Neutral Citation Number: [2025] EAT 9

Case No: EA-2022-000756-DXA

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 14 January 2025

Before:

JUDGE J KEITH

- -

Between:

MS BAZGHA ANWAR

Appellant

- and -

BOOTS MANAGEMENT SERVICES LTD

Respondent

- -
- -

The **Appellant** appeared **in person**
Mrs Grace Holden (instructed by Shoosmiths LLP) for the **Respondent**

Hearing date: 14 January 2025

- -

JUDGMENT

SUMMARY

PRACTICE AND PROCEDURE

Even assuming that the Appellant had consented to the withdrawal of one of her claims, which the Appellant disputed, the Employment Judge erred in dismissing that claim at a private Preliminary Hearing at which she was legally unrepresented, having indicated to her that two of her claims as formulated appeared to be inconsistent and had no reasonable prospects of success, without prior warning that the Employment Judge was considering dismissing one of the claims, and where a previous Judge had already recorded the fact of the two separate claims and had given no indication that they were legally inconsistent. While there is a wide margin of appreciation for Employment Tribunals in relation to case management and when considering the withdrawal of claims, on the particular facts of this case, the Employment Judge's actions were outside that wide margin and amounted to a procedural error of law.

JUDGE J KEITH:

1. These written reasons reflect the full oral judgment which I gave to the parties at the end of the hearing.

2. I refer in these reasons to two bundles. Where I refer to a page in the core bundle, I do so as 'x/CB'. Where I refer to a page in the supplementary bundle, it is to 'x/SB.'

3. The Appellant appeals against the decision of Employment Judge Drake (the 'EJ') who, in a decision dated 10 June 2022, dismissed the Appellant's appeal for 'automatic' unfair dismissal, at a Preliminary Hearing held in private.

The Appellant's claim and litigation history

4. By way of background, the Appellant had sufficient service to bring the claim for "ordinary" constructive unfair dismissal, having been employed by the Respondent from 5 October 2015 to 4 July 2021. She had claimed unfair dismissal in her Claim Form (41/CB) but had also referred to 'other claims' where she had claimed a breach of the **Working Time Regulations 1998** and a breach of her contract, in response to which she resigned.

5. At an earlier Preliminary Hearing held in private on 21 December 2021, Employment Judge Knowles had recorded the following (67-68/CB):

> "22. The Claimant confirmed that the March, May and June notifications to her employer (the latter being her grievance) are what she states were her protected disclosures. She states that she was notifying them of health and safety matters, specifically relating to daily rest under the Working Time Regulations 1998. She states that the detriment she suffered was the Respondent failing to resolve her grievances.
> 23. The Claimant also stated that the detriment she suffered, as a result of her protected disclosures, was dismissal. I noted that this would be a Section 103A claim of automatically unfair dismissal under the Employment Rights Act 1996. I explained to the Claimant that dismissal cannot be a detriment under Section 47B. See section 47B(2).
> 24. I did acknowledge that the Claimant has a claim of automatically unfair dismissal for a protected disclosure under Section 103A. But it is a separate claim to her claim of detriment (failure to resolve her grievance) under Section 47B."

The Judgment under challenge

6. Following a subsequent Preliminary Hearing held in private before the EJ on 10 June 2022, the

EJ made both case management orders and gave a judgment. At that hearing, the Appellant represented herself. The Respondent was represented by a solicitor, Ms Clapham. The EJ recorded in the case management orders at page 9/CB the following case summary:

> "The Complaints
> 45. The Claimant is making the following complaints:
> 45.1 Constructive unfair dismissal;
> 45.2 Unlawful deductions from her pay;
> 45.3 Breach of the Working Time Regulations;
> 45.4 Failure to pay her full entitlement to holiday pay;
> 45.5 Detriment as a result of making a Public Interest Disclosure;
> The above claims remain extant for testing before a full panel hearing.
> The following are the claims she sought to make but which are either dismissed or leave to add them by way of amendment has been refused:
> 45.6 Automatically unfair dismissal because of having made a public interest disclosure under Section 103A ERA; she recognised this as a separate head to detriment under Section 47B because of the effect of Section 47B(2) which provides that detriment under this section does not include dismissal – in effect the Claimant opted to rely on Section 47B and complain that the detriment she faced was alleged failure by the Respondents to address and accept her grievance;"

7. In the separate judgment, at 16/CB, the EJ stated:

> **"1.** The Claimant's claim (in case number 2601526/2021) of automatically unfair dismissal is by consent struck out in accordance with Rule 37(1) paragraphs (a) to (e) inclusive in Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ("the Rules"), on the grounds that the claim has no reasonable prospect of success, and the Claimant has not sufficiently complied with Case Management Orders by EJ Knowles 21 December 2021.
> 2 The Respondent's counterclaim (in case number 1806578/2021) is also struck out as it has no prospect of success.
>
> Reasons
> (1) The Claimant recognises that her primary complaint of constructive unfair dismissal claim is inconsistent with her original claim that she had been dismissed unfairly because of allegedly making a public interest disclosure for the purposes of section 103A of the Employment Rights Act 1996 as amended ("ERA") and that she sought to pursue her claims in respect of detriment caused by making such disclosure which was best pursued under Section 47B ERA.
> (2) The Respondent's counterclaim was expressed in the erroneous belief that the Claimant was pursuing a claim (inter alia) of breach of contract pure and simple which I concluded was incorrect. I found that the Claimant's claims were purely for constructive unfair dismissal, detriment (failing to deal with her grievances as distinct from dismissal) as a result of making a public interest disclosure, breach of the Working Time Regs and failure to provide or pay holiday entitlement in full. The case had not been perceived by the Tribunal on initial case sift as being a claim of breach of contract and had not been coded as such, though this is not definitive. On examination of the pleadings I found that the Respondents were indeed mistaken and I note that when this was discussed today, they did not resist the proposal for this part of their defence being struck out which therefore disposes of action number 1806578/2021

> (3) For the sake of completeness, I set out below the basis upon which I had to consider the position so far as set out in relevant parts of Rule 37: -
> (1) At any stage of the proceedings, either on its own initiative or on the application of a party, a tribunal may strike out all or part of a claim or response on any of the following grounds -
> (a) that it . .. has no reasonable prospect of success;
> (b) ;
> (c) for noncompliance with any of these Rules or with an order of the tribunal;"
> [the underlining is this Tribunal's emphasis]

Events after the dismissal of the automatic unfair dismissal claim

8. On 12 June 2022 (72/CB), the Appellant wrote to the ET reiterating that she would be pursuing her claim of automatic unfair dismissal. She said:

> "I feel that the stress of the hearing meant that I may not have articulated this well, and I just thought I would clarify matters, if this was unclear from what I had said or if there was any misunderstanding, as I did go into quite some detail about the detriment aspect of the claim."

9. She added, (74/CB):

> "In addition to my previous email, now that I have looked at my notes. Can you please clarify the reason why Automatic Unfair Dismissal was said to be disposed of on 10/06/22? Is it because I am already claiming Constructive Dismissal? Or can I still claim Automatic Unfair Dismissal with Constructive Dismissal?"

The reconsideration application

10. The Appellant then made a reconsideration application on 17 June 2022 (76/CB):

> "I am writing for reconsideration of a judgment that was handed out as a result of the Preliminary Hearing on June 10th 2022.
> Employment Judge Drake dropped Automatic Unfair Dismissal. I am writing to further describe this claim so that this may be reconsidered, as I may not have articulated myself well as I was under some stress/have been suffering with some fatigue from a recent infection with Covid-19. I did not want Automatic Unfair Dismissal dropped…. Not listening to my grievance and my loss of trust and confidence in my employer were also a whistleblowing detriment, but also the stress, feeling rundown and anxious were all a result of the way I was being treated by my employer.
> Therefore, as the protected disclosure/asserting WTR rights is a contributory factor to my overall dismissal and would be considered dismissals in themselves (i.e. not being listened to and the company not committing to abiding by WTRs leading to my reduced trust in my employer). I would like an Employment Judge to kindly reconsider the judgment in relation to my case in the interests of justice. It would be much appreciated if Automatic Unfair Dismissal could be left in as I can then actively pursue this claim, as it is relevant to my case. Judge Knowles has previously discussed this as being part of my claim during the first Preliminary Hearing held in December 2021.
>
> The Judge holding this hearing in June 2021 mentioned he has had a recent infection with Covid-19 himself as well."

11. The EJ responded by refusing the reconsideration request on 23 June 2022, with the

following reasons (1/CB):

> "On the day of the preliminary hearing, the Claimant accepted that her claim was limited to constructive dismissal and that her claim for automatic unfair dismissal could not proceed. Accordingly, I explained that it was therefore to be treated as dismissed on withdrawal but leaving the constructive dismissal claim extant."

The Appellant's Appeal

12. In her Notice of Appeal (19/CB), the Appellant states:

> "3) Protected disclosures (whistleblowing): Asserting rights under WTRs, as breaches illegal, and stating it has an impact on patient safety (ERA 43B). Made disclosures to management (ERA 43C). Employee (Appellant) refusing to work the shift (employee asserting rights under WTRs) and due to impact on patient safety and her own safety, which led to loss of employment (ERA 45A, 44, 101A/103A- unfair dismissal & in relation to WTRs). Employer failed to act on the face of it with their shift planning and ignored the Appellant (see above).
>
> 4) The employer did not act upon the issues and therefore the Appellant was being automatically and unfairly dismissed (ERA 100/101A/103A). They did not process/deal with the grievances. At first the Appellant was told she would get a letter in the post after the grievance hearing, then later there was no letter. This was unfair treatment and the Appellant did not feel she was being treated like an employee at the latter stages of her employment at all. It is all linked… Therefore the ERA has been misinterpreted on 10/06/22. The judge wanted to go with the Respondent's list of claims from their agenda."

The order for a preliminary hearing and subsequent grant of permission

13. Mathew Gullick, KC, sitting as a Deputy High Court Judge in this Tribunal, ordered that there be a Preliminary Hearing of the Appellant's appeal. He observed that:

> "The Appellant's claim for "automatic" unfair dismissal was dismissed (the Employment Judge stated, with her agreement) at a preliminary hearing on 10 June 2022 on the basis that (1) it was not consistent with her claim to have been constructively dismissed, and (2) the Appellant had breached an earlier case management order. There may be arguable errors of law in the decision appealed, and this case merits consideration at an Appellant-only Preliminary Hearing in the EAT, with written submissions being provided by the Respondent.
>
> In particular, I am not satisfied (without having at least some input from the Respondent, which may be able to point the EAT to authority on the issue and will, in any event, by able to set out the arguments that it made to the Employment Judge) that a claim to have been constructively dismissed (if established) is necessarily inconsistent with a claim that such constructive dismissal was for an automatically unfair reason (in this case, under section 103A of the Employment Rights Act 1996). If there is (as a matter of law) no such inconsistency, then the parties (and the Employment Judge) may have proceeded on a mistaken basis at the preliminary hearing below. It may, of course, be the case that the issue was argued before the Employment Judge on the basis that although such a claim is not impermissible as a matter of law, it was not one that was capable of arising on the particular facts of this case (even if the Appellant were to establish all the facts alleged by her). If that is the position, then the Respondent can

> explain that in writing to the EAT.
>
> It is also not clear to me (a) in what respects the Appellant may have been in breach of the earlier case management order and (b) why such breach(es) ought to have resulted in the claim under section 103A being struck out; or indeed if the Respondent argued, or the Employment Judge found, that this was an independent reason why the claim under section 103A should not proceed. Input from the Respondent as to the relevance of this issue, from its perspective, would also be of assistance. I note that although the breaches of the earlier case management are not specifically identified in the judgment and reasons being appealed, there are some such breaches identified in the (separate) case management order also made following the hearing on 10 June 2022, but it is not entirely clear to me whether they were confined to other aspects of the claim or whether they extended to the claim under section 103A."

14. The Preliminary Hearing took place before Caspar Glyn KC, sitting as a Deputy High Court Judge on 22 November 2023. He granted permission for the appeal to proceed. He did so for the following reasons (29/CB):

> "It is arguable that C's recognition/acceptance that her claim was limited to constructive dismissal and could not proceed was her recognition/acceptance of the expressed view of the Judge. If that was the case, then it is arguable, that the expressed view of the Judge, that a section 95(1)(c) **Employment Rights Act 1996** constructive dismissal claim is inconsistent with or limits a claim from section 103A **ERA 1996** was an error of law which caused the Claimant to act as she did."

The parties' respective positions

The Appellant's position

15. I summarise the gist of the Appellant's skeleton argument and oral submissions. The Appellant relies on the case of **Flintshire County Council v Sutton** [EAT/1082/02] as authority for the proposition that detriments or omissions could be done of the ground of protected disclosures and that these could feed cumulatively into a breach of the implied term of mutual trust and confidence. The EJ had told the Appellant at the hearing on 10 June 2022 that she must choose between an automatic and an ordinary unfair dismissal claim. She had been put 'on the spot' as she did not wish to choose between the two claims.

16. The case management orders from the Preliminary Hearing before EJ Knowles, dated 12 December 2021, showed that both claims could be made. Alternatively, the EJ had dismissed the Appellant's claim of automatic unfair dismissal on the basis that the EJ had told the Appellant that she could not claim both that she was subject to a detriment done on the

ground of a protected disclosure and claim automatic unfair dismissal, which was not correct.

17. The Appellant disputed that she had changed the basis of her claim or was inconsistent, as contended for by the Respondent. The Respondent argues that the Appellant was inconsistent as she claimed either to have consented on the basis of inappropriate interventions by the EJ, or she had not consented at all. Rather, the Appellant said the EJ had told her that she needed to "nail her colours to the mast." She referred to the notes of the Respondent's solicitor, Ms Clapham, who appeared before the EJ, at 27/SB. She was forced to pick one of two options, either claims of detriments done on the ground that she had made a protected disclosure and an ordinary unfair dismissal, or no claim of detriments, but a claim of automatic unfair dismissal. The Appellant could bring claims of detriment and automatic unfair dismissal, as Mrs Holden accepted was consistent with the case of **Price v Surrey County Council & Or** [EAT/0450/10] (see paras [51] and [52]). There could be an omission done deliberately on the ground of a protected disclosure, in response to which an Appellant resigned. This could form the basis of both detriment and automatic unfair dismissal claims, if both were on the ground of the protected disclosure.

18. The Appellant disputed that she was putting her case now before this Tribunal in a way that she had not done before the EJ. She referred to her witness statement before the EJ at 2/SB, where she had stated about being singled out because she had raised issues. She made clear that she had not agreed to dropping her automatic unfair dismissal claim and this was a point that she had made in her reconsideration request (see 76/CB).

19. The Appellant explained that in her Notice of Appeal, she had referred to the EJ misinterpreting the **ERA 1996** in regarding her claims as mutually exclusive, when they were not, or the EJ had wanted to agree with the Respondent's proposed list of issues from their case management agenda (see 19/CB).

The Respondent's position

20. I summarise the Respondent's Answer and the detailed skeleton argument, as well as Mrs Holden's oral submissions.

21. Mrs Holden set out a number of general propositions on the withdrawal of complaints. A wide margin of appreciation applied to a Tribunal in assessing whether a claimant wished to withdraw a claim (see para [49] of **Drysdale v The Department of Transport (The Maritime & Coastguard Agency)** [2014] EWCA Civ 1083). This was in the context of the overriding objective and the expectation that ETs should exercise case management, which was an important part of their role in narrowing down issues (see **McKinson v Hackney Community College & Ors** UKEAT/0237/11 and **St Christopher's Fellowship v Walters-Ennis** [2010] EWCA Civ 921, para [14].) Finally, this Tribunal in **Fairbank v Care Management Group** [2012] 3 WLUK 603, para [23] had emphasised that case management should take place to ensure that the issues identified were not more numerous than necessary. In the context of appropriate case management, the EJ had done nothing more than discuss with the Appellant the precise nature of her claims. The EJ had not exerted inappropriate pressure on the Appellant to withdraw her claim but had acted properly to clarify her case. The EJ was not required to invite any representations before dismissing a claim upon a withdrawal.

22. Moreover, and specifically in relation to this appeal, the Appellant had not pursued any ground of appeal based on the way the EJ had had disposed of her claim, namely by a strike-out by consent. Therefore, any authorities on whether the Appellant's withdrawal was clear or unambiguous, such as **Segor v Goodwich Actuation Systems** [EAT/0145/11] were not relevant. Rather, the available evidence in this case, including, critically, Ms Clapham's notes, were consistent with the Respondent's position that the EJ had not expressed a view that there was a fundamental inconsistency between a claim of constructive unfair dismissal and automatic unfair dismissal or claims of detriments. The Respondent accepted, in principle, that a claimant could bring a claim of constructive unfair dismissal where the principal reason was

a protected disclosure and that it was possible for someone to resign in response to a detriment done on the ground of a protected disclosure.

23. However, on the facts of this case, the EJ had asked the Appellant about the factors which had caused her to resign and had noted that they appeared to be slightly contradictory because one appeared to refer to a protected disclosure and the other to unsatisfactory health and safety arrangements. This was not a reference to incompatibility between ordinary and automatic unfair dismissal claims in principle, but in how the Appellant put her claim. The Appellant said that the detriment she suffered was a failure to resolve the grievance, not her constructive dismissal. This was reflected in the case management orders whereby she had opted to rely on **Section 47B ERA 1996**. While the EJ had referred to an inconsistency, the EJ had not said that it was not possible for the Appellant to bring the claim under **Section 103A 1996**, which involved constructive unfair dismissal.

24. Moreover, had the EJ told the Appellant that she could not bring a claim of constructive unfair dismissal where the principal reason was the protected disclosure, the Appellant would have said this in subsequent correspondence of 12 June 2022. Instead, she had queried whether she could still claim automatic unfair dismissal and constructive unfair dismissal. This was a question rather than a positive assertion. What was very clear was that the Appellant afterwards had, perhaps, not clearly understood what had taken place, and was seeking clarification but that was no reason to disturb the EJ's dismissal of her automatic unfair dismissal claim. If that were to occur in every case, then that would impede the proper case management of the hearings.

25. Taking into account the Appellant's Claim Form, which the EJ had unarguably done, and the Appellant's witness statement, her focus was upon the impact of an alleged breach of the **Working Time Regulations 1998** and not upon the making of a protected disclosure.

26. The EJ had, therefore, acted appropriately in case managing the issues. In that context,

this Tribunal should be slow to set aside a withdrawal or a disposal of a claim by consent. As per the authority of **Drysdale**, it was not normal for an appeal court to interfere with an ET's exercise of judgment, in the absence of an act or omission which no reasonable Tribunal could have done and which amounted to an unfair treatment of a claimant.

27. Here, the EJ had explored with the Appellant how she had put her claim. The contemporaneous evidence did not indicate that the EJ had erroneously advised the Appellant that the two claims were incompatible. It did not appear that the Appellant's consent was based on the EJ's guidance. Nor was there any suggestion of unfair pressure put upon her. In the circumstances, the Respondent says that there was no error of law.

Conclusions

28. There are significant issues with the EJ's decision in its compliance with the **ET Rules**, which I canvassed at the beginning of the hearing with Mrs Holden. That being said, I accept her general submission that the Appellant had not appealed on that basis, nor had the grant of permission been on that basis. I mention them as they are relevant to the disposal of this appeal, and I discuss them later in these reasons.

29. At the core of this appeal is whether the EJ erred in dismissing the Appellant's claim of automatic unfair dismissal for the principal reason of having made a protected disclosure. As I have indicated, the Respondent invites me to be slow to disturb that decision where it was with the Appellant's consent and says that this is an attempt by the Appellant to reformulate her claim and that I should not go behind that agreed withdrawal.

30. Assuming for one moment there was some form of consent which, for the avoidance of doubt the Appellant expressly disputes, the question is whether, as a result of such apparent or alleged consent, this was a result of the EJ's interventions which were in breach of the guidelines set out in **Drysdale,** in the sense that her consent was based on an act or omission

on the part of the EJ which no Tribunal, directing itself properly, would have done, and which amounted to unfair treatment of a litigant in person.

31. I emphasise that I am not setting any general principle and as, indeed, **Drysdale** makes clear, the assessment of the withdrawal of a claim is intensely fact-specific. I also caution myself of the wide margin of appreciation open to the EJ.

32. However, the facts here are stark. The context was a private Preliminary Hearing on 10 June 2022 at which no prior warning had been given to the Appellant that any claims would be dismissed. An earlier Judge, EJ Knowles, had expressly recorded, on 21 December 2021, that the Appellant had claims of both automatic unfair dismissal and claims of detriment, namely a failure to resolve her grievance.

33. While Mrs Holden argues that the substance of a mere failure to resolve a grievance cannot, in itself, form the basis of an automatic (as opposed to an ordinary) unfair dismissal claim, she agreed with the general proposition that a detriment done on the ground of protected disclosure, namely, the Appellant's grievance had been ignored because the Respondent regarded an Appellant as the 'problem', and the Appellant's resignation which was for the principal reason of the protected disclosure, were not inconsistent claims. That is consistent with **Price v Surrey County Council**.

34. In that context, what then formed the EJ's basis for reaching the conclusion that the Appellant was no longer pursuing a claim of automatic unfair dismissal? In the context of the EJ's own reasons, they were that the Appellant had recognised that her complaint of constructive unfair dismissal was inconsistent with the claim that she had been dismissed unfairly for having made a protected disclosure and, instead, that she had sought to pursue her claims for detriment. Clearly, the EJ had regarded the claim of automatic unfair dismissal, as formulated, as not disclosing any reasonable prospect of success, which is why he dismissed it under **Rule 37** of the **ET Rules**.

35. I pause to add that Mrs Holden accepts that the EJ's reference in the judgment to non-compliance with case management orders had no bearing or relevance to the dismissal of the automatic unfair dismissal claim and only related to separate discrimination claims. It remains unclear why there is any reference to it in the judgment. I also bear in mind, when considering the EJ's rationale and reasons, the case management orders which refer to the Appellant opting to rely on the claim under section 47B because she could not claim automatic unfair dismissal.

36. From both sets of reasons, it is clear that the EJ had formed the view as to whether the Appellant could pursue claims both of detriment and automatic unfair dismissal and that the Appellant must choose one or another. I am conscious that the EJ has not been asked for their notes or record but, on the other hand, I am left with the judgment as expressed. However, the view I have formed is also consistent with Ms Clapham's notes, even if they are only a summary and not a complete verbatim record. For her part, the Appellant says they do not record her insistence that she did not wish to withdraw her claim.

37. The EJ is recorded as stating, in the notes, to a potential inconsistency at 30/SB as follows:

> "EJ – What is the detriment? Para 22 of EJ Knowles – PID – WTR Breaches daily rest.
> Failing to resolve grievances.
> Para 23 of EJ Knowles.
> (1) Failure to resolve grievances
> (2) Constructively dismissed due to PID.
> ↓
> Alternatives: if not (1), THEN it's (2).
> Might seem inconsistent."

38. The same notes record a discussion between the EJ and Appellant (noted as 'C') as follows:

> "C – I raised these issues – not taken seriously – not being listened to.
>
> EJ – Was that a factor of breach causing you to resign?
>
> C – Yes. Breach of H&S and WTR which led to resignation.
>
> EJ – These are slightly contradictory:

> (1) Dismissed b/c of PID
> (2) Resigned due to non-satisfactory H&S (health and safety)
>
> C I wasn't listened to.
> →Detriment.
> Didn't want to listen to my grievance.
>
> EJ – Didn't accept or listen?
> C – Feel they didn't accept it.
> EJ – C appears to be saying core of the claim is I raised H&S WTR affecting me – complaints not resolved so resigned.
> Dispose of automatically UDL?
> [Ms Clapham] - Yes, sir, based on clarification."

39. I do not accept Mrs Holden's proposition that in the hearing, as pursued, the Appellant never put her claim on the basis that the act or omission was done on the ground of protected disclosure. In particular, the Appellant's witness statement, before the EJ at 2/SB, included the following passages:

> "The fact I have reported such issues clearly looks like the cause of been singled out over my work-related stress…
> I feel that this was done in order to make me think twice about raising the issues and this shift plan would have the effect of further hindering me and making me feel unwell and more stressed/anxious."

40. Taking a step back, Ms Clapham's notes suggest two things: first, that the EJ and the Appellant had discussed that there was an inconsistency between claims of detriment and automatic unfair dismissal; second, although the EJ dismissed the claim of automatic unfair dismissal and before doing so asked Ms Clapham to respond, there is no reference to any comment from the Appellant. To this, the Appellant had indicated in her reconsideration request that she had not wanted to withdraw her automatic unfair dismissal claim, to which the EJ answered this by stating at 1/CB that the Appellant had:

> "…accepted that her claim was limited to constrictive dismissal and that her claim for automatic unfair dismissal could not proceed. Accordingly, I explained that it was therefore to be treated as dismissed on withdrawal but leaving the constructive dismissal claim extant."

41. The EJ's error was to treat "the Appellant as having withdrawn her claim," having indicated to her that her claims as formulated appeared to be inconsistent, without prior warning

that the EJ was considering dismissing the claim, on the basis of the EJ's view that they had no reasonable prospect of success, where the Appellant was a litigant in person and where a previous EJ had already recorded the fact of separate claims. The context is of complex claims, the formulation of which might well include claims of detriment and automatic unfair dismissal, which would not be legally inconsistent.

42. On these specific facts, I am satisfied that, notwithstanding the wide margin of appreciation, this was a decision which, even assuming for one moment the Respondent's case that the Appellant consented to the withdrawal, which I should add is far from clear, the Appellant was effectively put on the spot, given two options, neither of which she wished to take because she wished to, in fact, pursue claims of both detriment and automatic unfair dismissal, and then, when she indicated one option, was taken to have withdrawn the claim of automatic unfair dismissal. That was, regrettably, unfair treatment of the Appellant which amounted to an error of law in the discharge of the ET's exercise of its case management functions.

Wider procedural errors and disposal of claims

43. I emphasise that these wider errors do not play a part in my decision that the EJ erred in law, because they were not the basis of the Appellant's appeal or grant of permission. However, they are relevant to the disposal of the appeal, in the context of the authority of **Mendy v Motorola Solutions UK Limited & Ors** [2022] EAT 47 as to how the ET wishes to resolve the claim.

44. The wider errors are that the Judge dismissed the claim pursuant to **Rule 37(1)(a)** of the **ET Rules** at a private Preliminary Hearing, with no prior notice that the strike-out was being considered, in apparent breaches of two rules. First is the notice requirement under **Rule 54** for strike-out under **Rule 37.** Second, the hearing be a public one under **Rule 56**. While it is true that a ET may regulate its own procedure (see **Rule 41**, as Mrs Holden referred me to),

there is, in fact, no suggestion that the EJ considered the need to comply with **Rules 54** and **56** and, having considered those two Rules, then chose to waive them, let alone did the EJ provide the reasons why.

45. The President in **Mendy** had concluded at para [43] that, given that she had set aside the part of the ET's order, this was not a case where she was remitting any matter to the ET; her function had come to an end with the order allowing the appeal, in setting aside the impugned order. Therefore, any steps to be taken were those for the ET. To any extent that the appellant in that case sought to make any application as to the future involvement of any Employment Judge, that was a matter for them to pursue in the ET proceedings and was not a matter for the President.

46. In summary, the Appellant's appeal is allowed and the EJ's order dismissing the claim of automatic unfair dismissal is set aside. As in the case of **Mendy**, the parties in this case have agreed that that the matter will be remitted to the Regional Employment Judge to make any directions that they regard as appropriate in order for this and the remainder of the Appellant's claim to be finally determined. The wider errors I have identified are intended to assist that consideration, although I am conscious that **ET Rules** as they applied have been replaced by the **Employment Tribunal Procedure Rules 2024.**