Neutral Citation Number: [2026] EAT 3

Case No: EA-2024-001009-AT

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 08 January 2026

Before:

HIS HONOUR JUDGE JAMES TAYLER

- -

Between :

Mr P McCrory

Appellant

- and -

Healthwatch Stockport Limited

Respondent

- -
- -

Mr P McCrory the **Appellant** in person
No attendance or representation for the **Respondent**

Hearing date: 16 December 2025

- -

JUDGMENT

SUMMARY

Practice and Procedure

On a proper analysis, the correspondence from the claimant was equivocal, and did not amount to a withdrawal of his claim. Consideration of withdrawal of claims, how to ask for a decision that a claim has not been withdrawn, and when a dismissal judgment should be issued.

HIS HONOUR JUDGE JAMES TAYLER:

The issues

1. This appeal raises issues about the withdrawal of claims, how to ask for a decision that a claim has not been withdrawn, and when a dismissal judgment should be issued.

The convoluted procedural history

2. By a claim form received by the Employment Tribunal on 28 December 2023, the claimant asserted that he had been unfairly dismissed, discriminated against because of sex and race; and subject to detriment as a whistleblower. He provided no significant details of his factual assertions. From what he said at this hearing, it appears that the primary issue was about his alleged treatment because of making protected disclosures.

3. The claim was brought against Healthwatch Stockport Limited, an independent healthcare champion for the Stockport community, and Stockport Metropolitan Borough Council.

4. The claimant withdrew the claim against Stockport Borough Council, which was dismissed on withdrawal by a judgment of a Legal Officer sent to the parties on 15 March 2024.

5. Healthwatch Stockport Limited, which I will refer to as the respondent, served a response on 20 March 2024. In the attached particulars the respondent asserted that the claimant was a volunteer and his complaints were misconceived and vexatious. The respondent stated that they would make an application to strike out or for a deposit order.

6. On 20 March 2024, respondent's solicitors wrote to the claimant reiterating their intention to apply for strikeout, suggesting that if they were successful they would apply for costs, which were said to be in the region of £2,500-£3,000. The offer was open until close of business on 27 March 2024, although it appears that the time for acceptance was subsequently extended to 31 May 2024.

7. The claimant wrote to the Employment Tribunal on 25 March 2024, explaining that his wife had recently died and requesting a stay of the proceedings.

8. A letter was sent on the instructions of Employment Judge Slater on 25 March 2024.

Employment Judge Slater expressed her condolences, which I reiterate, and postponed a preliminary hearing for case management, until a time when it was expected that the claimant would be able to deal with the matter again.

9. Employment Judge Slater noted that the respondent had asked that their application for strikeout be considered at the preliminary hearing, but decided that it was better that the claimant's complaints should first be clarified at a preliminary hearing for case management before a decision was made as to whether it was appropriate to fix a preliminary hearing at which strikeout or a deposit order could be considered.

10. On 31 May 2024 at 13:24, the claimant sent an email to the Employment Tribunal ("the first email"). The claimant inserted the respondent's costs warning and stated:

> **I am very concerned about the potential costs and given my personal circumstances** also, I have decided as follows:
>
> **I am writing to advise that in the absence of certainty over the maximum costs award** the Tribunal would grant against me, in favour of the respondent for the work done up to and including the schedule preliminary hearing **I wish to withdraw my claim** against HealthWatch Stockport Limited. My apologies for the following request, but, **I would be grateful if the Tribunal would advise regarding the maximum sum today in order that I can give further consideration to withdrawing today if the sum is outside what is a comfortable sum for myself.** [emphasis added]

11. Not having received a reply to the first email, the claimant again sent an email to the Employment Tribunal later on 31 May 2024, at 16:53 ("the second email"), stating:

> **I tried calling to find out if it had been possible to obtain a decision/position on the maximum costs award the Tribunal would grant against me**, in favour of the respondent for the work done up to and including the scheduled preliminary hearing. I appreciate the time available in which to obtain a decision was limited. **Therefore, as it appears unlikely there is sufficient time remaining in which to communicate further on the matter this afternoon, I wish to confirm that I wish to withdraw my claim** against Healthwatch Stockport Limited today **unless the Tribunal would not apply a costs order against covering the period detailed in correspondence and our conversation earlier today.** [emphasis added]

12. On 4 June 2024, a letter was sent on the instructions of Employment Judge Batten who, it would appear had seen the first email (although it was referred to as an email of 30 May 2024 - there is no

email of that date in the bundles and the Associates could not find one on the Employment Tribunal system), but not the second email:

> 1. The claimant is a litigant in person. He has presented a claim comprising unfair dismissal and various discrimination complaints which has been listed for a private case management discussion on 30 July 2024.
>
> 2. The claimant's email is about the tactics of the respondent and/or its solicitors in this litigation. **The Employment Judge notes that the claimant describes being very concerned about the potential costs consequences of the claim and suggests that he may withdraw the claim as a result of such.**
>
> 3. **The parties are reminded that costs do not follow the event in the Employment Tribunal.** Orders for costs are subject always to the provisions of rules 74 – 84 of the Employment Tribunal Rules of Procedure 2013 **and are very much the exception**. The decision as to whether a party has acted unreasonably or otherwise is a decision for an Employment Judge.
>
> 4. **In the circumstances, the claimant is invited to clarify, in the next 14 days, whether or not he does in fact withdraw his claim. If appropriate, such matters can be discussed at the forthcoming private case management hearing.** [emphasis added]

13. On 9 June 2024, a letter was sent, probably by a member of the Employment Tribunal staff who had seen the second but not the first email:

> **Thank you for informing the Tribunal that you have withdrawn your claim**.
>
> The file will be retained until **June 2025** and then destroyed.
>
> The hearing listed on **30/07/2024** will not now take place. [emphasis added]

14. On 10 June 2024, the claimant, not yet having seen the letter of 9 June 2024, sent an email to the Employment Tribunal in response to the letter of 4 June 2024, stating:

> **I am writing to advise that I wish to continue with my claim** [emphasis added]

15. On 20 June 2024, a letter was sent on the instructions of Employment Judge Butler stating:

> Employment Judge Butler notes the claimant's email of 10 June 2024, and writes to inform him that **once a claim has been unambiguously withdrawn then the Tribunal process is brought to an end. And there is no means of resurrecting the claim. The claim was unambiguously withdrawn. It was correctly dismissed on withdrawal**. And the claimant can now not continue with that claim, despite his expression to do so in his email. [emphasis added]

16. It was incorrect to state that the claim had been dismissed on withdrawal, a dismissal judgment

had not yet been made or issued.

17. On 20 June 2024, the claimant sent an email stating that he could not understand why the claim was being treated as withdrawn because he had replied to the letter of 4 June 2024 stating that he wished to continue with his claim.

18. On 26 June 2024, a judgment dismissing the claim ("the dismissal judgment") was signed by a Legal Officer stating:

> The proceedings are dismissed following a withdrawal of the claim by the claimant.

19. After the section where the judgment was signed, there was a notice:

> Under regulation 10A(2) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, because this decision has been made by a Legal Officer, a party may apply in writing to the Tribunal for the decision to be considered afresh by an Employment Judge. Such an application must be made within 14 days after the date this letter/decision is sent to the parties.

20. The file also appears to have been referred to Regional Employment Judge Franey, on whose instruction a letter was sent on 28 June 2024, stating:

> Regional Employment Judge Franey has reviewed the file. The claimant sent an email on 30 May indicating that he was considering withdrawing his claim. That email was referred for judicial attention and this resulted in the Tribunal letter of 4 June 2024 asking for clarification.
>
> However, in the meantime the claimant had sent a further email of 31 May which had not been seen by the judge who directed that our letter of 4 June be sent.
>
> **The email of 31 May was an unambiguous withdrawal.** The Tribunal cannot give guarantees about what orders it might or might not make.
>
> **The withdrawal of 31 May was acknowledged in our letter of 9 June. Under rule 51 the withdrawal brings the claim to an end, and it cannot be resurrected by withdrawing the withdrawal.**
>
> Regional Employment Judge Franey apologises for any confusion and notes that it would not have been apparent to the claimant that the letter of 4 June was written without the email of 31 May having been seen. But **the email of 31 May brought the claim to an end and a judgment dismissing the claim will shortly be issued.** [emphasis added]

21. The dismissal judgment was sent to the parties on 28 June 2024. The dismissal judgment was sent with a standard covering letter that included information about seeking reconsideration and

appealing to the EAT. The letter did not refer to the possibility of requesting that the decision be considered afresh by an Employment Judge. The letter referred to the possibility of applying for written reasons. The claimant did not apply for written reasons.

22. On 5 July 2024, the claimant sent an email, setting out his understanding of the sequence of events and stating "I wish to appeal the dismissal of the proceedings, and request the case be reinstated for the reasons detailed below". The claimant then set out the history of the email exchanges and concluded "I wish to appeal the decision to close the case".

23. On 19 July 2024, a letter was sent on the instructions of Regional Employment Judge Franey:

> Thank you for your letter dated 5 July 2024, which has been referred to the Regional Employment Judge.
>
> Regional Employment Judge Franey replies as follows: "**If you consider that the tribunal's view that there had been an unambiguous withdrawal of the claim was wrong in law you can appeal to the Employment Appeal Tribunal. The time limit is 42 days from when the decision to treat the email in that way was taken. Details of how to appeal were contained in the information accompanying the judgment**." [emphasis added]

24. The letter stated that if the claimant wished to assert that he had not unambiguously withdrawn the claim he should appeal the dismissal judgment. The claimant submitted an appeal that was received by the EAT on 7 August 2024, but treated as received the next day because it arrived after 4pm.

Withdrawal and dismissal – two significantly different things

25. The provisions that deal with the withdrawal of claims and dismissal judgments, are a little complex, and require some unravelling.

26. Before getting into the detail it is important to have two key concepts in mind. First there is **withdrawal** of a claim. **Withdrawal of a claim is an act of the claimant and brings that claim to an end in the Employment Tribunal without requiring any decision of the Employment Tribunal**. Withdrawal of a claim has consequences for the claim that was extant in the Employment Tribunal which is brought to an end and **cannot be revived**.

27. Second there is **dismissal** of a claim. **Dismissal is an act of the Employment Tribunal which**

exercises a discretion to issue a dismissal judgment which will have the effect that the claimant cannot commence a further claim against the respondent raising the same, or substantially the same, complaint. Dismissal prevents a claimant from bringing claims that they might have wished to bring in the future in the Employment Tribunal and, possibly, other venues.

28. The provisions apply to a claim or part of a claim, but for the sake of concision, I will use the term withdrawal to cover both possibilities.

29. This claim was dealt with under the **Employment Tribunal Rules 2013**, ("**ETR 2013**"). The equivalent provisions are now in the **Employment Tribunal Rules 2024** ("**ETR**").

30. Rule 51 **ETR 2013** (now Rule 50 **ETR**) provides:

> 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. [emphasis added]

31. The relevant act is that of the claimant informing the Employment Tribunal that the claim is withdrawn. The withdrawal brings the claim to an end without any act on the part of the Employment Tribunal.

32. That seems simple enough, but what is sufficient to amount to a withdrawal, and what if the claimant asserts that there has been a miscommunication and the words used did not amount to withdrawal?

33. In **Segor v Goodrich Actuation Systems Ltd** UKEAT/0145/11 Langstaff J (P) stated at paragraph 11 that "a concession or withdrawal cannot properly be accepted as such unless it is **clear, unequivocal and unambiguous**".

34. We will return to how the Employment Tribunal should deal with a challenge as to whether words used were "clear, unequivocal and unambiguous" and so constituted an effective withdrawal.

35. Once there has been a withdrawal the Employment Tribunal has a circumscribed discretion to issue a dismissal judgment. Rule 52 **ETR 2013** (now Rule 51 **ETR**) provides:

> 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**.

36. Where a claim has been withdrawn the Employment Tribunal must issue a dismissal judgment (as is demonstrated by the use of the word "shall") (1) unless the claimant has expressed a wish to reserve the right to bring a further claim and the Employment Tribunal is satisfied that there would be legitimate reason for doing so; or (2) the Employment Tribunal believes that to issue such a judgment would not be in the interests of justice.

37. A claimant may wish to reserve the right to bring a further claim where, for example, the claimant has realised that a breach of contract complaint may exceed the jurisdiction of the Employment Tribunal or where the claimant plans to bring a personal injury claim in the courts. Such possibilities may be obvious to the Employment Tribunal, even if not to the claimant, and may result in the Employment Tribunal concluding that it would not be in the interests of justice to issue a dismissal judgment. Where a dismissal judgment is issued it has the consequence that the claimant may not commence a further claim against the respondent raising the same, or substantially the same, complaint. While the discretion is circumscribed, it must be exercised before a dismissal judgment is issued.

38. Simler J (P), as she then was, explained the interplay of the provisions and their history in **Ms L Campbell v OCS Group Limited and Mr J Moffat**, UKEAT/0188/16/DA. I will quote a more extensive extract of analysis than usual because, rather surprisingly, neither **Segor** nor **Campbell**, both decisions of Presidents of the EAT, were reported:

11. The 2004 Rules were considered in *Khan v Heywood & Middleton Primary Care Trust* [2006] EWCA Civ 1087. The claimant in that case sought to set aside the withdrawal of his claim, and the respondent applied to have the claim dismissed on withdrawal. Both the employment tribunal and the EAT held that there was no power under Rule 25 to revive a withdrawn claim. The Court of Appeal agreed but held that a withdrawal in and of itself was not a judicial act and therefore did not create any issue or cause of action estoppel, so that a fresh claim based on the same cause of action would not be barred in consequence of the withdrawal. On the other hand, if and when a respondent successfully applied to have the claim dismissed under Rule 25(4), that would involve a judicial act, and the claimant would then be estopped from bringing fresh proceedings based on the same facts.

12. The 2013 Rules clarified the approach that existed under the 2004 Rules and to an extent codified the approach identified by the Court of Appeal in *Khan*. Rules 51 and 52 provide as follows:

> 51. End of claim
>
> Where a claimant informs the Tribunal, either in writing or in the course of a hearing, that a claim, or part of it, is withdrawn, the claim, or part, comes to an end, subject to any application that the respondent may make for a costs, preparation time or wasted costs order.
>
> 52 Dismissal following withdrawal
>
> 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.

13. Accordingly, Rule 51 makes clear that a withdrawal may be notified orally at a hearing and takes effect upon the tribunal being informed by the claimant either in writing or in the course of the hearing of withdrawal. The effect of withdrawal, as before, is to bring the proceedings to an end subject only to any application that might be made by the respondent for costs. The claim cannot be revived, but that does not mean that absent dismissal a fresh claim on the same facts cannot be made.

14. Unlike the position under the 2004 Rules, Rule 52 of the 2013 Rules does not require a respondent to make an application to the tribunal before it can dismiss a claim that has been withdrawn under Rule 51 . Rather, the effect of Rule 52 is mandatory. Dismissal must automatically follow unless one of the specified exceptions applies. This is emphasised, as Mr Johnston points out, by the Presidential Guidance given to Employment Tribunals on General Case Management 2014, where at paragraph 14 of the section entitled “Concluding cases without a hearing” the Guidance states:

> Withdrawal under Rule 51
>
> 14. When a claimant withdraws the claim comes to an end. The tribunal must issue a dismissal judgment under rule 52 unless for some reason this is inappropriate. …"

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.

16. In *Segor v Goodrich Actuation Systems Ltd* [2012] UKEAT/0145/11/DM the EAT made clear that tribunals should always take steps to ensure that litigants, particularly those who are self-represented or have lay representation, who seek to concede a point or abandon it do so on a clear, unambiguous and unequivocal basis before accepting the concession or abandonment indicated. At paragraph 11 Langstaff P held:

> 11. What we should say, however, is this. A tribunal will always want to take care where a litigant, particularly one who is self-represented or who has a lay representative, seeks to concede a point or to abandon it. It may be a matter of great significance. Though it is always for the parties to shape their cases and for a tribunal to rule upon the cases as put before it, and not as the tribunal might think it would have been better expressed by either party, it must take the greatest of care to ensure that if a party during the course of a hearing seeks to abandon a central and important point that that is precisely what the individual wishes to do, that they understand the significance of what is being said, that there is clarity about it, and if they are unrepresented, that they understand some of the consequences that may flow. As a matter of principle we consider that a concession or withdrawal cannot properly be accepted as such unless it is clear, unequivocal and unambiguous.

17. In *Drysdale v Department of Transport (Maritime and Coastguard Agency)* [2014] EWCA Civ 1083 , the claimant's wife, Mrs Drysdale, announced that she wished to withdraw her husband's claim for unfair constructive dismissal in the course of the hearing when it became clear that the case would have to be postponed part-heard. The tribunal enquired whether she was making an application for her husband's claim to be withdrawn, and she replied that she was. The respondent then applied for the claim to be dismissed, and after a short deliberation that application was granted by the tribunal. The claimant then applied for a review of the tribunal's decision, which was refused, and the EAT dismissed his appeal.

18. On further appeal to the Court of Appeal the claimant's wife submitted that she had been tired, stressed and frustrated at the time of the withdrawal, all symptoms exacerbated by her underlying condition of diabetes. She argued that the tribunal should

not have accepted the withdrawal so quickly and that it was not voluntary; further, the tribunal should not have dismissed the claim on the basis of her response to its enquiry in all the circumstances of this particular case. The Court of Appeal concluded that there was nothing in what occurred at the hearing to alert the tribunal to the possibility that Mrs Drysdale was or may have been indisposed so that her judgment was or could be affected. The tribunal was aware of her underlying medical condition, but neither she nor the claimant indicated at any stage during the hearing that she was feeling unwell. The Court reviewed the extent of the duty on tribunals towards litigants without legal representation in the context of applications to withdraw made at a hearing. Barling J, with whom Clarke and Arden LJJ agreed, held as follows:

> 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. …
>
> 63. That leaves the question whether notwithstanding Mrs Drysdale's confirmation that she wished to withdraw the claim and the appellant's apparent assent to that decision, it was incumbent upon the ET to adjourn the proceedings on that afternoon, either for a few minutes or for a longer period, to enable the appellant and Mrs Drysdale to reflect further on the decision to withdraw.
>
> 64. In my view, notwithstanding the absence of a legal representation, neither the overriding objective nor any other principle of law required the ET to take such a step. Whether to do so or not was a question of judgment falling squarely within the margin of discretion of the ET. The ET had no reason to suspect that the decision to withdraw the claim was ill-considered or irrational. Further, even if the ET had identified a risk that the decision was impulsive, that risk would have been removed by the conduct of the parties in the immediate aftermath of Mrs Drysdale's announcement. Also, the fact that Mrs Drysdale was not legally qualified would have been lower down the scale of significance in this case than in many others where there is no professional representation, given Mrs Drysdale's evident intelligence, clarity of thought and speech, and strength of purpose - qualities we have been able to observe ourselves in the course of this appeal.

19. It seems to me that the approach identified by both of those cases applies in the context of withdrawal and dismissal under Rules 51 and 52 of the 2013 Rules as follows. 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.

20. However, as the Court of Appeal made clear in *Drysdale*, 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.

21. At the Rule 52 dismissal stage, unlike a withdrawal, which is the act of the party in question, dismissal is the act of the tribunal and involves a judicial determination. The purpose of dismissal under the 2004 Rules was discussed by HHJ David Richardson in *Drysdale* (in the EAT) at paragraph 81:

> 81. The purpose of dismissal under rule 25 was explained by the Appeal Tribunal in a passage in *Verdin v Harrods Limited* [2006] ICR 396 at paragraphs 35-40 - a passage approved by the Court of Appeal in *Khan* (see paragraphs 44 and 72). It is sufficient to quote paragraphs 39-40:
>
> > 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* [*v Rothschild Asset Management Ltd* [2002] ICR 899]. 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 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.

22. Mr Matovu contends that, save in circumstances where the parties are present so that all matters including dismissal following withdrawal can be ventilated and explored, a tribunal faced with withdrawal - even where that is clear, unambiguous and unequivocal and gives no intimation of any intention to resurrect the claim in fresh proceedings - must nonetheless give the parties the opportunity to make representations before taking the serious step of dismissing the proceedings under Rule 52 . That, he submits, is consistent with the approach adopted under the earlier version of this Rule (Rule 25(4)) and is also consistent with the serious consequences of dismissal. He

> accepts that there is an opportunity to apply for reconsideration under Rule 70 and that if there are new matters that are brought to the attention of the tribunal those can be reconsidered in the round to determine whether an earlier dismissal decision was correct or should be open to reconsideration.
>
> 23. Although I accept that Rule 52 involves a judicial determination and that the principles of natural justice and the overriding objective both apply, there is nothing in the wording of Rule 52 itself that requires tribunals as a matter of course to invite representations from the parties before concluding that the proceedings should be dismissed. The Rule is in mandatory form and simply requires a tribunal to dismiss the proceedings unless there is good reason not to do so. The draughtsman could have provided for notification of an intention to make such a decision to be communicated to the parties to enable representations to be made before the decision to dismiss is made by the tribunal but chose not to do so. In the circumstances, I do not accept Mr Matovu's submission that tribunals are under a mandatory obligation to invite representations from the parties before any decision in the absence of the parties under Rule 52 is made.
>
> 24. However, as Mr Matovu submits, tribunals are empowered to regulate their own procedure and to conduct hearings in a manner considered fair having regard to the overriding objective. They are empowered to avoid undue formality and to question parties so far as appropriate in order to clarify the issues or elicit evidence. 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.

39. Dismissal judgments are frequently made by Legal Officers, who at the time of this claim were permitted to do so pursuant to Regulation 10B **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013** (now Rule 7(1) **ETR**). Pursuant to Regulation 10A (now Rule 7(2) **ETR**), within 14 days of the date on which an Employment Tribunal sends a notice of the decision made by the Legal Officer to a party, that party may apply in writing to the Employment Tribunal for the decision to be considered afresh by an Employment Judge. Accordingly, a party can apply, after a dismissal judgment has been made by a Legal Officer, for the matter to be considered again by an

Employment Judge, who will decide afresh whether a dismissal judgment should be made. The fact that this option exists does not prevent an appeal being made to the EAT against the judgment issued by the Legal Officer, although the EAT might stay an appeal to allow the appellant to request that the matter be considered afresh by an Employment Judge out of time.

The appeal

40. The claimant specified the dismissal judgment made by the Legal Officer as the decision he appealed against. He would not have been in time to appeal any earlier decisions, subject to an extension of time being granted by the EAT.

41. The appeal was permitted to proceed to a full hearing, having been considered on the sift by His Honour Judge Beard, by an Order sealed on 14 October 2024.

42. On 21 October 2024, the respondent's solicitors sent an email stating:

> The Respondent will not be lodging any Answer and will not be defending the appeal. We confirm that we would like to leave the matter to the EAT to determine the issue regarding the Employment Tribunal's decision.

43. The claimant's main contention is that his emails were not clear, unequivocal and unambiguous, and therefore there was no withdrawal, and he should be able to proceed with his original claim in the Employment Tribunal. He does not seek only to set aside the dismissal judgment. Setting aside the dismissal judgment would mean that he would no longer be precluded from raising the same or substantially the same complaint again, but that would be unlikely to assist the claimant if he wants to bring a claim in the Employment Tribunal because any new claim would be likely to be out of time.

44. The claimant has not suggested that he wants to bring proceedings elsewhere.

45. The appeal raises the question of what a claimant is to do if it is asserted that there was no withdrawal because the communication was not clear, unequivocal and unambiguous. Withdrawal is automatic and does not result in a judgment being issued by the Employment Tribunal. If there has been an effective withdrawal it cannot be undone. How, then, is a claimant to challenge an assertion that the claim has been withdrawn; or a respondent to assert that there has been a withdrawal.

46. A dismissal judgment can be challenged. However, if a dismissal judgment is revoked that does not necessarily mean that the claim in the Employment Tribunal was not withdrawn. If a withdrawal was effective it cannot be undone and the claim in the Employment Tribunal is at an end. In such circumstances, the consequence of the revocation of the dismissal judgment would be that the claimant would not be prevented from commencing a further claim against the respondent raising the same, or substantially the same, complaint, but the original claim would still be at an end.

47. I have considered whether the claimants challenge as to whether there has been an effective withdrawal should have been to earlier correspondence from the Employment Tribunal.

48. If a claimant asserts that there has been no withdrawal it is necessary to obtain a judicial determination as to whether the claim has been withdrawn. If an Employment Judge concludes that there has, or has not, been withdrawal that must be stated in a decision that could be appealed by a party that disagrees with the decision of the Employment Tribunal.

49. Rule 1(3) **ETR 2013** (now in similar terms in Rule 2 **ETR**) provides

> (3) An order or other decision of the Tribunal is either—
>
> (a) a "case management order", being an order or decision of any kind in relation to the conduct of proceedings, not including the determination of any issue which would be the subject of a judgment; or
>
> (b) a "judgment", being a decision, made at any stage of the proceedings (but not including a decision under rule 13 or 19), which finally determines—
>
> (i) a claim, or part of a claim, as regards liability, remedy or costs (including preparation time and wasted costs); or
>
> (ii) any issue which is capable of finally disposing of any claim, or part of a claim, even if it does not necessarily do so (for example, an issue whether a claim should be struck out or a jurisdictional issue)

50. Where there is a dispute as to whether there has been a withdrawal, a judicial determination of that issue is a judgment. It is a decision that is capable of finally disposing of any claim. It is not a case management order.

51. Where the dispute arises, otherwise than in the context of consideration of whether a dismissal

judgment should be issued or set aside, there should be a freestanding judgment determining the issue. On other occasions where a claimant asserts that a dismissal judgment should not be issued (or should be set aside) because there was no effective withdrawal, the two points can be dealt with in a single judgment, but the two determinations should be set out separately; whether the claim has been withdrawn and whether to issue a dismissal judgment. On appeal it might be determined that the claim was effectively withdrawn but a dismissal judgment should not have been issued. If it is decided that the claim was not withdrawn that would necessarily result in any dismissal judgment being set aside.

Analysis

52. The procedure in the Employment Tribunal became very muddled. Messages repeatedly crossed and correspondence was sent in ignorance of important items of previous correspondence.

53. On 9 June 2024, a letter was sent by a member of the Employment Tribunal staff thanking the claimant for informing the Employment Tribunal that he had withdrawn his claim. The letter did not constitute a judicial decision made by either a Legal Officer or an Employment Judge. The letter sent on the instructions of Employment Judge Butler on 20 June 2024, stated that the claim had been unambiguously withdrawn and that there was no means of resurrecting it. Employment Judge Butler stated that the claim had correctly been dismissed on withdrawal, whereas that was yet to occur. Employment Judge Butler's decision was only properly put into effect when the withdrawal judgment was issued. Regional Employment Judge Franey suggested that the dismissal judgment could be challenged by appeal to the EAT if the claimant wished to challenge his and Employment Judge Butler's conclusion that there had been an unequivocal withdrawal. Accordingly, I infer that the withdrawal judgment did two things, it was both a judgment putting into effect the determination that there had been an effective withdrawal and was also a dismissal judgment.

54. The surrounding correspondence demonstrates that the reason why the Employment Judges concluded that there was an effective withdrawal was because the claimant's second email was considered to be unequivocal.

55. The EAT, perhaps unsurprisingly, did not, when the appeal was submitted, pick up on the fact that there were no reasons for the dismissal judgment, which often is the case. I have concluded that I should exercise my discretion to hear the appeal without written reasons: Section 3.7.3 **Employment Appeal Tribunal Practice Direction 2024**. I do not consider that I need to exercise my power to request that the Legal Officer provide reasons because they are already clear enough from the correspondence, and it would result unnecessary delay.

56. Having regard to the confused correspondence, it might have been better had the claimant's email of 5 July 2024 been treated as an out of time request for the decision of the Legal Officer to be considered afresh by an Employment Judge. An Employment Judge could then have considered the matter having regard to all of the correspondence and surrounding circumstances and provided a reasoned judgment, including decision on both questions of whether the claim had been withdrawn and whether a dismissal judgment should be issued.

57. While I accept that a wide margin of appreciation is to be applied to the decision-making of the Employment Tribunal, I have concluded that the dismissal judgment was made in error of law. On a proper analysis of all the relevant correspondence and circumstances, including the fact that the claimant was recently bereaved and in fear of costs, the only decision that could have been reached was that there was not an unequivocal withdrawal. The first email clearly stated that the claimant was only considering withdrawal because of his concern that he might be liable for costs. He sought advice from the Employment Tribunal so that he might further consider withdrawing. While the Employment Tribunal could not advise the claimant, it was able to set out some general principles about costs in the letter of 4 June 2024, which would have provided the level of comfort that the claimant wanted when he was considering withdrawing his claim. The fact that the letter of 4 June 2024 was sent questioning whether the claimant wanted to withdraw the claim, demonstrates that, when the first email was considered by Employment Judge Batten, it was correctly treated as being equivocal. The second email had to be read in the context of the first and the claimant having informed the Employment Tribunal

of his recent bereavement and concern about costs. On a proper reading, the second email remained equivocal and any doubt falls away when it is read with the first. Accordingly, the only possible conclusion was that the claim had not been withdrawn. That meant that the claim did not automatically come to an end and there could be no judgment on withdrawal. The appeal is allowed and the matter is remitted to the Employment Tribunal for case management.

58. I explained to the claimant that the generalised points the Employment Tribunal made about costs in the letter of 4 June 2024, do not mean that they had assessed the specific merits of his claim. If the claimant wishes to obtain advice about the merits of his claim, and the risks, if any, that he might at some stage be subject to an award of costs, he should seek legal advice from a solicitor or other independent legal adviser.