



Neutral Citation Number: [2020] EWCA Civ 393

Case No: A2/2019/1870

**IN THE COURT OF APPEAL (CIVIL DIVISION)**  
**ON APPEAL FROM THE EMPLOYMENT APPEAL TRIBUNAL**  
**MRS JUSTICE ELISABETH LAING**  
**UKEAT/0140/18/BA**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 16/03/2020

**Before :**

**LORD JUSTICE BEAN**  
**LORD JUSTICE SINGH**  
and  
**LADY JUSTICE ASPLIN**

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**Between :**

**MARION MERVYN**  
**- and -**  
**BW CONTROLS LTD**

**Appellant**

**Respondent**

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**Paul Strelitz** (instructed on a Direct Access basis) for the **Appellant**  
**Richard Shepherd** (instructed by **Bennetts Solicitors, Bristol**) for the **Respondent**

Hearing date: 19 February 2020  
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**Approved Judgment**

**Lord Justice Bean :**

1. The Claimant appeals from a judgment of Elisabeth Laing J, sitting in the Employment Appeal Tribunal, of 28 March 2019, upholding the decision of an employment tribunal at Bristol (Employment Judge Livesey and two lay members) dated 24 November 2017, by which the ET had dismissed her claims for unfair dismissal. (The ET also rejected a claim for sex discrimination which has not been the subject of any appeal.)
2. Elisabeth Laing J granted permission to appeal to this court on 28 March 2019 on the basis that the outcome was “unjust”. While the judge felt bound to dismiss the Claimant’s appeal, she recognised that the case raised issues about: (a) the extent to which an ET should assist a litigant in person in formulating issues; and (b) the circumstances in which an ET can depart from an agreed list of issues when one party is a litigant in person and the list of issues appears to be deficient when compared to the original pleaded case.
3. The Claimant began work for the Respondent on 8 November 2005 as an Administrator. She initially worked part-time but subsequently took a full-time position. Lee Fowler is the Managing Director and owner of BW Controls and his wife, Julie Fowler, is the Company Secretary and a director. Two other individuals, Mr Smith (the Production Manager) and Simon Hawkes (the Design Engineer), also worked in the office. The Claimant left her employment with the Respondent in mid-November 2016 and submitted an ET1 claim form on 4 December 2016.

*The ET1 claim form*

4. In section 8 of her claim form, the Claimant ticked the box next to the words “I was unfairly dismissed (including constructive dismissal)”. Her attached particulars of claim contained allegations which to any employment lawyer would seem to indicate a case of constructive dismissal.

“On 14 November 2016 I had to walk out of my workplace due to stress. I have been working at BW Controls for 11 years. Lee Fowler has made it very difficult for me to carry out my job correctly and legally.”

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

“I notified a colleague Simon Hawkes that I was going home as I felt unwell. I believed I had been called a liar yet again.”

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

"After I left the building on 14 November 2016 I never spoke to anyone other than my partner Keith. On the evening of 15 November 2016 I received a text message from Julie Fowler, she asked if I was okay and if I wanted to talk. I replied back to Julie Fowler that I was not okay and would write a letter to Lee. I offered to bring in company property that was needed and asked for some personal items that belonged to me."

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

"Neither Lee nor Julie Fowler has responded to the contents of the Claimant's grievance letter saying that I have not put anything in writing."

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

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

### *The ET3 response form*

5. The Respondent's ET3 Response Form contained passages which indicated that in the company's view the Claimant had resigned.

Paragraph 9 contained information about the incident on 14 November 2016: "Later the Claimant shouted at another member of staff, Simon Hawkes, words to the effect of 'tell him he can stuff the job up his arse', this was within the hearing of the Respondent's clients. At approximately midday the Claimant walked past Mr Fowler's office and shouted, "stuff your fucking job" and left the premises a few minutes later. It is denied that the Claimant told Simon Hawkes that she was going home because she felt unwell."

Paragraph 10: "On 15 November 2016, Mrs Fowler sent a text message to the Claimant asking if she was OK. In the text message correspondence that followed it was clear that the Claimant had resigned in that she said she would return company property, would take what was hers and asked for her P45. The resignation was further confirmed in the Claimant's letter to the Respondent dated 17 November 2016."

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

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

Paragraph 23: "The claim for unfair dismissal/constructive unfair dismissal is denied."

*The telephone case management hearing*

6. The Claimant sent a letter to the ET on 30 January 2017 which responded to the Respondent's ET3 form. In that letter, she stated that the claim was for "unfair dismissal (including constructive dismissal)" but maintained that "there was no resignation on 14 November 2016". She set out further facts that could support a constructive dismissal claim; she said, for example, that she "had to leave my office because of Lee Fowler's unreasonable behaviour and making it impossible for me to carry out my work correctly and legally".
7. In the agenda form completed for the telephone case management hearing the Claimant again stated that her claim was for "unfair dismissal (including constructive dismissal)" and answered that there was no change in her claim since she issued her ET1 Claim Form. The Respondent recognised in its response that one of the issues was whether the Claimant was dismissed or resigned and, if she resigned, whether she could claim constructive dismissal.

8. On 8 February 2017 Employment Judge Reed held a case management hearing by telephone. According to the Respondent, the Claimant said at the hearing that she did not resign and did not intend to resign. According to the Claimant, the hearing lasted just under an hour, “went too fast” and was confusing. The judge produced a case management order which included the following:

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

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

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

9. On 6 March 2017 the Claimant wrote a response to the ET's case summary which again includes facts which could support a standard unfair dismissal case and a constructive dismissal case. She maintained that she was “dismissed” and that she went home on 14 November 2016 because she was ill. But she also stated that “the behaviour of Lee Fowler was detailed to explain why I went home ill”.
10. The substantive ET hearing took place in Bristol from 13-15 November. The Claimant appeared in person: she and her partner gave evidence. The Respondent was represented by counsel (Mr Bax) and called eight witnesses.

#### *The ET decision*

11. In its judgment dated 24 November 2019 the ET set out the list of issues which had been identified by Employment Judge Reed at the case management preliminary hearing.

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

"3.2. In relation to the complaint of unfair dismissal, the Claimant had informed Employment Judge Reed that she did not resign and that the Respondent had dismissed her by treating her behaviour as a dismissal. The Judge stated, in paragraphs 3 and 4 of his Summary, that the Claimant had

therefore either been dismissed (in which case, unfairly) or she had resigned (in which case, any claim of constructive unfair dismissal would have been likely to have failed because she did not allege she had resigned because of the Respondent's actions). If the Claimant was dismissed, the Respondent sought to run arguments of contributory conduct and/or that a fair process would not have made any difference (the principle in the case of *Polkey*)."

12. The ET acknowledged that it had "attempted to limit our findings to those matters which were relevant to a determination of the issues". The ET set out the evidence about the 14 November 2016 incident and acknowledged that the Claimant maintained throughout the hearing that she did not resign. The tribunal reached the following conclusions:

"5.4 Looking at the words used by the Claimant on 14 November and the text messages which were then sent, there could have been no doubt that the Claimant had indicated that she had resigned. Even the Claimant herself accepted in cross-examination that the text would reasonably have been interpreted as a resignation.

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

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

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

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

13. The Claimant's appeal to the EAT was rejected on the initial sift but at a rule 3(10) hearing (at which Mr Strelitz appeared for the Appellant *pro bono* under the ELAAS scheme) Judge Eady QC allowed it to proceed, though only on the following ground:

“I claimed that I was constructively unfairly dismissed and the Respondent acknowledged this in its ET3. However, having found that I resigned, the ET failed to go on and consider whether I did so in circumstances that would amount to a dismissal contrary to s 95(1)(c) ERA 1996. The ET ought properly to have done so where such a claim was plainly an alternate pleading by a self-representing litigant.”
14. The substantive hearing in the EAT came before Elisabeth Laing J on 28 March 2019, with Ms Mervyn once again representing herself. In her judgment the judge made some initial comments about how tribunals should deal with litigants in person. She noted that tribunals “must be careful not to invent a case for a litigant, which the litigant has not advanced or to step into the factual and evidential arena”: *Muschett v HM Prison Service* [2010] IRLR 451. She cited *Mensah v East Hertfordshire NHS Trust* [1998] IRLR 531 as authority for the proposition that a tribunal is not under a general duty to hear every allegation in the ET1, but it is able to investigate of its own motion a pleaded complaint which the litigant was not setting out to prove.
15. The judge expressed doubt as to whether the principle from *Mensah* could be extended to “a case in which the complaint which the litigant is not setting out to prove is inconsistent with the complaint which he is setting out to prove”. However, she recognised that “if it is obvious from the ET1 that a litigant in person is relying on facts that could support a legal claim”, the ET has a duty to ensure that the litigant in person understands the nature of that claim. Where a litigant in person has decided not to advance a claim, “the ET should be confident that the litigant in person has done so advertently.” The Judge noted that “a person with no legal training might well think that if she wanted to bring an unfair dismissal claim, the last thing that it would be in her interest to concede would be that she had resigned rather than been dismissed”.
16. Elisabeth Laing J found that the allegations in the ET1 “did raise a potential constructive dismissal claim”. Indeed, the Judge noted that counsel for the Respondent had accepted that the ET1 “described an employee walking out of the job because the job had become intolerable”.
17. The judge held that the list of issues did not bind the ET. After referring to *Hart v English Heritage* [2006] IRLR 915, *Parekh v London Borough of Brent* [2012] EWCA Civ 1630 and *Scicluna v Zippy Stitch Ltd* [2018] EWCA Civ 1320, she noted that the ET in the present case had recognised that it *did* have power to revisit the list of issues, because it had asked the parties at the start of the hearing whether they still agreed with that list.
18. The judge turned finally to the critical question of whether the ET was bound to consider the constructive dismissal claim, or at least to explore whether she intended to abandon the constructive dismissal claim she appeared to have set out in her ET1:

“92. The ET1 is what gives the ET jurisdiction to decide a dispute; see *Chapman v Simon* [1994] IRLR 124. The ET does

not have jurisdiction to consider a claim not made in the ET1 nor does it have a general duty to consider everything raised in the ET1 (see *Mensah*) even when the Claimant is a litigant in person. The question on the facts of this case is whether, where a potential constructive dismissal claim is made in the ET1, as I consider it was here, and it is a potentially central aspect of the claim, rather than [a] peripheral matter, the ET should consider that claim, or satisfy itself that the litigant in person has inadvertently withdrawn that claim.

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

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

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

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

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



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

19. As I have already noted, the judge gave permission to appeal to this court, where Ms Mervyn has been represented by Mr Paul Strelitz. Mr Richard Shepherd appeared for the Respondent company. Each has made concise and helpful submissions.

*The Claimant's submissions*

20. Mr Strelitz submits that Elisabeth Laing J erred in concluding that the ET was justified in neither considering the constructive dismissal claim nor satisfying itself that the litigant in person had “advertently” withdrawn that claim. The ET should have recognised that the distinction between a dismissal and constructive dismissal case would be confusing for a litigant in person. EJ Reed should have taken more care in the telephone hearing to ensure that the Claimant really wanted to withdraw the constructive dismissal claim and understood the consequences of doing so. The ET should have also been prepared not to adhere to the list of issues at the final hearing.
21. The Claimant submits that the EAT was wrong to rely on *Muschett* to conclude that the ET’s approach was justified. Although the Claimant had denied that she had resigned, she had also set out facts which demanded consideration as to whether the Respondent’s conduct amounted to constructive dismissal. The ET should have asked the Claimant why she went home on 14 November 2016 and corresponded in a manner which the ET itself found amounted to a resignation. This would not have strayed into the realms of inquisitorial justice or involved the ET stepping “into the factual and evidential arena”. On the contrary, it would have recognised the parties’ unequal footing. Such an approach would have enabled the Claimant to advance a central element of her pleaded claim.

*The Respondent's submissions*

22. Mr Shepherd submits that a “Claimant’s case is not what her lawyers (or a judge) may want it to be or think it should or could be” but “what the Claimant asserts it to be”: The Claimant advanced a positive case that she did not resign and adduced evidence in support of that claim; for example, that she “went home ill” on 14 November 2016. Because she claimed not to have resigned, she could not make a claim of constructive dismissal.
23. The Respondent also submits that constructive dismissal was not an available alternative finding, given that the Claimant had contended that she had not resigned. Since constructive dismissal requires the employee to have resigned in response to her employer’s repudiatory breach, the Claimant could not have made this claim out while arguing that she never resigned.
24. The Respondent further argues that the Claimant is wrong to submit, as a ground of appeal, that the ET should have assisted the Appellant in her giving of evidence. This

ground was not advanced before the EAT and so cannot be pursued before the Court of Appeal. In any event, if the ET had assisted the Claimant in the way in which the Claimant now proposes, it would have “stepped into the factual and evidential arena”.

*The material before the ET*

25. It is useful to look at the essential written material which was available to the ET on the question of what the Claimant was really asserting:-

- a) Her ET1 lodged on 4 December 2016 contained three pages of “additional information” beginning with the sentence “on 14 November 2016 I had to walk out of my workplace due to stress”.
- b) The Respondent’s ET3 stated that it was clear that the Claimant had resigned.
- c) The Claimant’s completed case management agenda form repeatedly describes her complaint as being “unfair dismissal (including constructive dismissal)” as well as a separate claim for discrimination.
- d) A covering letter from her enclosing the completed agenda included the paragraph “the claim is for unfair dismissal (including constructive dismissal) and discrimination. There was no resignation on 14 November 2016 and no contact from my employer Lee Fowler under 25 November 2016”. Later in the same document we find:-

“I had always acted in the interests of the company, as I had for the last 11 years. I had to leave my office because of Lee Fowler’s unreasonable behaviour and making it impossible for me to carry out my work correctly and legally. ... I am claiming unfair dismissal including constructive dismissal”

- e) The Respondent’s agenda form, in response to the question asking what were the issues or questions for the tribunal to decide, answered (so far as material):-

“Was the Claimant dismissed? If so, was she unfairly dismissed?”

Did the Claimant resign? If so, can she claim constructive dismissal?”

26. I have already noted what occurred at the telephone case management hearing. At the substantive hearing a bundle of documents was produced which included the Respondent’s notes of a series of phone calls and text messages involving “Julie” (Mrs Fowler) and “Marion” (the Claimant) on 15, 16 and 17 November 2016. These included:-

Julie (15 Nov at 17:11): Hi Marion, I understand you went home from work upset yesterday and haven’t been in today. Would you give Lee or I a ring when you get this message only on a personal note we wanted to know if you are okay. Regards, Julie.

Marion: (15 Nov at 17:39): Hello Julie. I am not okay. After 11 years of service I find myself in a position where I can no longer work for bw controls anymore. I will forward a letter to Lee and return property that belongs to the company. Keith will collect my property at the end of the week. Regards, Marion.

Julie (15 Nov at 17:56): I am very sorry to hear this and it is certainly something that Lee and I would not want. I am at home on my own so if you would like to talk then please give me a ring.

(after several more exchanges)

Marion (16 Nov at 19:18): You are not my employer, stop harassing me with your stupid texts. I will be there at 09:30 tomorrow [to collect my P45].

Julie (16 Nov at 20:31) Marion, as a director of BW Controls I am telling you not to attend our offices until an appointment has been agreed as you are no longer an employee of the company.

27. The Claimant's witness statement dated 5 June 2017 nowhere states expressly that she had been dismissed. In the first paragraph it says that "the Respondent's believed that I resigned based on the interpretation of the text messages sent on 15 November 2016 between Julie Fowler and myself".
28. The witness statement of Mr Fowler states that just before midday on 14 November 2016 the Claimant walked past his office and said "stuff your fucking job".

#### *The law*

29. Rule 29 of the Employment Tribunals Rules of Procedure 2013 provides:-

"The Tribunal may at any stage of the proceedings, on its own initiative or on application, make a case management order. Subject to Rule 30(A) 2 and 3 [neither of which is relevant here] the particular powers identified in the following rules do not restrict that general power. A case management order may vary, suspend or set aside an earlier case management order where that it necessary in the interests of justice, and in particular where a party affected by the earlier order did not have a reasonable opportunity to make representations before it was made."

30. The decision of this court in *Parekh v London Borough of Brent* [2012] EWCA Civ 1630 is in my judgment instructive. It was an unfair dismissal case in which the Claimant appeared in person at a pre-hearing review in the employment tribunal; the Respondent was represented by counsel. (There was an issue about whistleblowing which is not relevant for present purposes.) The council's case was that Mr Parekh had been fairly dismissed on the grounds of lack of capability. The judge at the PHR made an order which included the following:-

"19. Accordingly, it is now definitively recorded that the issues between the parties which will be determined by the tribunal are as follows:

a. Did the respondent act reasonably in treating capability as a sufficient reason for dismissal and in particular did the respondent act reasonably in concluding that the claimant lacked the competencies referred to in sub paragraphs b, c and d of the letter of 27 August 2009 referred to above?

b. Did the respondent otherwise act unreasonably in its decision to dismiss the claimant from his employment?

c. Was dismissal within the range of reasonable responses?"

31. Mr Parekh appealed, first to the EAT and then to this court, from the order made at the PHR. The complaint on his behalf was that as the list of issues did not include the prior question "Has the [Council] proven on the balance of probabilities that the reason for the dismissal of [Mr Parekh] was capability?" Mr Parekh was thereby prevented from disputing the Council's given reason for dismissing him.

32. In this court Mummery LJ said [emphasis added]:-

30. ... {The] list was described by the employment judge as the issues "definitively recorded" by him. He recorded them following the discussions at the PHR by Mr Parekh and Mr Ross, appearing for the Council, with him. The list was not the product of any adjudication, let alone any binding adjudication, of a dispute of substantive fact or law between the parties, such as whether capability was the reason for the dismissal, or of a procedural application or dispute.

31. A list of issues is a useful case management tool developed by the tribunal to bring some semblance of order, structure and clarity to proceedings in which the requirements of formal pleadings are minimal. The list is usually the agreed outcome of discussions between the parties or their representatives and the employment judge. If the list of issues is agreed, then that will, as a general rule, limit the issues at the substantive hearing to those in the list: see *Land Rover v. Short* Appeal No. UKEAT/0496/10/RN (6 October 2011) at [30] to [33]. *As the ET that conducts the hearing is bound to ensure that the case is clearly and efficiently presented, it is not required to stick slavishly to the list of issues agreed where to do so would impair the discharge of its core duty to hear and determine the case in accordance with the law and the evidence:* see *Price v. Surrey CC* Appeal No UKEAT/0450/10/SM (27 October 2011) at [23]. As was recognised in *Hart v. English Heritage* [2006] ICR 555 at [31]-[35] case management decisions are not final decisions. They can therefore be revisited and reconsidered, for example if there is a material change of circumstances. The

power to do that may not be often exercised, but it is a necessary power in the interests of effectiveness. It also avoids endless appeals, with potential additional costs and delays.

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

33. We were referred by Mr Shepherd to the first sentence of paragraph 32 of Mummery LJ’s judgment in *Parekh*, but it does not assist in determining the present case. Mummery LJ was not saying that an agreed list of issues cannot be revisited by the employment tribunal: that would be inconsistent with the sentence I have italicised in the previous paragraph of his judgment. It is important to remember that *Parekh* was an interlocutory appeal from a decision at a pre-hearing review in a case which had not, even after appeals to the EAT and to this court, reached a substantive hearing. Mummery LJ was making the point that the procedure adopted by Mr Parekh’s lawyers, by appealing (twice) rather than asking the tribunal to reconsider the list of issues, was inappropriate.
34. The recent decision of this court in *Scicluna v Zippy Stitch* [2018] EWCA Civ 1320 concerned a somewhat unusual claim for unauthorized deduction from wages and breach of contract. Both sides had been represented throughout. An agreed list of issues had been filed with the ET. One of these was what was the agreement regarding the Claimant’s wages, if any. The Claimant said there was an oral agreement for him to receive £100 net per day in salary and that while he had agreed to defer payment he had not waived his rights to the salary. The Respondent said that there was no agreement for the Claimant to be paid a salary until another employee departed.
35. Longmore LJ said:-

“14. Ever since the Woolf reforms, parties in the High Court have been required to agree lists of issues formulating the points which need to be determined by the judge. That list of issues then constitutes the road map by which the judge is to navigate his or her way to a just determination of the case. Employment tribunals encourage parties to agree a list of issues for just that reason and, if advocates are retained on both sides, it is right and proper for a list of issues to be prepared.

15. In paragraphs 32-33 of *Land Rover v Short* (2011) UKEAT/0496/10/RN Langstaff J approved the submission of counsel that:-

"it was trite law that it was the function of an Employment Tribunal to determine the claims which the claimant had actually brought, rather than the claims which he might have

brought and that accordingly the claimant was limited to the complaints set out in the agreed list of issues.””

36. After citing paragraph 31 of Mummery LJ’s judgment in *Parekh*, Longmore LJ continued:

“17. Professional advocates were retained in the present case and agreed the list of issues which was given to the employment judge (so we were told) on the morning of the hearing. The judge was, therefore, entitled to proceed on the basis that the only issue in relation to the claim for unauthorised deduction from wages and breach of contract was whether there was an agreement that the claimant be paid a salary. Having decided that there was such an agreement, she not unnaturally upheld the contract claim as being outstanding on termination. She never dealt with any argument that nothing was outstanding because the company could not afford to pay the claimant's salary and still less with any argument that, even if the company could not afford to pay it, it was necessary to imply a term that, nevertheless, the company was obliged to pay once the employment had come to an end. These issues were never said to be issues which the judge needed to decide.

37. Underhill LJ agreed with Longmore LJ. At the end of his short judgment he said:-

“There are exceptional cases where it may be legitimate for a tribunal not to be bound by the precise terms of an agreed list of issues: but this is not one of them.”

Peter Jackson LJ agreed with both judgments.

38. I do not read the last sentence of the judgment of Underhill LJ in *Scicluna* as imposing a requirement of exceptionality in every case before a tribunal can depart from the precise terms of an agreed list of issues. It will no doubt be an unusual step to take, but what is “necessary in the interests of justice” in the context of the tribunal’s powers under Rule 29 depends on a number of factors. One is the stage at which amending the list of issues falls to be considered. An amendment before any evidence is called is quite different from a decision on liability or remedy which departs from the list of issues agreed at the start of the hearing. Another factor is whether the list of issues was the product of agreement between legal representatives. A third is whether amending the list of issues would delay or disrupt the hearing because one of the parties is not in a position to deal immediately with a new issue, or the length of the hearing would be expanded beyond the time allotted to it.

### *Stepping into the arena?*

39. In *Mensah*, Gibson LJ encouraged tribunals “to be as helpful as possible to litigants in formulating and presenting their cases. It is always good practice for Industrial Tribunals to clarify with the applicant (particularly if appearing in person or without professional representation) the precise matters raised in the IT1 which are to be pursued and to seek confirmation that any others so raised are no longer pursued”.

However, Peter Gibson LJ went on to find that an ET is not under a “duty to hear every allegation in the originating application unless so abandoned, the Industrial Tribunal being bound to act of its own motion even if the applicant does not put forward evidence to make good the allegation nor argues in support of it”. This is because:

“it must be for the judgment of the particular Industrial Tribunal in the particular circumstances of the case before it whether of its own motion it should investigate any pleaded complaint which it is for the litigant to prove but which he is not setting out to prove.”

40. In *Muschett* the claimant submitted that, since he was a litigant in person, the employment judge should have helped him to unearth relevant facts to help him make his case. Rimer LJ rejected this view of the function of employment judges at [31]:

“It is not their role to engage in the sort of inquisitorial function that Mr Hopkin [counsel for the claimant] suggests or, therefore, to engage in an investigation as to whether further evidence might be available to one of the parties which, if adduced, might enable him to make a better case. Their function is to hear the case the parties choose to put before them, make findings as to the facts and to decide the case in accordance with the law. The suggestion that, in the present case, the employment judge committed some error of law in failing to engage in the sort of inquiry that Mr Hopkin suggested is, in my judgment, inconsistent with the limits of the role of such judges as explained by this court in *Mensah v. East Hertfordshire NHS Trust* [1998] EWCA Civ 954; [1998] IRLR 531 (see paragraphs [14] to [22] and the cases there cited by Peter Gibson LJ). Of course an employment judge, like any other judge, must satisfy himself as to the law that he must apply to the instant case; and if he assesses that he has received insufficient help on it from those in front of him, he may well be required to do his own homework. But it is not his function to step into the factual and evidential arena.”

41. In the recent EAT case of *McLeary v One Housing Group Ltd* UKEAT/0124/18/LA, Judge Auerbach said:-

“I have also considered whether it might be said that it would not be appropriate for the Tribunal, as it were, to invite a claimant to add a wholly new complaint. Indeed, it would not. However, what was necessary here, starting with the Case Management hearing, was simply to *clarify* the substance of what the Claimant was saying and the claims that she was seeking to bring. A margin of appreciation should indeed be allowed to the Judge below, as to how such matters are managed; but when, as in this case in my judgement, it shouts out from the contents of the Particulars of Claim that it is being alleged that there have been a number of acts of disability

discrimination that have, along with other acts, contributed to an undermining of trust and confidence that has driven an employee to resign, and the employee is effectively a litigant in person and has no professional representation, this is a matter that should, at the very least, be raised at the Case Management Preliminary Hearing so that clarification can be sought.”

42. In the present case to use Judge Auerbach’s vivid phrase, it “shouted out” from the contents of Ms Mervyn’s Particulars of Claim that, on a proper analysis, she was alleging that she had been constructively dismissed.

*Conclusion*

43. It is good practice for an employment tribunal, at the start of a substantive hearing with either or both parties unrepresented, to consider whether any list of issues previously drawn up at a case management hearing properly reflects the significant issues in dispute between the parties. If it is clear that it does not, or that it may not do so, then the ET should consider whether an amendment to the list of issues is necessary in the interests of justice.
44. In this case (putting to one side the claim for alleged discrimination) the pre-reading of the essential material (in particular the ET1 and ET3) which no doubt occurred should have indicated to the tribunal that it was in truth far more likely than not that the Claimant had resigned, and that the real issue between the parties was (or should be) why she did so.
45. Against that background, and with the Claimant appearing once again in person, I do not think, with respect, that it was enough for the Tribunal simply to ask at the start of the substantive hearing whether the parties confirmed the previous list of issues. It would not have amounted to a “step into the factual and evidential arena” for the tribunal to have said that it seemed to them that there was an issue as to whether Ms Mervyn has been dismissed or had resigned and that the list of issues ought to be modified accordingly, perhaps on the lines suggested in the Respondent’s agenda form produced for the case management hearing. The Respondents had suggested these questions:
- i) Was the Claimant dismissed, if so, what was the reason for the dismissal, and did the Respondent act reasonably in treating it as a reason for dismissal?
  - ii) If the Claimant was not dismissed but resigned, why did she resign? Was the resignation in response to any behaviour by the Respondent amounting to constructive dismissal?
46. Such a course of action would of course have required the tribunal to ask both parties whether they were in a position to proceed immediately. But, as was fairly accepted by Mr Shepherd in argument, in this case no adjournment would have been necessary, save possibly until the afternoon of the first day of the hearing. The Claimant had set out her case, including what a lawyer would describe as allegations of repudiatory conduct, in her witness statement. The Respondent had eight witnesses available to deal with the contents of that statement. In Mr Fowler’s witness statement he had said that, in view of the case management order that it would not need to hear evidence



about his alleged mismanagement, he would not address “Marion’s misplaced claims” but added that they were untrue and irrelevant to the employment relationship in any event. He could almost certainly have given evidence about the disputed facts without significant delay or disruption of the hearing.

*Disposal*

47. In the present case it was necessary in the interests of justice for the list of issues to be amended so that the tribunal could consider “ordinary” unfair dismissal and constructive unfair dismissal as alternatives. This is not to say that if it had done so Ms Mervyn’s claim would have succeeded, but I do not think that it is possible for this court to say that it could have made no difference to the outcome.
48. I would therefore allow the appeal and remit the constructive dismissal claim for rehearing by an employment tribunal, if possible comprised of Employment Judge Livesey and his colleagues who conducted the previous hearing. Their previous findings of fact should stand, in particular the finding that the Claimant resigned on 14 or 15 November 2016. Their remaining task is to hear evidence and argument on the question of whether that resignation occurred in circumstances in which Ms Mervyn was entitled to terminate her contract without notice by reason of the employer’s conduct.

**Lord Justice Singh:**

49. I agree that this appeal should be allowed for the reasons given by Bean LJ.

**Lady Justice Asplin:**

50. For all the reasons set out above, I agree that the appeal should be allowed and remitted to the employment tribunal and for the purposes of that further hearing, the previous findings of fact should stand. It follows that I also agree that on the facts of this case, in the interests of justice, the tribunal should have amended the list of issues so that it could consider unfair dismissal and constructive unfair dismissal as alternative claims. This is not a case in which in amending the list of issues, the tribunal would have been inviting a completely new complaint. Far from it. Just as in *McLeary v One Housing Group Ltd*, in this case the contents of the ET1 and ET3 shouted out that constructive unfair dismissal was being claimed in the alternative.
  51. Although it would have been most convenient and appropriate had the matter been clarified at the case management hearing, in the circumstances of this case, there was nothing to prevent the tribunal from making the amendment. Obviously, the tribunal must take care not to step into the factual and evidential arena and not to be perceived as favouring one party over another. However, in order to do justice to all parties, it is equally important, where at least one of those parties is unrepresented, to clarify the issues which arise on the pleadings and to seek to confirm whether any and, if so, which claims have been conceded.
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## **ORDER**

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**UPON** hearing Counsel for the Appellant and Counsel for the Respondent on 19<sup>th</sup> February 2019

**IT IS ORDERED THAT:**

1. The appeal be allowed.
2. The Appellant's constructive dismissal claim is remitted for rehearing by an employment tribunal in accordance with paragraph 48 of the judgment of this court.
3. The Respondent do pay the Appellant's costs in this court to be assessed on the standard basis if not agreed.