



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr Yasini Mfunda  
**Respondent:** London Borough of Southwark Limited  
**Heard at:** London South (by telephone) **On:** 6 January 2021  
**Before:** Employment Judge Fowell  
**Representation:**  
**Claimant:** In person  
**Respondent:** Mr M Smith of Bevan Brittan LLP Solicitors

## JUDGMENT ON A PRELIMINARY ISSUE

1. This case concerns a complaint of unlawful deduction from wages. Mr Mfunda says that the council operated a flexitime system and he was owed about 89 hours when he left them on 12 February 2019.
2. That claim was due to be heard in Croydon on Monday, 9 March 2020, with a time estimate of one day, but on the working day before the hearing, Friday 6 March 2020, Mr Mfunda sent an email to the council's solicitors withdrawing the claim.
3. In that email he made reference to a counter-schedule from the respondent. This set out the maximum amount which they felt he could obtain by way of compensation if successful in his claim.
4. Mr Mfunda explained to me at this hearing that he had misunderstood this counter schedule and believed that it was an offer of settlement by the council, and on that basis only had withdrawn the claim.
5. Unfortunately I was not provided with a copy of the email in question but the contents were read out to me. As already noted, it was sent to the respondent's solicitors and also copied to the employment tribunal and to ACAS. Making allowance for any error on my part in making a note of this important communication, it read,

“Further to your counter schedule of loss dated 29 August 2019 where you suggest that the maximum amount I can receive is £1922, having taken advice, I am writing to confirm that I withdraw my application which is due for hearing on Monday 9 March”

6. It is clear from this wording that the counter schedule was identified correctly. It is not referred to as an offer of settlement but as the maximum amount which Mr Mfunda could receive. On that basis, he withdrew the claim. The implication is that, having regard to the low value of the claim, he no longer thought it worth his while to pursue.
7. On receipt of that email the hearing was vacated. Subsequently Mr Mfunda wrote to the tribunal about the matter and this hearing was initially listed for November 2020 before being adjourned due to lack of an available judge.
8. The precise motives behind a decision to withdraw are not in fact relevant. Rule 51 of the Employment Tribunal Rules of Procedure provides:

**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.

9. Once withdrawn, the tribunal has no power to set aside the withdrawal so as to ‘reactivate’ the claim — [\*Khan v Heywood and Middleton Primary Care Trust 2007 ICR 24, CA\*](#). It follows that having concluded that this was a withdrawal, these proceedings are at an end.
10. In theory, a claimant can then start again and resubmit the same claim, but the usual course of action is for the Tribunal to dismiss the claim, which means that it cannot then be revived. Rule 52 provides:

**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.

11. If Mr Mfunda were to submit his claim again it would of course be out of time. He would have to satisfy a tribunal that it had not been reasonably practicable to submit the claim in time. On the present facts it is difficult to know how that test could be met. Nevertheless, I am concerned that there was or may have been

some confusion on the part of Mr Mfunda when he withdrew his complaint, regardless of my reading of his email, and so, in the interests of justice, I decline to dismiss his claim outright. It is a matter for him whether he chooses to attempt to pursue it further. In the meantime, the claim stands withdrawn and the present proceedings are at an end.

Employment Judge Fowell

Date 6 January 2021