



# EMPLOYMENT TRIBUNALS

*Claimant*  
Mr T Armstrong

*Respondent*  
Molekula Ltd

## JUDGMENT OF THE EMPLOYMENT TRIBUNAL

MADE AT NORTH SHIELDS  
EMPLOYMENT JUDGE GARNON

ON 27<sup>th</sup> June 2018

### JUDGMENT

The claims of automatically unfair dismissal on the ground the claimant made a protected disclosure (but not the claim of otherwise unfair dismissal) and of subsection to detriment short of dismissal on the ground the claimant made a protected disclosure are dismissed on withdrawal by the claimant

### REASONS

1. The Employment Tribunal Rules of Procedure 2013 ( the Rules)include

#### ***End of claim***

**51.** *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a claimant informs the Tribunal, either in writing or in the course of a hearing, that a claim, or part of it, is withdrawn, the claim, or part, comes to an end, subject to any application that the respondent may make for a costs, preparation time or wasted costs order.*

#### ***Dismissal following withdrawal***

**52.** *Where a claim, or part of it, has been withdrawn under rule 51, the Tribunal **shall** issue a judgment dismissing it (which means that the claimant may not commence a further claim against the respondent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.*

The word “shall” which I have emboldened is mandatory. Unless one of the exceptions applies, which it does not , I must issue a dismissal judgment.

2. Although the respondent may contemplate applying for costs, in the circumstances I would discourage such an application. I draw its attention to the following relevant legal provisions. The Rules include as far as relevant

*76 (1) A Tribunal may make a costs 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 .. had **no reasonable prospect of success**.*

*77. A party may apply for a costs 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. No such order may be made unless the paying party has had a reasonable opportunity to make representations (in writing or at a hearing, as the Tribunal may order) in response to the application.*

3. The Court of Appeal and EAT have said costs orders in the Employment Tribunal:

- (a) are rare and exceptional.
- (b) whether the Tribunal has the right to make a costs order is separate and distinct from whether it should exercise its discretion to do so
- (c) the paying party’s conduct as a whole needs to be considered, per Mummery LJ in Barnsley MBC v. Yerrakalva [2011] EWCA 1255 at para. 41:  
*“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.”*

4. Several factors are relevant on withdrawals. A Tribunal must consider whether the claimant has brought or conducted the proceedings unreasonably in all the circumstances, and not whether the late withdrawal of the claim was in itself unreasonable, see McPherson v BNP Paribas 2004 ICR 1398. In that case the Court of Appeal said it would be wrong if, acting on a misconceived analogy with the Civil Procedure Rules, tribunals took the line it was unreasonable conduct for claimants to withdraw claims, and if they did, they should be made to pay costs. The Court pointed out withdrawals could lead to a saving of costs, and it would be unfortunate if claimants were deterred from dropping claims by the prospect of an order for costs upon withdrawal that might well not be made against them if they fought on to a full hearing and failed. In National Oilwell Varco (UK) Ltd v Van de Ruit EATS 0006/14 in which McPherson was cited, a claimant had not acted unreasonably in withdrawing his claim on the day prior to a pre-hearing review.

5. In this case, as the trial approaches the claimant has realised his claim can be simplified. That does not indicate he never intended to “ go through with it” or that his

allegations were other than genuine. What I call the “threshold” issue is whether I am satisfied one of the circumstances in Rule 76 exists. The pleadings reveal substantial disputes of fact. If the “threshold” has not been reached, no more need be decided. If it has, a Tribunal may still not exercise its discretion to make a costs order

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T M Garnon EMPLOYMENT JUDGE

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON 27<sup>th</sup> JUNE 2018