



# EMPLOYMENT TRIBUNALS

**Claimant:** Ms S Stanley  
**Respondent:** Sofology Limited  
**On:** 16 March 2021  
**Before:** Employment Judge Benson

## JUDGMENT

1. The respondent's application for costs is refused.

## REASONS

### Application

1. This is the respondent's application that the claimant pay its legal costs incurred in these proceedings. The amount which it seeks is £4999.14 plus VAT. It says that this represents its costs from the outset of the claim to the date of the final hearing on 18 February 2021. In the alternative, it seeks its costs to 29 December 2020 when the claimant notified the Tribunal that she was withdrawing her claim. That amount is £1592.64.
2. The claimant's claim of unfair dismissal was listed for a final hearing on 18 February 2021. The respondent stated that the claimant had not complied with any of the Tribunal's case management orders and had not responded or engaged with the respondent in the preparation of her claim for the final hearing. On 22 January 2021, the respondent requested that the hearing be converted to a preliminary hearing to consider an application to strike out the claimant's claim and an application that the claimant pay the respondent's legal costs on the grounds that the claimant 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.

3. On the morning of the hearing, the Tribunal located an email from the claimant dated 29 December 2020 by which the claimant notified the Tribunal that she wished to withdraw her claim. Unfortunately, that email was not copied to the respondent and nor was any action taken in respect of it by the Tribunal.
4. As a result of the claimant's withdrawal, a judgment was issued dismissing the claim on 18 February 2021.
5. Although the claimant was aware that the respondent was making an application that she should pay its costs, she did not attend the hearing on 18 February. Even so, I considered that the claimant should be given the opportunity to explain why she has not participated in these proceedings and to put forward any arguments why she should not be ordered to pay the respondent's costs. She should also have the opportunity to provide to the Tribunal details of her income and outgoings and evidence about her ability to pay any costs which may be ordered.
6. The respondent requested that its application was considered on the papers without a further hearing. I gave the claimant the opportunity to request a hearing but she confirmed she was content to deal with the matter on paper.

### **Evidence and submissions**

7. The claimant submitted a detailed statement and supporting financial documentation on 3 March 2021. She has also been sent the respondent's Schedule of Costs on 23 February 2021. I have given consideration to all documents including the respondent's application dated 22 January and the claimant's statement.

### **Findings of fact**

8. The claimant issued her claim on 30 June 2020 claiming unfair dismissal. Having brought the claim, she chased the Tribunal by way of email on 23 August as she had not heard anything from them. The response from the Tribunal was sent to the claimant's email address on her claim form but it was incorrect. Thereafter the claimant did nothing else to pursue her complaint. When the respondent realised that the email address was incorrect, it sent the response and further correspondence by post. The claimant accepts that she received the notice of the final hearing dated 17 November 2020 with the standard case management orders. She did not comply with the Tribunal's case management order issued on 17 November 2020 in that she was to provide a schedule of loss by 15 December 2020. On 29 December 2020 she was to provide the respondent with a list of documents, however on that day she emailed the Tribunal withdrawing her claim. There was therefore one case management order which was not complied with.
9. Unfortunately, she did not copy the respondent into her correspondence and the Tribunal did not notify the respondent either. The respondent

continued with its preparation and followed the case management order to exchange lists of documents. On 22 January 2021, the respondent wrote to the claimant notifying her that it was applying to strike out her claim as it had been conducted in an unreasonable, scandalous, or vexacious manner; she had not complied with a Tribunal order and/or it had not been actively pursued and that if she continued to pursue her claim (as it was unaware it had been withdrawn) the respondent would seek an order for costs against her. The respondent did try to contact the claimant by phone, but the claimant did not answer numbers which were unknown to her as she had previously been a victim of fraud and did not listen to phone message as she stated that everyone who knew her would text her.

10. On 17 February, the day before the hearing, the respondent contacted the claimant and notified her that they were attending the hearing today and that she should attend. She advised them that she had withdrawn her claim. This was the first occasion that the respondent was aware that the claimant had written to the Tribunal on 29 December 2020.
11. The claimant has provided a statement in which she apologises to the respondent and the Tribunal for her non-activity and sets out the reasons she did not comply with the case management order or pursue her claim. In summary her evidence is that having been made redundant by the respondent, she was spent her time actively applying for new jobs whilst also working in temporary role in a supermarket on Saturday, Sunday and Monday nights from 9.30pm to 6.30 am. She found this exhausting and obtained further temporary work from August 2020. She says she focused on her new job and did not properly read either the response sent by the respondent's solicitor or the notice of hearing and case management orders sent by the Tribunal. She did not feel she had the mental capacity to deal with it. The claimant was used to working with legal processes having dealt with small claims as part of her role with the respondent however Christmas was very stressful for her and on 29 December she decided it would be too stressful to carry on with the claim and wrote to the Tribunal withdrawing it.
12. In her representations to the Tribunal for this hearing, she has provided evidence of her income and outgoings. She confirmed that she has no savings, she has monthly outgoings of £1306.12 (which includes repayments of credit cards and other loans of £631 per month). She has recently commenced new employment in a permanent role and is earning £23,000 per annum (which I calculate to be approximately £1640 per month net).

## **The Law**

13. The power to award costs is contained in the 2013 Rules of Procedure. The definition of costs appears in rule 74(1) and includes fees, charges, disbursements or expenses incurred by or on behalf of the receiving party.
14. Rule 75(1) provides that a Costs Order includes an order that a party makes a payment to another party "in respect of the costs that the receiving party has incurred while legally represented".

15. The circumstances in which a Costs Order may be made are set out in rule 76. The relevant provision here was rule 76(1) which provides as follows:

**“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.”**

16. The procedure by which the costs application should be considered is set out in rule 77 and the amount which the Tribunal may award is governed by rule 78. In summary rule 78 empowers a Tribunal to make an order in respect of a specified amount not exceeding £20,000, or alternatively to order the paying party to pay the whole or specified part of the costs with the amount to be determined following a detailed assessment.

17. Rule 84 concerns ability to pay and reads as follows:

**“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.”**

18. It follows from these rules as to costs that the Tribunal must go through a three stage procedure (see paragraph 25 of **Haydar v Pennine Acute NHS Trust UKEAT 0141/17/BA**). The first stage is to decide whether the power to award costs has arisen, whether by way of unreasonable conduct or otherwise under rule 76; if so, the second stage is to decide whether to make an award, and if so the third stage is to decide how much to award. Ability to pay may be taken into account at the second and/or third stage.

19. The case law on the costs powers (and their predecessors in the 2004 Rules of Procedure) include confirmation that the award of costs is the exception rather than the rule in Employment Tribunal proceedings; that was acknowledged in **Gee v Shell UK Limited [2003] IRLR 82**.

20. In awarding costs against a claimant who has withdrawn a claim, an employment tribunal must consider whether the claimant has conducted the proceedings unreasonably in all the circumstances, and not whether the late withdrawal of the claim was in itself unreasonable — **McPherson v BNP Paribas (London Branch) 2004 ICR 1398, CA**.

21. It is appropriate for a litigant in person to be judged less harshly in terms of his or her conduct than a litigant who is professionally represented. According to the EAT in **AQ Ltd v Holden 2012 IRLR 648, EAT**, an employment tribunal cannot, and should not, judge a litigant in person by the standards of a professional representative.

22. If there has been unreasonable conduct there is no requirement for the Tribunal to identify a precise causal link between that unreasonable conduct and any specific items of costs which have been incurred: **McPherson v BNP Paribas (London Branch) [2004] ICR 1398**. However, there is still the need for some degree of causation to be taken into account as the Court of Appeal pointed out in **Barnsley Metropolitan Borough Council v Yerrakalva [2012] IRLR 78**:

“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.”

### **Decision**

23. As required by **Haydar v Pennine Acute NHS Trust UKEAT 0141/17/BA** I must ask myself three questions. The first is whether the power to award costs has arisen.
24. The application made by the respondent is based upon the claimant’s conduct of these proceedings which the respondent says is unreasonable. I must consider whether the claimant has conducted the proceedings unreasonably in all the circumstances, and not whether the late withdrawal of the claim was in itself unreasonable
25. Having issued the claim on 30 June 2020, the claimant initially chased the Tribunal by way of email on 23 August 2020 as she had not heard anything from them. She did not receive a response but did hear from the respondent’s solicitors with a copy of the response form. From then onwards she received correspondence by post by essentially that comprised of the notice of hearing and case management orders which were posted to the claimant 18 November 2020. The claimant accepts that she received that correspondence but did not take any action nor notify the Tribunal or the respondent with her correct email address. The claimant did not comply with the Tribunal’s order to file a schedule of loss on 15 December 2020. Although the claimant did not provide her correct email address, that had little or no bearing on any failure to pursue this claim or her failure to comply with the Tribunal’s order.
26. The only order which the claimant failed to comply with was the provision of a schedule of loss. There were no steps which needed to be taken by the claimant before that date to progress her claim. On the day upon which the list of documents was to be provided to the respondent, the claimant withdrew her claim. That was an early stage in these proceedings. The claimant should have copied that email to the respondent but did not. The Tribunal should have actioned that email and notified the respondent, but it did not. Had either of these actions taken place, the respondent would not have incurred the additional legal costs which it did. The claimant is a litigant in person and should not be judged against the standards of a professional representative. Although there are directions which tell parties that correspondence should be copied to the other party, it is something which

is frequently overlooked by those not experienced in the Employment Tribunal system. The claimant accepts that she should have done so but at the time it did not occur to her. The conduct of the claimant to the date that she withdrew her claim could not be said to have been unreasonable.

27. Where the claimant could have assisted the Tribunal and the respondent was if she had read the respondent's letter of 22 January 2021, when it would have become clear that it was unaware that she had withdrawn her claim. She did not however read it having wanted to focus on a new year with a more positive outlook. Had she read that letter she could have contacted the respondent and advised them of the position. This has put the respondent to additional cost and inconvenience. Although this conduct might be considered unreasonable, the claimant was a litigant in person and she had understood that her claim was finished. I consider that although she disengaged from the process from that point, it was not unreasonable for her to have done so, particularly against a background of the events of the previous year which she had found particularly stressful and having decided to move forward with her life.
28. For the reasons given above, as a litigant in person, that failure is not one which I consider makes the conduct of these proceedings unreasonable such that an award to costs should be made against the claimant.
29. In finding that the claimant's conduct was not unreasonable, it is not necessary for me to exercise my discretion and consider the second and third questions set out in **Haydar** (above). If I had needed to do so, I would again be directed to the principles in **Gee** (above) that awards of costs in the Employment Tribunal are the exception rather than the rule and **AQ Ltd** (above) that litigants in person should not be judged by the standards of a professional representative and based upon the facts above would not have made an order that costs be paid.

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Employment Judge **Benson**  
Date 21 June 2021.

JUDGMENT SENT TO THE PARTIES ON  
25 June 2021

FOR THE TRIBUNAL OFFICE

Notes

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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