EMPLOYMENT TRIBUNALS

Claimant: **Mary Jenkins**

Respondent: **Achieve Together Limited**

Before: **Employment Judge Volkmer**

COSTS JUDGMENT

1. The Claimant is ordered to pay the Respondent costs in the sum of £4,172.10.

2. This sum must be paid within 14 days of this judgment being sent to the parties.

REASONS

Background

1. The Claimant presented a claim to the Tribunal on 21 September 2023 making a complaint of constructive dismissal against the Respondent.

2. A case management hearing was listed to take place on 10 June 2024. The Claimant did not attend. She had written an email to the Tribunal the day before the hearing, to which she had not copied the Respondent say that she was unable to attend the hearing. The Case Management Order, which was sent to the parties on 14 June 2024 contained numerous warnings (in bold text) stating that the Claimant was required to copy the Respondent into all correspondence to the Tribunal. The hearing was adjourned and relisted to take place on 20 August 2024.

3. The case was initially joined with the claims of two former colleagues of the Claimant bringing similar complaints.

4. The case management hearing took place on 20 August 2024 before Employment Judge Smail. He listed a final hearing to take place over three days on 7,8 and 9 April 2025. He gave case management orders which required disclosure to take place on 16 October 2024 and witness statements to be exchanged by 28 November 2024. The order was sent to the parties on 30

August 2024. The case management order also stated that parties must copy the other party into correspondence with the Tribunal.

5. By application of the Respondent and due to witness availability, the hearing was postponed to begin on 22 April 2025. Notice of this was sent to the parties on 11 October 2024.

6. The Respondent made a strike out application on 21 March 2025 on the basis that the Claimant had not provided a witness statement, contrary to the orders made by Employment Judge Smail on 20 August 2024.

7. During this period the other two claimants withdrew their claims.

8. On 11 April 2025, the Claimant applied to postpone the hearing.

9. On 16 April 2025 the Tribunal wrote to the parties setting out Employment Judge Midgley's orders that the Claimant must comment on the strike out application by return. The Claimant was ordered to provide a date by which she would provide a witness statement. A strike out warning was given in relation to the failure to provide a witness statement. The Claimant's postponement application was refused because it did not contain adequate reasons or evidence.

10. The Claimant renewed her application for postponement on 16 April 2025 saying that she needed time for her solicitor to appear with her and to give witnesses due warning. She stated that the case had changed due to her colleagues dropping out. On 17 April 2025, the Claimant wrote to the Tribunal again saying that she would not be able to produce all the required documentation as she did not have access to equipment. She referred to caring responsibilities for her husband and said that she could not attend the Tribunal next week without representation or careful preparation.

11. The Respondent wrote to the Claimant on 17 April 2025, copying the Tribunal stating that: "*You have given a very strong indication that you will not be attending the hearing next week if the hearing is not rescheduled. If the hearing is not rescheduled, which seems highly unlikely, I would ask you to give serious thought to your position, given that my client's barrister will have to travel from Manchester to Exeter wholly unnecessarily and incur the cost of having to do so. If you do not attend the hearing, and the hearing I (sic) set to go ahead, my client will seek to make an application for the expenses/costs that will have been incurred (and that would have been avoidable). I have explained this position to you in earlier correspondence in fuller detail.*"

12. Regional Employment Judge Pirani's considered the Claimant's further postponement application, and his directions were sent to the parties on Thursday 17 April 2025 saying the following:

"*The claimant's further application to postpone this hearing is refused. The claimant has had plenty of time to prepare for this hearing. She has failed to comply with case management orders seemingly without any reasonable explanation. If she intends to continue the hearing she must provide her witness*

statement and relevant documents to the tribunal and the respondent as soon as possible.

The respondent's application to strike out the claim will be considered at the start of the hearing.

The claimant is to reply by return (by 2.30 pm) indicating whether or not she wishes to continue or to withdraw her claim.

If she continues but fails to comply with case management orders and / or fails to turn up to the tribunal on Tuesday a judge may decide that her conduct is unreasonable and may make an order for costs."

13. The Claimant emailed the Tribunal withdrawing her claim at 9.45pm on the evening of Thursday 17 April 2025. However, she did not copy the Respondent. The Claimant apologised for her late reply and stated in her email that she had not seen the Tribunal's email until she had finished work.

14. Friday 18 April 2025 and Monday 21 April 2025 were bank holidays for Good Friday and Easter Monday 2025 respectively.

15. The Tribunal forwarded the Claimant's email to the Respondent at 7.35am on the morning of 22 April 2025 saying the hearing would no longer go ahead due to the Claimant's withdrawal. The Respondent emailed the Tribunal at 8.54am on 22 April 2025 saying that they wished the hearing to go ahead in order to make a costs application. The Tribunal wrote to the Claimant at 9.21am saying that there would be a costs hearing at 10am. The Claimant responded at 12.54pm saying that she had not known there would be a costs hearing.

16. The hearing took place on 22 April 2022, but the Claimant did not attend. Counsel attended on behalf of the Respondent. The Respondent indicated that it would make a costs application. I decided that I could not determine costs without the Claimant being given the opportunity to make representations. I decided that I would make the decision on the papers. I made orders regarding dates for submission of the costs application and any response. Unfortunately, there was a delay in sending the order out. As such later amended the order on 3 June 2025 to set new deadlines for the relevant case management orders.

The Costs Application

17. On 28 April 2025 the Respondent made a costs application on the ground that the Claimant's withdrawal of her claim on 17 April 2025 was unreasonable conduct pursuant to Rule 74(2)(a) of the Employment Tribunal Procedure Rules 2024. The sum claimed is £4,172.10 in relation to the costs of Respondent's counsel attending the hearing, which is broken down as follows.

    Full brief fee £3,600 (including VAT)
    Travel (518 miles) £233.10
    Accommodation £339
    TOTAL: £4,172.10

18. On 3 June 2025, I amended the case management order to update the dates and it was sent to the parties the same day. The case management order stated that the Claimant must write to the Tribunal with any objections to the costs order by 30 June 2025 and gave detailed instructions to the Claimant regarding providing information regarding her financial means. It stated that if the Claimant did not provide information/evidence regarding her financial means, these would not be taken into account. Nothing was received during that time frame.

19. The Respondent wrote to the Tribunal on 4 July 2025 referring to the 30 June 2025 deadline and stating that the Claimant had not responded.

20. On 6 July 2025, once again not copying the Respondent, the Claimant wrote to the Tribunal stating that:

"*On the 17th April I wrote to the court to withdraw my case and this was acknowledged, I had been told by the respondent's solicitor they were going to ask for it to be struck out anyway. On Tuesday 22nd of April I received an email at 9.30 to attend a cost hearing in Exeter, I live in Paignton and am registered disabled, I do not drive and the journey on public transport would take an hour and a half as well as finding the location. I only had half an hours notice, and I was totally unaware this was happening as I had cancelled. Since I received correspondence to say, the strike out had been received prior to the court case and it was finalised. I don't understand why the solicitors would attend a hearing that was cancelled and say I didn't attend. I can only assume because it was straight after a long bank holiday weekend the information was late in reaching them. Hopefully this can be resolved amicably*."

The Law

21. Rules 73 to 76 of the Employment Tribunal Procedure Rules 2024 (the "Tribunal Rules") deal with costs as follows:

Costs orders and preparation time orders
73.— (1) A costs order is an order that the paying party make a payment to—
(a) the receiving party in respect of the costs that the receiving party has incurred while represented by a legal representative or a lay representative, or
(b) another party or witness in respect of expenses incurred, or to be incurred, for the purpose
of, or in connection with, an individual's attendance as a witness at a hearing.
(2) A preparation time order is an order that the paying party make a payment to the receiving party in respect of the receiving party's preparation time while not represented by a legal representative.
(3) A costs order under paragraph (1)(a) and a preparation time order may not both be made in favour of the same party in the same proceedings.
(4) The Tribunal may decide in the course of the proceedings that a party is entitled to either a costs order or a preparation time order but may defer its decision on the kind of order to make until a later stage in the proceedings.

When a costs order or a preparation time order may or must be made
74.—(1) The Tribunal may make a costs order or a preparation time order (as appropriate) on its own initiative or on the application of a party or, in respect

of a costs order under rule 73(1)(b), a witness who has attended or has been ordered to attend to give oral evidence at a hearing.
(2) The Tribunal must consider making a costs order or a preparation time order 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 of it, or the way that the proceedings, or part of it, have been conducted,
(b) any claim, response or reply had no reasonable prospect of success, or
(c) a hearing has been postponed or adjourned on the application of a party made less than 7 days before the date on which that hearing begins.
(3) The Tribunal may also make a costs order or a preparation time order (as appropriate) on the application of a party where a party has been in breach of any order, rule or practice direction or where a hearing has been postponed or adjourned.
(4) Where in proceedings for unfair dismissal a final hearing is postponed or adjourned, the Tribunal must order the respondent to pay the costs incurred as a result of the postponement or adjournment if—
(a) the claimant has expressed a wish to be reinstated or re-engaged which has been communicated to the respondent not less than 7 days before the hearing, and
(b) the postponement or adjournment of that hearing has been caused by the respondent's failure, without a special reason, to adduce reasonable evidence as to the availability of the job from which the claimant was dismissed or of comparable or suitable employment.

Procedure
75.— (1) A party may apply for a costs order or a preparation time order at any stage up to 28 days after the date on which the judgment finally determining the proceedings in respect of that party was sent to the parties.
(2) The Tribunal must not make a costs order or a preparation time order against a party unless
that party has had a reasonable opportunity to make representations (in writing or at a hearing, as the Tribunal may order).

The amount of a costs order
76.— (1) A costs order may order the paying party to pay—
(a) the receiving party a specified amount, not exceeding £20,000, in respect of the costs of the receiving party;
(b) the receiving party the whole or a specified part of the costs of the receiving party, with
the amount to be paid being determined—
(i) in England and Wales, by way of detailed assessment carried out either by a county court in accordance with the Civil Procedure Rules 1998(33), or by the Tribunal
applying the same principles;
(ii) in Scotland, by way of taxation carried out either by the auditor of court in accordance with the Act of Sederunt (Taxation of Judicial Expenses Rules) 2019(34), or by the Tribunal applying the same principles;
(c) another party or a witness, as appropriate, a specified amount in respect of necessary and reasonably incurred expenses for the purpose of, or in connection with, an individual's attendance as a witness at a hearing;

(d) an amount agreed between the paying party and the receiving party in respect of the receiving party's costs.
(2) Where the costs order includes an amount in respect of fees charged by a lay representative, for the purposes of the calculation of the order, the hourly rate applicable for the fees of the lay representative must not exceed the rate under rule 77(2) (the amount of a preparation time order).
(3) A costs order under sub-paragraphs (b) to (d) of paragraph (1) may exceed £20,000.

22. Rule 90 of the Tribunal Rules state as follows.

90.— (1) Where a party sends a communication to the Tribunal it must send a copy to all other parties, and state that it has done so (by use of "cc" or otherwise).

23. Costs awards in Employment Tribunal proceedings are the exception rather than the rule (*Gee v Shell UK Ltd [2003] IRLR 82*).

24. *Milan v Capsticks Solicitors LLP & Others UKEAT/0093/14/RN* sets out a structured approach to be taken in relation to an application for costs where the then President of the EAT, Langstaff J, described the exercise to be undertaken by the Tribunal as a 3-stage exercise at paragraphs 52:

"*There are thus three stages to the process of determining upon a costs order in a particular amount. First, the tribunal must be of the opinion that the paying party has behaved in a manner referred to in [Rule 76]; but if of that opinion, does not have to make a costs order. It has still to decide whether, as a second stage, it is "appropriate" to do so. In reaching that decision it may take account of the ability of the paying party to pay. Having decided that there should be a costs order in some amount, the third stage is to determine what that amount should be. Here, covered by Rule [78], the tribunal has the option of ordering the paying party to pay an amount to be determined by way of detailed assessment in a county court*."

Unreasonable Conduct

25. The EAT decided in *Dyer v Secretary of State for Employment EAT 183/83* that "unreasonable" has its ordinary English meaning and is not to be interpreted as if it means something similar to "vexatious". It will often be the case, however, that a Tribunal will find a party's conduct to be both vexatious and unreasonable. Whether conduct is unreasonable is a matter of fact for the Tribunal to decide. It can include pursuing an unmeritorious claim: *Keskar v Governors of All Saints CofE School [1991] ICR 493*.

26. In *Yerrakalva v Barnsley Metropolitan Borough Council and another [2012] ICR 420*, CA Lord Justice Mummery held:
"*The vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and ask whether there was unreasonable*

conduct by the Claimant in bringing and conducting the case and, in doing so, identify the conduct, what was unreasonable about it and what effects it had."

27. In *AQ Ltd v Holden UKEAT/0021/12/CEA* His Honour Judge Richardson stated that a Tribunal cannot and should not judge a litigant in person by the standards of a professional representative. Justice requires that Tribunals do not apply professional standards to lay people, who may be involved in legal proceedings for the only time in their life. Tribunals must bear this in mind when assessing the threshold tests. Even if the threshold tests for an order for costs are met, the Tribunal must exercise its discretion having regard to all the circumstances and it is not irrelevant that a lay person may have brought proceedings with little or no access to specialist help or advice. However, Judge Richardson said in paragraph 33:

"*This is not to say 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 objecti*vity."

28. However, in *Barton v Wright Hassall LLP [2018] 1 WLR 1119 UKSC* the Supreme Court made the following comments in a case concerning litigation covered by the Civil Procedure Rules:

"*I start with Mr Barton's status as a litigant in person. In current circumstances any court will appreciate that litigating in person is not always a matter of choice. ... Their lack of representation will often justify making allowances in making case management decisions and in conducting hearings. But it will not usually justify applying to litigants in person a lower standard of compliance with rules or orders of the court…. The rules provide a framework within which to balance the interest of both sides. That balance is inevitably disturbed if an unrepresented litigant is entitled to greater indulgence in complying with them than his represented opponent. Any advantage enjoyed by a litigant in person imposes a corresponding disadvantage on the other side, which may be significant if it affects the latter's legal rights, under the Limitation Acts for example. Unless the rules and practice directions are particularly inaccessible or obscure, it is reasonable to expect a litigant in person to familiarise himself with the rules which apply to any step which he is about to take*." (paragraph 18)

29. Similarly, in *Vaughan v London Borough of Lewisham & Ors (No. 2) [2013] IRLR 713*, the EAT declined to interfere with a substantial costs order against an unrepresented party. Underhill J observed that "*the basis on which the costs*

threshold was crossed was not any conduct which could readily be attributed to the appellant's lack of experience as a litigant".

Discretion

30. In *Oni v UNISON 2015 ICR D17, EAT* Simler LJ set out six principles for the exercise of discretion in relation to costs applications as follows (paragraphs 16 to 20).
    a. Firstly, costs applications warrant appropriately detailed and reasoned consideration and conclusion.
    b. Secondly, costs are compensatory and not punitive.
    c. Thirdly, the fact that a party is unrepresented is a relevant consideration.
    d. Fourthly, the means of a paying party in any costs award may be considered twice: first, in considering whether to make an award of costs; secondly, if an award is to be made in deciding how much should be awarded.
    e. Fifthly, there is no requirement that the costs awarded must be found to have been caused by or attributable to the unreasonable conduct found though causation is not irrelevant. What is required is for the tribunal to look at the whole picture of what happened in the case and to identify the conduct; what was unreasonable about the conduct and its gravity, and what effects that unreasonable conduct had on the proceedings.
    f. Sixthly the broad discretion a tribunal has in making an award of costs must be exercised judicially and reasons ought to be given.

Discussion and conclusions

31. There are three stages to be applied:
    a. finding whether the Claimant has behaved in a manner referred to in Rule 74;
    b. if so, considering whether I should exercise my discretion in making such an order; and
    c. if so, considering the amount of the award and form of the award.

Whether the Claimant has behaved in a manner referred to in Rule 74

32. I take into account that the Claimant is a litigant in person. Nevertheless, I find that the Claimant's conduct in withdrawing her claim at such a late stage and not copying the Respondent to her email to withdraw her claim was unreasonable:
    a. Rule 90(1) of the Tribunal Rules is clear that parties must copy each other to correspondence with the Tribunal;
    b. the Claimant had had numerous reminders and clear instructions that she must copy the Respondent to Tribunal correspondence (such as in the case management orders resulting from the hearings on 10 June 2024 and 20 August 2024);
    c. the Claimant had been informed by the Respondent in an email on 17 April 2025 that it would incur costs associated with their barrister

attending, and that if she did not attend the hearing costs would be pursued;

d. the Claimant had been warned by Regional Employment Judge Pirani on 17 April 2025 that if she failed to attend the hearing, this might be considered unreasonable and there may be an order for costs.

33. Whilst the Respondent's email and the directions of Regional Employment Judge Pirani (c and d above) referred to non-attendance in circumstances where the claim was not withdrawn, they would have made clear to the Claimant that if she caused the Respondent's representative to attend unnecessarily this would incur costs and potentially be considered unreasonable conduct.

34. The Claimant's first application for postponement had failed. In the knowledge that she was not prepared for the hearing, it was open to the Claimant to have withdrawn her claim before she did so. Further, the Claimant's reference in her response to the Respondent receiving the information regarding her withdrawal late because of being a bank holiday weekend misses the point that the reason the Respondent was unaware of her email withdrawing her claim is because she had not copied them to it (in breach of Tribunal rules). It was obvious that the Tribunal would not be processing emails outside of working hours and as such there was no way for the Respondent to have known prior to incurring costs. The Claimant was aware the barrister would be travelling from Manchester, as the Respondent had informed her by email on 17 April 2025. It was therefore clear that the barrister would need to travel to Exeter before the Tribunal re-opened on 22 April 2025.

35. The Claimant has therefore behaved in a manner referred to in Rule 74(2)(a) (unreasonably).

Whether I should exercise my discretion in making such an order

36. Having found that conduct on behalf of the Claimant was unreasonable, there is no requirement for this Tribunal to award costs. There are a number of factors to consider, including the nature, gravity and effect of the unreasonable conduct, although there is no principle that costs should only be awarded where they can be shown to have been incurred by specific instances of unreasonableness.

37. In this case, I find that it is appropriate to award costs against the Claimant in respect of the conduct outlined above. The Claimant could have easily prevented the Respondent wasting expenditure on legal fees by copying them to her email. She had ample notice that costs would be incurred if a barrister attended for the Respondent and that they would make a costs application if this cost was unnecessarily incurred. Nevertheless, she chose not to inform the Respondent that, at this very late stage, she had chosen to withdraw her claim.

38. In deciding whether costs should be awarded, I am permitted to take into account the Claimant's ability to pay. However, there were no submissions or

evidence in respect of her ability to pay and, therefore, this does not affect my decision in finding that it is appropriate to award costs.

Considering the amount of the award and form of the award

39. Having found that there was unreasonable conduct and that it is appropriate to award costs, I am still required to address my mind to whether I should exercise my discretion in awarding costs in this matter. In other words, I must decide whether it is just to exercise the power to award costs. The basic principle is that the purpose of an award of costs is to compensate the party in whose favour the order is made, not to punish the party ordered to pay the costs.

40. The Claimant has not provided any information about means, so I do not take these into account.

41. Looking at all the evidence in the round, I find that is just to award costs in this matter to take into account the conduct outlined above.

42. Given the nature of the findings of unreasonableness when considered in the context of the case overall, I make an award of costs in the sum of £4,172.10. This will compensate the Respondent for the amount of costs which were incurred in their barrister attending the hearing on 22 April 2025, which could have been avoided if the unreasonable conduct had not taken place.

Approved by Employment Judge Volkmer
8 July 2025

JUDGMENT & REASONS SENT TO THE PARTIES ON
25 July 2025

FOR THE TRIBUNAL OFFICE