Neutral Citation Number: [2025] EAT 190

Case Nos: EA-2023-000835-BA

EA-2023-000836-BA

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 18 December 2025

Before :

HIS HONOUR JUDGE AUERBACH

- -

Between :

MS D KAUR

Appellant

- and –

BIRMINGHAM CITY COUNCIL

Respondent

- -
- -

Rad Kohanzad (instructed by Atkinson Rose) for the **Appellant**
Felix Levay (instructed by Birmingham City Council, Legal and Governance Department) for the **Respondent**

Hearing date: 23 October 2025

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JUDGMENT

SUMMARY

PRACTICE AND PROCEDURE

Dismissal upon withdrawal

The claimant presented an employment tribunal claim including complaints of disability and sex discrimination. Following the entering of a response which contended, among other things, that the claim was out of time, the claimant withdrew the claim. She did not at the time notify any wish to bring any further claim. Subsequently the claim was dismissed upon withdrawal by a legal officer. About seven months following the withdrawal, the claimant wrote to the tribunal applying for the dismissal to be revisited. She did so on the basis that, until that point, she had been ignorant of the potential implications of a dismissal upon withdrawal for her ability to pursue a further claim. She had just received advice about that from solicitors who were acting for her in respect of a potential civil personal injury claim. That followed their having been alerted, for the first time, to the existence of the previous tribunal claim, and its dismissal, by the respondent, in its reply to a letter before action. As the original decision had been reached by a legal officer, the judge considered the dismissal issue afresh. She affirmed the original decision to dismiss and subsequently declined an application by the claimant for a reconsideration of that decision. The claimant appealed.

The judge did not err by failing to consider whether the claimant had hitherto been reasonably ignorant of the potential implications of a dismissal upon withdrawal, because she had not appreciated that there was any reason to tell her PI solicitors about the previous tribunal claim when she first instructed them, shortly after the withdrawal. The judge addressed this issue, properly concluding that the claimant should in any event have informed her PI solicitors at the outset of the previous formal tribunal proceedings arising out of the same background as her proposed PI claim. Had she done so, then that would have led to the matter being raised at that earlier time. The appeal failed.

HIS HONOUR JUDGE AUERBACH:

Introduction and Litigation History

1. This appeal, by the claimant in the employment tribunal, challenges decisions of EJ Edmonds, sitting at Midlands (West), affirming the dismissal of her claim following its withdrawal, and subsequently refusing a reconsideration application. I will start by setting out the relevant history.

2. The claimant was employed by the respondent from May 2004. She began a period of long-term sickness absence in August 2020. In March 2022, whilst still off sick, she took steps with a view to bringing an employment tribunal claim. On 14 March Irwin Mitchell, solicitors, to whom it would appear the matter was referred under her legal expenses insurance, identified in an initial advice that the tribunal claim that she wanted to bring appeared to be out of time.

3. The claimant presented her claim, as a litigant in person, on 21 March 2022. Her complaints included disability and sex discrimination. She attached a lengthy narrative particulars document which began with an explanation for the delay in bringing her claim. She advanced a case that the discrimination that she alleged was continuing. The claim was given case number 1301563/2022.

4. On 8 April 2022 Irwin Mitchell wrote to the claimant with their assessment and advised that they were unable to act for her under her legal expenses insurance. They were not further involved.

5. The complaints were defended. The respondent was represented by its in-house legal team. The grounds of resistance contended that the complaints were out of time, asserted that they were vexatious and not properly particularised, and denied any discrimination or other wrongdoing.

6. On 24 June 2022 the claimant emailed the employment tribunal. The email was headed "Withdrawal of Tribunal Claim 1301562/2022." It read:

> **"To whom it may concern**
>
> **Please could I withdraw my tribunal claim, reference above.**
>
> **I am struggling extensively with my mental health and so am unable to proceed with this claim.**

I apologise for any inconvenience caused.

Thanks
Dalvinder Kaur"

7. Later that day the claimant emailed the respondent, copying in the tribunal. The email read:

"To advise, today I contacted the Employment tribunal and withdrew my claim.

Though I fully stand by each and every allegation I have made, and I am mentally unable to continue alone; the tribunal process timescales has made it difficult to find representation."

8. On 13 August 2022 the employment tribunal emailed the claimant:

"The Employment Legal Officer has requested if you can inform the Tribunal if you wish to withdraw your claim.

Please advise within seven days."

9. The claimant sent a reply the same day. I have not seen it. But, in a later application she wrote that she had responded to that email "by directing them back to my 24 June email."

10. On or around 8 July 2022, the claimant contacted another firm of solicitors, Setfords, with a view to bringing a civil personal injury (PI) claim.

11. On 18 August 2022 the respondent emailed the tribunal, copying in the claimant. It began by referring to "the below email". It continued:

"We note that the Tribunal have stated that they have not received the below confirmation from the Claimant that she wishes to withdraw her Employment Tribunal claim.

Whilst looking into this further, we have found that the Claimant's case number referenced below – 1301562/2022, is in fact incorrect. The correct case number is 1301563/2022. The difference seems to be a 3 instead of a 2 before the "/".

We would be grateful if the Tribunal provides a Judgment on this in light of the Claimant's below withdrawal as soon as possible.

We confirm the Claimant has been copied."

12. On 18 August 2022 a judgment was signed by RJ Metcalf – Legal Officer. It was emailed on 19 August 2022. The email, and the judgment, bore the correct case number. The judgment read:

> **"The Claimant's claims, having been withdrawn by the Claimant, stand dismissed under Rule 52 of the Rules contained in Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013."**

13. At the foot of the judgment was a notification that, because the decision had been made by a Legal Officer, a party could apply in writing, within 14 days after the date of sending, for the decision to be considered afresh by an Employment Judge.

14. On 15 September 2022 Setfords sent a letter of claim to the respondent. On 24 January 2023 the respondent replied disputing liability. In the course of that letter it referred to the fact that the claimant had begun a tribunal claim, which had later been withdrawn and dismissed upon withdrawal.

15. That led to exchanges between Setfords and the claimant on 25 January 2023. They indicated that they had not been aware that she had issued a tribunal claim. She replied that she "didn't realise this was important", and that she had withdrawn because she had obviously missed the time limit. Setfords then gave advice about the implications of the dismissal upon withdrawal for a civil PI claim.

16. On 25 January 2023 the claimant emailed the employment tribunal:

> **"I apologise for contacting so long after our last correspondence.**
>
> **With regards to my withdrawal, I mentioned how it was because of my mental health diagnosed conditions, having no representation and knowing I'd also missed the tribunal timescale by at least a year; and although I am not looking to resurrect it, I have just read up about rule 51, 52a and b.**
>
> **I did not know about these rules when I requested my withdrawal and because of my mental health I didn't realise the finality or consequences of my decision/actions (I only became aware of them today!!)**
>
> **I have found legal representation for a civil claim (as this allowed me to remain in timescale and have someone knowing what they are doing) but I'm fearful of what my withdrawal with yourselves might mean in terms of allowing them continuing to pursue this claim and my solicitor continuing to represent me. They are looking into this now, and perhaps I shouldn't have contacted and allowed them to do the research, but it's in my desperation that I have.**
>
> **To be honest I'm still suffering and have received ill health retirement because of it (and am appealing this decision internally also because of failures), but I digress.**
>
> **I can provide medical records to show my claim was at around the same time as I was officially diagnosed by two psychiatrists, and led to me being granted injury at work allowance by my employer.**
>
> **I wondered whether I could apply the rule 52a even though I have missed the deadline, and again because I had no clue what I was doing or knowledge of this requirement (I would urge**

> **you to revisit my records to get a true picture of this), I am hoping there are provisions for those with mental health conditions, which I did outline many times as my reason for cancellation, along with no representation.**
>
> **Could I also just ask if my withdrawal still provides the 52b rule, as this is indicated at the bottom of the form.**
>
> **To advise, I received no information or communication from my employer requesting it to be dismissed.**
>
> **From what I understand (?) these rules are at the discretion of the tribunal, and so I really hope you are able to advise in my favour, by taking my justifications into consideration. Please.**
>
> **I know this is an emotive email, and I'm sorry.**
>
> **Please provide me with a response at your earliest opportunity. It would very much be appreciated."**

17. The claimant emailed the tribunal over the next few days providing further information, and materials. It is clear that thereafter there was further correspondence, in which the claimant provided some further material, before the judge considered the matter. I do not have copies of those later emails, but the tribunal's decision that followed refers to the evidence and information that it had.

The Dismissal Judgment and the Reconsideration Judgment

18. By a decision sent on 28 June 2023 EJ Edmonds dismissed the claimant's application.

19. The judge began by identifying that the claimant was not seeking to resurrect her employment tribunal claim or resile from her decision to withdraw it. But the judge noted that she wished to bring a separate civil personal injury claim regarding overlapping matters, and that she, the claimant, said she was precluded from doing so because her employment tribunal claim had been dismissed.

20. The judge set out the text of rules 51 and 52 of the **Employment Tribunals Rules of Procedure 2013**, as will I at this point:

> **"End of claim**
>
> **51. Where a claimant informs the Tribunal, either in writing or in the course of a hearing, that a claim, or part of it, is withdrawn, the claim, or part, comes to an end, subject to any application that the respondent may make for a costs, preparation time or wasted costs order.**
>
> **Dismissal following withdrawal**
>
> **52. Where a claim, or part of it, has been withdrawn under rule 51, the Tribunal shall issue a judgment dismissing it (which means that the claimant may not commence a further claim**

> **against the respondent raising the same, or substantially the same, complaint) unless—**
>
> **(a) the claimant has expressed at the time of withdrawal a wish to reserve the right to bring such a further claim and the Tribunal is satisfied that there would be legitimate reason for doing so; or**
>
> **(b) the Tribunal believes that to issue such a judgment would not be in the interests of justice."**

21. The judge noted that the decision to dismiss the claim had been taken by a legal officer, and so the application had been reviewed in accordance with regulation 10A **Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013**. The judge set out regulation 10A(2):

> **"(2) Within 14 days after the date on which a Tribunal sends notice of a decision made by a legal officer to a party, that party may apply in writing to the Tribunal for that decision to be considered afresh by an Employment Judge."**

22. The judge stated that she had therefore considered the decision afresh, rather than following the reconsideration process in rule 72 that would have applied, had the original decision by taken by a judge. The parties had agreed to the matter being decided on the papers without a hearing and had made written representations, including the provision of various pieces of evidence by the claimant.

23. The judge next noted that the application had not been made within 14 days of the date on which the legal officer's judgment had been sent, but she considered that she had the power to extend time. She had therefore considered whether it was in the interests of justice and in accordance with the overriding objective in rule 2 (which she set out) to do so. The judge noted that there had been considerable delay in the application being made. But she accepted the claimant's submission, as demonstrated by the accompanying correspondence with her PI solicitor **"that she had not made the application any earlier because she had not appreciated that she was precluded from bringing a personal injury claim about overlapping matters until 25 January 2023."** The claimant had then contacted the tribunal promptly the same day. The judge said that, having regard to the overriding objective, it was in the interests of justice to consider the request out of time.

24. The decision then set out the timeline, starting with the emails to the tribunal and the respondent of 24 June 2022 regarding the withdrawal. The judge noted that during that period, the

claimant was applying for ill-health retirement, which was ultimately granted. On or around 8 July 2022 she had contacted Setfords enquiring about potential representation relating to her "becoming ill through work" and a potential civil PI claim. On 5 August 2022 she sent her ID to Setfords and thanked them for taking on her case. The dismissal upon withdrawal was on 19 August 2022.

25. The judge noted that, at the time of withdrawal, the claimant had made no reference to a desire to pursue proceedings elsewhere. She simply stated that she was withdrawing for the sake of her mental health. In her correspondence with the respondent's solicitors she had not intimated another claim, but referred to "tribunal timescales" making it difficult to find representation – which the judge inferred was a reference to the tribunal claim having been brought out of time.

26. The tribunal continued:

> **"10. In addition, by the time the claim was dismissed, the claimant had legal representation. We accept that the claimant no longer had representation in relation to her Employment Tribunal claim, however she had by that time instructed Setfords solicitors in relation to her potential personal injury claim. It is not clear from the documentation we have seen whether Setfords were given any information at all about her prior Tribunal claim or not, however it was only in January 2023 that the solicitor with conduct of the matter became aware of that she had withdrawn a prior claim in the Employment Tribunal. Had it come to light when the claimant first instructed solicitors, then there might have been time to prevent the dismissal judgment from being issued.**
>
> **11. I have considered the claimant's health at the time and fully accept that she was ill during that period (sufficiently so to be awarded ill health retirement), however it appears that she was able to instruct solicitors to represent her. I have also seen a letter from The Oaktree Clinic which had concluded a mental health assessment on the claimant on 8 July 2022. Whilst highlighting her clear mental health issues, it also stated that the claimant was able to describe her difficulties in detail and referenced a pre-occupation with her work situation. I find that she therefore could have made her solicitors and/or the Tribunal aware of her prior claim and intent to reopen these matters by way of personal injury claim at that time."**

27. The tribunal went on to hold that, in those circumstances, given that there was no expressed wish to reserve the right to bring such a further claim, and no indication that it would not be in the interests of justice to dismiss the claim, the decision to dismiss the claim was entirely correct, given that dismissal was mandatory unless Rule 52(a) or (b) applied. It was common for claimants to withdraw their claims on the basis of mental ill health, and that alone did not make it not in the interests of justice to dismiss the claim. Further, by the time the claim was dismissed, almost two

months had passed without any indication from the claimant that she had changed her position. The tribunal found **Srivatsa v Secretary of State for Health** [2018] EWCA Civ 936; [2018] ICR 660 not to be of assistance, as it was decided under the differently-worded **2004 Rules of Procedure**.

28. The judge concluded that, taking all the above into account, the tribunal claim remained dismissed. The judge's final observation, at [14], was:

> **"It will be for the court dealing with the personal injury claim to determine what, if any, impact that may have on any claims which the claimant may have brought, or may seek to bring, in that forum."**

29. I will call that first decision of EJ Edmonds the dismissal decision.

30. On 6 July 2023 the claimant applied for a reconsideration. She pasted in to her narrative application, or attached, copies of various further materials. These included extracts from her correspondence with Irwin Mitchell, the letter of claim from Setfords from September 2022, the respondent's reply of 24 January 2023, and her exchanges with Setfords on 25 January 2023.

31. In the course of the reconsideration application the claimant wrote:

> **"Upon rereading the initial Judgement, I made an incorrect assumption that dismissal was synonymous with withdrawal because that was what I had requested. No communication was received until this judgement, no correspondence was provided to distinguish the two words and I hadn't used the word dismiss when withdrawing. There is no mention in the paperwork that explains the rule as you have done on the top of page 2 of your response. It is unfortunate that I cannot prove this, but I strongly believe that if your wording explaining dismissal was included in the judgement (shown below) it would have changed everything and I would not be in this position now. Hindsight is a great thing and whilst I admit I should have looked up Regulation 52, in my defence nowhere in the judgement or attached papers was there an indication of the consequences of my actions, I had just assumed (again incorrectly) that the Rule was just the law to back up the judgement as written. The guidance provided with the judgement again just gave details on how to ask the Tribunal to reconsider or to appeal, but why would I, when I believed that I didn't want the tribunal claim to continue and wanted to stop it? The speed in which I did contact a Personal Injury Solicitor should be seen as showing my ignorance. Had I known that I needed to communicate my Personal Injury Claim I would have been aware of the rule."**

32. A further decision was sent on 17 July 2023. The judge had considered the application under the reconsideration provisions of rules 70 - 72 of the **2013 Rules of Procedure**. She wrote that it was dismissed because there was no reasonable prospect of the original decision being varied or revoked.

33. In her reasons the judge noted that the claimant had not, at the time of the withdrawal, reserved the right to bring a further claim, so rule 52(a) did not apply. As to rule 52(b) and the interests of justice, the judge had considered the further evidence and submissions provided by the claimant. The judge noted that, at the time of the withdrawal, the claimant had not been "fully represented" by Irwin Mitchell, and was no longer in contact with her union representative. However, that, in itself, would not lead to a finding that it would not be in the interests of justice to dismiss her claim.

34. The judge continued:

> **"9. I also note the claimant's submission that she had not appreciated the impact of any dismissal and had mistakenly assumed that it was synonymous with withdrawal. Whilst I accept that may be the case, the point remains that she could have looked into this further, and that at the time of dismissing the claimant there was no information available to the Tribunal to suggest that it would not be in the interests of justice to dismiss the claim. In addition, by that time the claimant was in contact with a personal injury solicitor: the claimant accepts that she did not make her personal injury solicitor aware of the fact that she had brought, and later withdrawn, a personal injury claim. Had she done so, there was still time at that point for the Tribunal to have been made aware of the potential for further proceedings prior to dismissing the claim. She says that she did not because she did not realise it mattered, however the fact that the claimant had brought formal proceedings against the respondent previously in relation to the matter appears to be relevant information that ought to have been provided, regardless of whether she knew or not that this might preclude her from bringing new proceedings.**
>
> **10. Whilst the claimant has provided further evidence in support of her application for reconsideration, nothing in the information provided changes the original finding that the dismissal of her employment tribunal claim should stand. I accept that the claimant was suffering from ill health at the time but she was able to carry out other tasks associated with commencing proceedings relating to her intended personal injury claim, and therefore I do not find that this prevented her from taking action to prevent the dismissal of her Employment Tribunal claim and/or to make her personal injury solicitors aware of that claim.**
>
> **11. Taking into account the interests of justice, the interests of not only the claimant, but also the respondent who believed the claimant's claims to have been dismissed in August 2022, along with the public interest requirement that there should be, as far as possible, finality in litigation, there is no reasonable prospect of the original decision being varied or revoked and therefore the claimant's request for reconsideration is refused. Whilst I understand that the claimant has asserted that closure and understanding are what she requires to assist her diagnosed conditions, that does not change the fact that at the time the claimant's claim was dismissed, she had not given any indication that she wished to bring further proceedings and had not indicated anything to suggest it would not be in the interests of justice to dismiss her claim. The claimant's claim remains dismissed."**

The Appeal

35. The claimant appealed from both the dismissal decision and the reconsideration decision. Her self-authored grounds of appeal were considered on paper not to be arguable. Thereafter solicitors

came on record, and there was a rule 3(10) hearing before me at which Mr Kohanzad of counsel appeared. I allowed one amended ground drafted by him to proceed. The ground is somewhat discursive but, at the start, identifies the essential basis of the challenge as being that:

> **"… the EJ erred in failing to address the reasonableness of The Claimant's ignorance of the consequences of withdrawing her claim."**

36. The body of the ground includes the following further passages:

> **"She did not know at the time of the withdrawal that by the claim being dismissed she would be prevented from bringing a claim in the county court."**
>
> **"The fact that the Claimant could have told her solicitors of her ET claim does not address the Claimant's case that she was ignorant of the consequences of withdrawal and dismissal. If she did not know of the consequences of withdrawing her ET claim, she would not know that it was something she should have told her personal injury solicitors. In Rumsfeldian jargon, it was an unknown unknown. The question for the ET, which it failed to address, was whether the Claimant's ignorance and, therefore, her failure to inform her PI solicitors of her ET claim was reasonable. The fact that the Claimant could have told them does not determine the question.**"

The Law

37. I have already set out the text of rules 51 and 52 of the **2013 Rules of Procedure**, which were current at the relevant time in this case. I note that rules 50 and 51 of the **Employment Tribunals Rules of Procedure 2024** are in substantially the same terms. (References to "claimant" have become references to "party advancing a claim", perhaps so as to embrace employers' contract claims.) I will continue to refer to the **2013 Rules** in what follows.

38. The provisions of earlier rules were different. The 1993 rules did not draw the same clear distinction between discontinuance and dismissal, as do the civil procedure rules, leading Mummery LJ to comment in **Rothschild Asset Management Ltd v Ako** [2002] EWCA Civ 236; [2002] ICR 899 at [30] that it would be "advisable" for the tribunal, upon being notified of a withdrawal, to ask the applicant for a statement of the circumstances, before deciding whether to dismiss.

39. The relevant 2001 rules were materially the same as the 1993 rules. However, rule 25 of the 2004 rules put the onus on a respondent, if proceedings were withdrawn, to apply for them to be

dismissed. Authorities that considered that new rule were reviewed by HHJ David Richardson in **British Association for Shooting and Conservation v Cokayne** [2008] ICR 185. He observed:

> **"33. In Khan v Heywood and Middleton NHS PCT , which was concerned with the construction of Rule 25, Wall LJ said (in a judgment with which Brooke LJ and Smith LJ agreed):**
>
> > **72 …. whilst none of the authorities cited to us is directly in point, their thrust seems to me strongly to support the proposition formulated by Moore-Bick LJ in paragraph 46 of his judgment in Fraser that the lacuna in the rules identified by Mummery LJ in Ako has now been made good. This is also, I think, the basis of Judge Richardson's reasoning in the extracts from his decision in Verdin which I have set out in paragraph 44 of this judgment, and with which I agree.**
>
> **34. Further, he cited with approval a passage from the judgment of the Appeal Tribunal in Verdin v Harrods Ltd (2006) IRLR 339 to the following effect:**
>
> > **39. So a party who receives a notification of withdrawal of the whole proceedings, and wishes to establish once and for all that there is to be no further litigation on the same questions, may apply for dismissal. The subsequent hearing will then concentrate on the question, which Mummery LJ identified in Ako. Is the withdrawing party intending to abandon the claim? If the withdrawing party is intending to resurrect the claim in fresh proceedings, would it be an abuse of the process to allow that to occur? If the answer to either of these questions is yes, then it will be just to dismiss the proceedings. If the answer to both these questions is no, it will be unjust to dismiss the proceedings.**
> >
> > **40. I agree with a submission made by Mr Nicholls, that where one party withdraws the other party will generally be entitled to have the proceedings dismissed. This is because the party who withdraws will generally have no intention of resurrecting the claim again, or if he does will generally have no good reason for doing so. There is sometimes a temptation for a litigant, as the day of battle approaches, to withdraw a claim in the hope of being better prepared on another occasion. That will be unacceptable. Tribunals will be no doubt be astute to prevent withdrawal being used as an impermissible substitute for an application for adjournment. Occasionally, however, there will be good reason for withdrawing and bringing a claim in a different way."**
>
> **35. In my judgment once proceedings are dismissed on withdrawal under Rule 25 a claimant in subsequent proceedings based on the same cause of action cannot avoid the consequences of the order dismissing the proceedings merely by asserting that he always intended to bring a second claim and that it is not an abuse of process to bring it. While the earlier dismissal stands it provides an answer to the subsequent claim. The decision of the Court of Appeal in Ako shows that there may be exceptions to the operation of cause of action estoppel where it is necessary to do justice. But the exception was only necessary because there was no means of bringing Tribunal proceedings to an end except by dismissing them.**
>
> **36. What, then, is the position of a claimant who has withdrawn proceedings and, ignorant of the true purpose of Rule 25, not opposed an application for the proceedings to be dismissed? If such a claimant were altogether without remedy it might be necessary to fashion an exception to the operation of cause of action estoppel in order to provide him with one. But, as was discussed with counsel at the hearing of this appeal, I consider that such a claimant has a remedy. It is to apply for a review of the dismissal. Dismissal of the proceedings under Rule 25(4) must be by means of a judgment, since it is a final determination: see Rule 28(1). Such a judgment may be reviewed: see Rule 34(1)(b). If a litigant made it clear to the Tribunal that he intended to start proceedings again, and if he did not oppose the dismissal of the proceedings because he was ignorant of the effect of such an order, the Tribunal would have power under Rules 34-36 to review the matter.**
>
> **37. At the moment there is nothing to draw to the attention of a litigant in person the importance of the distinction between withdrawal and dismissal. There is, therefore, still a trap for the litigant in person. I consider that, even if an application for dismissal is unopposed,**

> **where the claimant is a litigant in person a Tribunal Chairman should see whether there is any material on the file which might suggest that, applying the tests in Verdin, it would be unjust to dismiss the claim without further enquiry."**

40. I note for completeness that in 2008 there was an amendment to the wording of the 2004 rules.

41. Then, in 2013 rules 51 and 52 **Employment Tribunals Rules 2013** came in. The new rules were considered by Simler P (as she then was) in **Campbell v OCS Group UK Ltd** UKEAT/0188/16. She observed at [14] that, unlike the position under the 2004 rules, rule 52 did not provide for the respondent to apply for a dismissal upon withdrawal. Rather, it was mandatory for the tribunal to dismiss a complaint upon withdrawal *unless* either rule 52(a) or rule 52(b) applied.

42. Simler P continued, at [15]:

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

43. After reviewing relevant authorities Simler P noted the need for the tribunal to consider, as necessary, whether there has been a clear, unambiguous and unequivocal withdrawal, including, as appropriate, making enquiries to clarify that. However, she went on to say at [20] that

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

44. Simler P went on to reject a submission that the tribunal was under an *obligation* to seek representations from the parties before deciding whether to dismiss. The rule was in mandatory form and simply required the tribunal to dismiss the proceedings unless there was good reason not to do so. However, the tribunal had the *power* to make enquiries. She concluded at [24]:

> **"It seems to me that it is a matter for the judgment of the tribunal to decide whether it is**

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

45. I was also referred in a post-hearing email from counsel to **Baker v Abellio London Limited**, UKEAT/0250/16; but I do not think it adds anything in substance to the law in relation to rule 52.

Discussion and Conclusions

46. It is important to note at the outset that the scope of the single live ground of appeal, and hence the issues that I have to decide in order to determine it, are very narrow and limited. The claimant has never disputed that she unambiguously withdrew her tribunal claim. She has never sought to bring a fresh claim in the employment tribunal, of any sort. Nor is there any dispute that EJ Edmonds correctly concluded that rule 52(a) did not apply in this case. The appeal is solely concerned with whether the judge erred, as alleged by the single ground, with respect to whether rule 52(b) applied.

47. The original dismissal decision was, as I have noted, taken by a legal officer. The application for that decision to be considered afresh was not made within 14 days. The judge, however, decided to extend time and to consider it on its merits. There was no cross-appeal by the respondent in respect of that decision. A proposed draft further ground of appeal, the premise of which was that the judge had confined herself purely to reviewing the legal officer's decision, by reference to the information available when the legal officer took that decision, was not permitted to proceed to a full hearing.

48. The only issue before me is whether, in deciding whether it was not in the interests of justice for the claim to be dismissed, and/or reconsidering that decision, the judge erred in failing to consider whether the claimant ought reasonably to have appreciated, sooner than she did, the potential

implications of dismissal of her employment tribunal claim for her ability to pursue a civil PI claim.

49. I have used the phrase "potential implications" because, unlike, for example, **Cokayne**, this is not a case where the claimant has been seeking to start a fresh *employment tribunal* claim, which is said to raise the same, or substantially the same, complaint(s) as the first claim. The respondent's position, as argued by Mr Levay, who appeared for it, is that it is *not* necessarily the case that the dismissal of the employment tribunal claim brought in this case means that the claimant is estopped from pursuing a civil PI claim for negligence; but that any such issue has yet to be determined (and, it contends, would be best left to the civil court to decide, should that prove necessary).

50. As well as specifically arguing that the tribunal had not erred as alleged in the ground, Mr Levay also advanced a number of other lines of argument, which he said had a bearing on the correct outcome of this appeal and/or on whether, if the tribunal did err as alleged, remission of the dismissal issue to it was required, or would serve any purpose. I will consider each of Mr Levay's lines of argument, in the order in which they were raised in his skeleton argument.

51. First, Mr Levay contended, relying on **Campbell**, that there was no duty on the tribunal to make further enquiries of the claimant, whether before taking the dismissal decision, or the reconsideration decision. However, the short answer to this line of argument, is that the ground does not contend that the judge erred by failing proactively to seek further information, clarification or submissions from the claimant. It contends that the judge erred, having regard the information and evidence that the claimant had herself positively provided to the tribunal prior to each of her decisions.

52. Mr Levay's next line of argument was to the effect that it was simply not relevant whether the claimant was reasonably ignorant of the potential implications of a dismissal prior to 25 January 2023. Rule 52 now made it mandatory to dismiss unless rule 52(a) or (b) applied. There may be many cases in which a claimant, particularly a litigant in person, withdraws their claim, in ignorance of the potential legal implications of a dismissal upon withdrawal. But, as **Campbell** confirms, under rule

52, the tribunal is under no obligation to try to find out whether they appreciate such issues *at all*, before proceeding to dismiss the claim. So, Mr Levay argued, whether they are ignorant of such matters at all (reasonably or not) must be a wholly irrelevant consideration in all cases.

53. However, while, where the tribunal is not on notice of any issue of ignorance, there is no duty on it in every case to make enquiries of the claimant about that, it does not follow that, where a claimant has positively raised their wish to pursue a further claim, and indicated that they were hitherto ignorant of the potential legal implications of dismissal, the judge can simply disregard that explanation. As explained in **Campbell**, it is open to a claimant, *after* withdrawal and *prior to* the dismissal decision, to raise with the tribunal that they wish to pursue a further claim, and, invoking rule 52(b), to seek to contend that it would not be in the interests of justice to dismiss the claim. Further, as discussed in **Cokayne**, the reconsideration provisions provide a potential route, in an appropriate case, by which a claimant may seek to have a dismissal decision reopened after the event, on the basis that they did not hitherto appreciate the legal implications of that decision.

54. In a case where the claimant does raise, after the withdrawal of a tribunal claim, but prior to dismissal of it, that they wish to bring a further claim, it will generally be relevant, when deciding whether it is not in the interests of justice to dismiss the existing claim, for the tribunal to consider whatever information it has about the nature of the further claim that the claimant has in mind, and whether it would raise the same, or substantially the same, complaint as the claim that has been withdrawn, and whether there might be a legitimate reason for bringing such a further claim.

55. As Simler P noted in **Campbell**, rule 52 does not require the tribunal to act, in terms of deciding whether or not to dismiss, within any particular time period following a withdrawal. In the present case the judge was taking the dismissal decision afresh, in point of time after the claimant had raised, in substance, her objection to dismissal, and the nature of her concern. Nevertheless, she still raised that objection for the first time some seven months after she had withdrawn her claim. It was

not disputed by the ground of appeal, or Mr Kohanzad (appearing again for the claimant) in argument, that, in those circumstances, the tribunal was entitled to regard it as relevant to consider whether she reasonably ought to have appreciated the potential implications of a dismissal (and, hence, ought to have raised her objection with the tribunal) very much sooner following the withdrawal than she in fact did, and in particular in view of her having first instructed PI solicitors when she did.

56. I pause to note that, in the course of argument before me, it was suggested that some analogies may usefully be drawn from the approach taken in the authorities, to the test of whether it was not reasonably practicable for a claimant to present a late unfair dismissal complaint in time. But the overall test which the present tribunal had to apply was whether it was not in the interests of justice to dismiss, within the crucible of the overriding objective. The judge's evaluation of the claimant's explanation for why she had not raised the matter sooner, formed part of her application of that test.

57. Mr Levay's next line of argument was that, if it *was* relevant to consider whether the claimant was reasonably ignorant, then, as she had instructed PI solicitors, she must, as he put it, abide by their mistake. I am not persuaded by that argument. That is for two reasons. Firstly, there was no finding by the tribunal that the PI solicitors were at fault on the basis that they had not proactively asked the claimant whether she had begun and/or withdrawn an employment tribunal claim. Secondly, it would not automatically follow that such a finding would be decisive of the question that the tribunal had to decide, as between the claimant and the respondent, under rule 52(b). There is no such rule of law.

58. Mr Levay's next line of argument was the one that engaged directly with the substance of the ground. He contended that, on a fair reading of the two decisions, the tribunal *did* consider whether the claimant was "reasonably ignorant" of the implications of a dismissal upon withdrawal, and it concluded that she was not. Mr Kohanzad disagreed with that reading of the decisions.

59. I should address first, the question of the tribunal's approach to the claimant's mental ill health at the relevant time. Although the ground makes some reference to that aspect, I made it clear in my

reasons for allowing it to proceed at the rule 3(10) hearing, that I did not consider it arguable that the tribunal had erred in its approach to it. Mr Kohanzad nevertheless argued that there was a distinct live issue as to whether the tribunal erred by not considering the potential impact of her mental ill health on the question of whether, in the language of the ground, she was reasonably ignorant.

60. However, I do not think that there is any material point of distinction that can be sustained here; and in any event the tribunal did not err with respect to its consideration of the potential impact of the claimant's mental ill health. It properly considered it, and the evidence that it had in that regard, and properly concluded at [11] of the dismissal decision that the impact of the claimant's mental ill health at the relevant time was not such as to impair her ability to inform her PI solicitors about her employment tribunal claim or its withdrawal, nor her ability to make the tribunal itself aware of her wish to pursue a civil PI claim.

61. However, the ground contends that the tribunal failed properly to address whether the claimant was *reasonably* ignorant. It argues that this question is not answered by a finding that she *could* have informed the PI solicitors of the employment tribunal claim, and its withdrawal, in the sense that her mental ill health at the time was not such as to impede her from being capable of doing so. That, it is submitted, does not address the question of whether she *unreasonably* failed to do so, given that she was at the time ignorant of the potential legal significance of this aspect for a future PI claim.

62. As to that, to repeat what I have said earlier, the judge's evaluation of this aspect of the matter was not governed by a discrete legal test. Rather, the issue of why the claimant did not make her application objecting to dismissal sooner than she did, and whether she ought to have done so much sooner following the original withdrawal, fell to be considered as part of the judge's overall application of the interests of justice test, within the crucible of the overriding objective.

63. Considering, first, the dismissal decision, the judge did accept in that decision that the claimant was *in fact* ignorant of the point until 25 January 2023. That acceptance formed part of her

reasoning as to why she decided to consider the application on its substantive merits, though it was out of time. (I should note that neither the ground, nor Mr Kohanzad in argument, contended that, the tribunal should, given that it had taken that approach to the time point, also have concluded that the claimant was reasonably ignorant when deciding the merits of that application. In any event I do not think it did so err. The considerations relevant to the merits were not identical to those which were relevant to the prior question of whether to consider the application out of time.)

64. As to whether the claimant was reasonably ignorant, at the end of [11], the tribunal said that the claimant "could" have made her solicitors and/or the tribunal aware of her prior claim and intent to reopen matters by way of a PI claim. Mr Kohanzad argued that "could" does not mean "should." But sometimes, in common parlance, "could" *is* indeed used to mean not merely "was capable", but to mean, in effect "could, and should". However, this sentence came at the end of a discussion of the fact that the claimant had PI solicitors, who, it could be inferred from what happened in January 2023, would have alerted her to the issue of the legal effect of a dismissal, had they been told of the tribunal claim when they were first instructed, and then, specifically in [11], of whether the claimant's mental ill health had been so severe as to impede her from sharing that information with those solicitors at that time. In that context it might be said that, in that passage, "could" does not clearly signify that the tribunal considered that this was what the claimant *should* have done.

65. Turning to the reconsideration decision, however, the position there is different. In the last five lines of [9] the tribunal specifically considered the claimant's submission that she did not inform Setfords, when she first instructed them, that she had brought and withdrawn an employment tribunal claim, because she had not appreciated that this was something that they might need to know.

66. The tribunal's answer, given in that paragraph, was that the fact that she had brought such formal proceedings before in relation to the matter "appears to be relevant information that ought to have been provided", *regardless* of whether she knew that this might preclude her from bringing new

proceedings. Mr Levay submitted in particular that "ought" meant "ought reasonably", and it was this failure to tell her PI solicitors that meant, in the tribunal's view, that the claimant did not have a reasonable explanation for her continuing ignorance of the consequences of dismissal thereafter.

67. I consider that this passage in the reconsideration decision does make clear that the tribunal considered the issue raised by this ground. It makes it clear that the tribunal not only considered whether the claimant was, at the time when she instructed Setfords, *capable* of informing them that she had begun, and then withdrawn, an employment tribunal claim arising out of the same background. It also considered whether she *ought* to have done so, and concluded, for the reasons that it gave, that, notwithstanding that she was not aware at the time of the potential ramifications of a dismissal upon withdrawal, she in any event ought to have informed her solicitors about the fact of the previous formal proceedings, and their withdrawal. The tribunal also plainly considered that, had she done so, that would have led to the tribunal being alerted around that time that she intended to bring a civil PI claim, and objected to the tribunal proceedings being dismissed upon withdrawal.

68. In the language of the sole ground of appeal, I conclude that the judge did not fail to address the reasonableness of the claimant's continuing ignorance. Certainly in the reconsideration decision, if not in the prior dismissal decision, she did. There is, I note, no perversity challenge advanced in the alternative; and in any event, the judge came to a view that she was entitled to reach.

69. All of that being so, the appropriate determination, in respect of both decisions, is that the appeal should be dismissed, because the outcome of the judge's decisions should stand.

70. It is therefore not necessary for me to address Mr Levay's further fall-back arguments, had I concluded otherwise, as to why he contended that, in any event, any error would have made no difference and/or remission would have served no purpose.

71. Mr Kohanzad, at the time of the hearing before me, said that he was not aware of the claimant

having in fact issued a civil PI claim, but did not specifically know whether she had or had not done so. I have noted that the tribunal did not purport to determine whether dismissal of the tribunal claim would, as such, preclude the claimant from bringing a civil PI claim. Mr Levay made some submissions to me to the effect that it would not; but also to the effect that, if she had yet to issue such a claim, the respondent would have a limitation defence. These are not matters which I need to adjudicate, or express a view upon. So I need say no more about them.

Outcome

72. The appeal in respect of both the dismissal and the reconsideration decisions is dismissed.