EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Miss Sarah Fisher	AND	Novia Financial Plc

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Plymouth **ON** 18 March 2021
BY CLOUD VIDEO PLATFORM

EMPLOYMENT JUDGE N J Roper

Representation
For the Claimant: Did Not Attend
For the Respondent: Mr P Woodhouse, Solicitor

JUDGMENT

The judgment of the tribunal is that:
1. The claimant's claims are struck out; and
2. The claimant is ordered to pay the respondent's costs in the sum of £6,540.00.

REASONS

1. This is the judgment following a preliminary hearing to determine (i) whether the claimant's claims should be struck because she has failed actively to pursue them; and (ii) to determine the respondent's application that the claimant should pay its costs.
2. This has been a remote hearing on the papers which has not been objected to by the parties. The form of remote hearing was by cloud video platform. A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. The documents that I was referred to are in a bundle of 25 pages, the contents of which I have recorded. The order made is described above.
3. The claimant was on notice of today's hearing, but she failed to attend. Unfortunately her failure to engage with the process has been a consistent trend throughout these proceedings.
4. In this case the claimant Miss Sarah Fisher has brought claims alleging unfair constructive dismissal, and discrimination on the grounds of disability and sex and/or marital status. The unfair dismissal claim has already been dismissed by Employment Judge Dawson by judgment dated 26 November 2020.
5. I have considered the grounds of application and the response submitted by the parties. I have also listened to the factual and legal submissions made by and on behalf of the

respondent. The claimant did not attend and did not furnish any written submissions. I have not heard any oral evidence, and I do not make findings of fact as such, but my conclusions based on my consideration of the above are as follows.

6. The claimant was employed as an Implementation Executive by the respondent from 30 August 2016 until her resignation on 3 October 2019 which gave four weeks' notice to expire on 31 October 2019. She issued these proceedings on 29 September 2019 claiming unfair constructive dismissal, and discrimination on the grounds of disability and sex and/or marital status. The unfair dismissal claim has already been dismissed because the claimant issued these proceedings before she had resigned her employment, and this Tribunal did not therefore have jurisdiction to hear the claim.
7. The respondent entered a response on 28 October 2019 defending the claims. A case management preliminary hearing was listed for 25 March 2020 which the claimant failed to attend. The claimant had not answered correspondence from the respondent ahead of that case management preliminary hearing whereby the respondent sought to agree the issues and to agree an agenda as directed by the Tribunal. Employment Judge Livesey prepared a case management order dated 25 March 2020 which ordered the claimant to provide an explanation to the Tribunal and the Respondent on or before 22 April 2020 for her failure to attend the hearing and/or engage with the respondent. The claimant failed to comply with this order, and by letter dated 1 May 2020 The Tribunal wrote to the claimant informing her that Employment Judge Livesey was considering striking out the claimant's claim because it had not been actively pursued.
8. The claimant did respond to that strike out warning by email dated 11 May 2020 suggesting that the emails had been lost in her spam folder and she confirmed that she did wish to proceed with her claims.
9. The matter was then listed for a further preliminary hearing on 26 November 2020. Meanwhile the respondent had complained to the Tribunal that the claimant continued to fail to engage with the respondent in connection with meaningful preparation for that hearing, and it applied for the unfair dismissal claim to be struck out on the basis that the Tribunal did not have jurisdiction to hear it. The respondent also applied for the claimant to pay its costs which the respondent argued had been needlessly incurred and thrown away as a result of the claimant's failure to engage with the process.
10. The claimant did attend the preliminary hearing on 26 November 2020, acting in person, and at that hearing the unfair dismissal claim was dismissed, and further case management orders were made by Employment Judge Dawson on the same date. The matter was listed for its full main hearing in Bristol for five days from 4 October 2021, and this hearing today was also listed to determine the respondent's application for costs. The claimant was ordered to attend today's hearing for the purposes of cross-examination. As noted above, the claimant failed to do so.
11. In addition, the claimant was ordered on 26 November 2020 to provide further information in connection with her disability discrimination claim, and to provide a schedule of loss, both by 17 December 2020. The claimant failed to comply with these orders. The claimant was also provided to give mutual disclosure of all documents which she wished to rely on at the full main hearing on or before 29 January 2021, and again failed to comply with that order. In the meantime, the respondent complied with all orders which should be made by the Tribunal, and further attempted without success to engage with the claimant in connection with the preparation of the claim. It also applied for the claimant's claim to be struck out, and the parties were then put on notice that that application would also be determined today.
12. Having established the above facts, I now apply the law.
13. <u>The Strike Out Application</u>
14. The Employment Tribunal Rules of Procedure 2013 are in Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 and are referred to in this judgment as "the Rules". Rule 37(1) provides that at any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on the grounds that (a) it is scandalous, or vexatious, or has no reasonable prospect of success; (b) that the manner in which the proceedings have been

conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious; (c) for non-compliance with any of these Rules or with an order of the Tribunal; (d) that it has not been actively pursued; (e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).

15. The respondent has referred me to, and I have considered, the following authorities: Weir Valves & Control UK Ltd v Armitage [2004] ICR 371 EAT (paragraph 17) and Khan v London Borough of Barnet UKEAT/0002/18 at paragraph 29.
16. If the claimant had complied with the Tribunal orders and engaged in the process today and earlier, and if she had supplied the further information as ordered, I might have been persuaded that this matter was still capable of a fair trial. However, this is a case which was presented nearly 18 months ago, and it arose from circumstances which (depending upon the further information from the claimant which has not been forthcoming) related to matters arising some time before that. The respondent argues that it is now prejudiced by this delay and will be unable to meet any allegations raised by the claimant even if she complies with clear Tribunal orders (which of course she has not). The Overriding Objective in Rule 2 requires that cases are dealt with fairly and justly but so as to avoid delay and to save expense. The interests of justice apply to other Tribunal users and Tribunal staff, as well as the parties in this case, and it is unfair on other Tribunal users who face significant delays to be delayed further by unmeritorious claims. Obviously, the claimant will face significant prejudice if her claim is struck out, because she will no longer be able to pursue it. I have to balance that prejudice against the prejudice suffered by the respondent in trying to meet an unspecified and historical claim in circumstances where the claimant has failed to engage in the process and to comply with orders to specify the exact nature of those claims. In addition, given the claimant's history of failing to engage with the process and to comply with Tribunal orders, I am not satisfied that a fair trial remains possible.
17. It is clear in this case that the grounds for strike-out in Rule 37(1) are made out, and in particular: (c) non-compliance with any of these Rules or with an order of the Tribunal; and (d) that it has not been actively pursued; In my judgment the balance of prejudice favours the respondent and the claimant's claims are therefore struck out under Rule 37(1)(c) and (d).
18. The Application for Costs:
19. The respondent also makes an application for its costs on the basis that the claimant has acted abusively or otherwise unreasonably in the way in which the proceedings have been conducted.
20. The Rules
21. Rule 76(1) provides: "a Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that – (a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or (b) any claim or response had no reasonable prospect of success.
22. Under Rule 78(1) a costs order may – (a) order the paying party to pay the receiving party a specified amount, not exceeding £20,000, in respect of the costs of the receiving party; (b) order the paying party to pay the receiving party the whole or a specified part of the costs of the receiving party, with the amount to be paid being determined, in England and Wales, by way of detailed assessment carried out either by a county court in accordance with the Civil Procedure Rules 1998, or by an Employment Judge applying the same principles …"
23. Under Rule 84, in deciding whether to make a costs, preparation time, or wasted costs order, and if so in what amount, the Tribunal may have regard to the paying party's (or, where a wasted costs order is made, the representative's) ability to pay.
24. The Relevant Case Law
25. I have been referred to and have considered the following cases: Gee v Shell Ltd [2003] [2003] IRLR 82 CA; McPherson v BNP Paribas [2004] ICR 1398 CA; Monaghan v Close Thornton [2002] EAT/0003/01; Brooks v Nottingham University Hospitals NHS Trust [2019] WLUK 271, UKEAT/0246/18; NPower Yorkshire Ltd v Daley EAT/0842/04; AQ Ltd v

Holden [2012] IRLR 648 EAT Kapoor v Governing Body of Barnhill Community High School UKEAT/0352/13; Nicholson Highland Wear v Nicholson [2010]IRLR 859; Barnsley BC v Yerrakalva [2012] IRLR 78 CA; Liddington v 2gether NHS Foundation Trust EAT 0002/16 IDS 1059; Jilley v Birmingham and Solihull Mental Health NHS Trust [2008] UKEAT/0584/06; Single Homeless Project v Abu [2013] UKEAT/0519/12; Vaughan v LB of Newham [2013] IRLR 713; and Raggett v John Lewis plc [2012] IRLR 906 EAT.

26. The Relevant Legal Principles
27. The correct starting position is that an award of costs is the exception rather than the rule. As Sedley LJ stated at para 35 of his judgment in Gee v Shell Ltd "It is nevertheless a very important feature of the employment jurisdiction that it is designed to be accessible to people without the need of lawyers, and that in sharp distinction from ordinary litigation in the UK, losing does not ordinarily mean paying the other side's costs …" Nonetheless, an Employment Tribunal must consider, after the claims were brought, whether they were properly pursued, see for instance NPower Yorkshire Ltd v Daley. If not, then that may amount to unreasonable conduct. In addition, the Employment Tribunal has a wide discretion where an application for costs is made under Rule 76(1)(a). As per Mummery LJ at para 41 in Barnsley BC v Yerrakalva "The vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and to ask whether there has been unreasonable conduct by the claimant in bringing and conducting the case and, in doing so, to identify the conduct, what was unreasonable about it, and what effects it had." However, the Tribunal should look at the matter in the round rather that dissecting various parts of the claim and the costs application, and compartmentalising it. There is no need for the tribunal to find a causative link between the costs incurred by the party making the application for costs and the event or events that are found to be unreasonable, see McPherson v BNP Paribas, and also Kapoor v Governing Body of Barnhill Community High School in which Singh J held that the receiving party does not have to prove that any specific unreasonable conduct by the paying party caused any particular costs to be incurred.
28. When considering an application for costs the Tribunal should have regard to the two-stage process outlined in Monaghan v Close Thornton by Lindsay J at paragraph 22: "Is the cost threshold triggered, e.g. was the conduct of the party against whom costs is sought unreasonable? And if so, ought the Tribunal to exercise its discretion in favour of the receiving party, having regard to all the circumstances?"
29. In Brooks v Nottingham University Hospitals NHS Trust the EAT confirmed that dealing with an application for costs requires a two-stage process. The first is whether in all the circumstances the claimant has conducted the proceedings unreasonably. If so, the second stage is to ask whether the tribunal should exercise its discretion in favour of the claiming party, having regard to all the circumstances.
30. The threshold to trigger costs is the same whether a litigant is or is not professionally represented, although in applying those tests, the EAT has held that the status of a litigant is a matter which the tribunal must take into account – see AQ Ltd v Holden in which Richardson J commented: "Justice requires the tribunals do not apply professional standards to lay people, who may be involved in legal proceedings for the only time in their life. As [counsel] submitted, lay people are likely to lack the objectivity and knowledge of law and practice brought about by a professional adviser. Tribunals must bear this in mind when assessing the threshold tests in [rule 76(1)(a)]. Further, even if the threshold tests for an order of costs are met, the tribunal has discretion whether to make an order. This discretion will be exercised having regard to all the circumstances. It is not irrelevant that a lay person may have brought proceedings with little or no access to specialist help and advice." However, Richardson J also acknowledged that it does not follow from this "that lay people are immune from orders for costs: far from it, as the cases make clear. Some litigants in person are found to have behaved vexatiously or unreasonably even when proper allowance is made for their inexperience and lack of objectivity". These statements were approved by Underhill P in Vaughan v London Borough of Newham.

31. The unpreparedness of a litigant in person which causes an inability properly to particularise the claim can constitute unreasonable conduct and was a proper basis on which to award costs to the respondent - Liddington v 2gether NHS Foundation Trust.
32. With regard to the paying party's ability to pay, Rule 84 allows the tribunal to have regard to the paying party's ability to pay, but it does not have to, see Jilley v Birmingham and Solihull Mental Health NHS Trust and Single Homeless Project v Abu.
33. Recovery of VAT
34. VAT should not be included in a claim for costs if the receiving party is able to recover the VAT, see Raggett v John Lewis plc which reflects the CPR Costs Practice Direction (44PD).
35. Conclusion
36. in my judgment the claimant has acted unreasonably in the manner in which she has brought and conducted the proceedings, and the application under Rule 76 is made out. I have regard to the two-stage process outlined in Monaghan v Close Thornton: in my judgment the cost threshold is triggered because the conduct of the party against whom costs is sought was unreasonable. Secondly, I consider that it is appropriate for the Tribunal to exercise its discretion in favour of the receiving party, having regard to all the circumstances.
37. I have seen a schedule of the costs claimed by the respondent which was sent in advance of this hearing to the claimant. The costs have been claimed at the hourly rate of £300.00 per hour for work undertaken by a partner; and £200 per hour for work undertaken by an assistant solicitor, plus VAT. I find that to be a reasonable rate, and it is commensurate with other firms of solicitors in the vicinity of Bath. The total costs claimed amounted to £7,140.00 plus VAT, at 20%. However, some of that in my judgment was an overestimation as to the amount of work to be undertaken at this hearing today. Nonetheless I am satisfied that the respondent's solicitors have been engaged for nearly 30 hours in the defence of this claim, and that the respondent has discharged interim accounts which have been submitted by the respondent's solicitors so as to meet the indemnity principle. The respondent is registered for VAT and will be able to reclaim this, and for this reason the claimant is not ordered to pay any VAT. I have no information as to the claimant's means, but that is because the claimant failed to comply with the Tribunal order to attend this hearing so that she could be cross examined on this matter. Bearing in mind all of the above I consider in the circumstances that the amount of costs claimed to be reasonable.
38. I therefore order that the claimant pays the respondent's costs in the sum of £6,540.00.

Employment Judge N J Roper

Date: 18 March 2021

Judgment sent to Parties: 25 March 2021

FOR THE TRIBUNAL OFFICE