a logical point in the submissions, not right at the end of the hearing, as the Claimant earlier suggested in her written materials.

(l) At no stage did the Employment Judge couch matters in terms of it being a decision he had made that the Claimant could not pursue this claim, as opposed to ascertaining from her what she proposed to do.

(m) Whilst the Employment Judge did not say in terms, "The consequence of you withdrawing the automatically unfair dismissal claim, if that is what you decide to do, is that you will not be able to pursue it", in my judgment, this was quite clear from the context. Furthermore, there was nothing to suggest to the Employment Judge that the Claimant did not understand that. Indeed, when I asked the Claimant today whether she accepted that she realised at the time that withdrawal meant she could not pursue that allegation as part of her claim, she very fairly replied to me, "It was kind of obvious".

(n) The passage that I have earlier referred to from page 26 of the transcript indicates that the Employment Judge was not aware that there were any mental health issues affecting the Claimant's ability to represent herself and, indeed, she did not suggest, when he raised that question, or at any other point in the hearing, that there were. The earlier inclusion of a disability discrimination claim, which had been disputed by the Respondent on the basis that the Claimant was not disabled and which had been withdrawn some months earlier during a time when she was legally represented, was not sufficient to put the Employment Judge on notice that he was required to proceed in a way other than that which he adopted. As he stated in this exchange, the Employment Judge's perception was that the Claimant had conducted the hearing, "Very competently". It is apparent from the transcript that she was engaged and articulate on a range of issues during the hearing, as I have already noted.

47. I do not underestimate the difficulties for a litigant in person in the Employment Tribunal system, and, as the Claimant told me, "It has been an extreme learning curve". Nonetheless, having regard to all the circumstances that I have identified and the principles I must apply, I consider that the Claimant's withdrawal of her automatically unfair dismissal claim was clear, unambiguous, and unequivocal and that there was nothing to reasonably suggest otherwise to the Employment Judge at the time. Furthermore, I conclude that the Employment Judge acted properly and quite understandably, given the strike out application he had to determine, with a view to clarifying and understanding the way the Claimant was putting her case. The questions he asked of her were fair and clear, and the Claimant was given an appropriate opportunity to consider whether or not to withdraw this part of her claim, in circumstances where it was clear what the implications of that were for the future pursuit of the claim. Equally, there was no unfair pressure put on her to do so.

48. Therefore, for all these reasons, I dismiss the appeal.

49. As an addendum to my judgment, I record that the submissions before me finished at approximately noon. I then indicated I would need some time to consider matters before giving my decision and that I proposed to give judgment at 2.00pm. Before rising, I checked with the parties that this was convenient for both of them and I was told that it was. It was only when I returned to court at 2.00pm intending to give an *ex tempore* judgment that I was made aware, via the usher, that the Claimant, in fact, had to leave before 2.30pm in order to catch a pre-booked coach from Victoria Station to travel back to her home in Devon. I explained that it would take longer than the 20 – 25 minutes available before the Claimant had to leave for me to deliver judgment and I discussed the various options with the parties. It was agreed by both parties that I would proceed to give my judgment as proposed, with the Claimant leaving when

she needed to do so and that I would direct that a transcript of the judgment would be prepared (which would then be available to the parties). As I explained to the Claimant, there was no question of me dealing with any consequential or ancillary matters in her absence. This was the course that was then followed: the Claimant left at approximately 2.20pm whilst I was part the way through giving this judgment; a transcript of the judgment was directed and I extended the time for any application for permission to appeal, so that it ran from the Claimant's receipt of the transcript, rather than earlier.