EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Nos: S/4105198/16, S/4105199/16, S/4105200/16
(Multiple Case No 7959)

Held in Glasgow on 8 September 2017 (Preliminary Hearing)

Employment Judge: Ian McPherson

1.	**Mr Brian Aitken**	**1st Claimant** **Represented by:** **Mr Mark Allison - Solicitor**
2.	**Miss Courtney Aitken**	**2nd Claimant** **Represented by:** **Mr Mark Allison - Solicitor**
3.	**Mrs Elizabeth Aitken**	**3rd Claimant** **Represented by:** **Mr Mark Allison - Solicitor**
Pro Fives Ltd		**Respondents** **Represented by:** **Mr Ian S Meth - Consultant**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is as follows:-

(1) Having heard parties' representatives on the respondents' opposed application for Strike Out of the claims, under **Rule 37(1)(a) of the Employment Tribunal Rules of Procedure 2013**, as having no reasonable prospect of success or, in the alternative, for Deposit Orders to be made against each of the claimants, in terms of **Rule 39**, on the basis that the claims have little reasonable prospect of success, the Tribunal notes and

records that, after hearing the claimants' solicitor's objections to the application for Strike Out under **Rule 37**, the respondents' representative **withdrew** that application for Strike Out;

(2) Noting that, in the alternative, the respondents' representative still insisted upon his application for Deposit Orders to be made against each of the claimants, and the claimants' solicitor still insisted upon his objections to that application being granted , the Tribunal has **refused** that application, and so makes no Deposit Orders;

(3) Having noted parties' agreed position that the claims and response, not having been struck out, should now be relisted for Final Hearing for full disposal, including remedy, if appropriate, the Order of the Employment Tribunal, in exercise of the general powers to manage proceedings conferred by **Rule 29 of the Employment Tribunal Rules of Procedure 2013**, is that:-

(a) Insofar as the claimants' solicitor has not complied with standard case management order (3) made by the Judge, on 9 May 2017, and he has failed to prepare and lodge with the Tribunal (copied to the respondents' representative) detailed schedules of loss, with supporting vouching mitigation documents, within 21 days of that date, for each of the three claimants, **of consent** of the respondents' representative, the Tribunal **varies** that earlier Order of the Tribunal, so as to allow an extended period for compliance within 14 days of the date of this Preliminary Hearing, i.e. **by no later than 4.00pm on Friday, 22 September 2017**.

(b) Otherwise, the Tribunal **confirms** that those standard case management Orders (1) to (6) made on 9 May 2017 remain in full force and effect for the purposes of the Final Hearing on dates to be hereinafter assigned by the Tribunal.

(c) Further, having heard parties' representatives, and noted the terms of paragraphs 25 to 27 of the Judge's written Note and Orders of the Tribunal, issued on 9 May 2017, following the Case Management Preliminary Hearing heard by him on 5 May 2017, **allows** the claimants' solicitor a period of 14 days from the date of this Preliminary Hearing, i.e. **by no later than 4.00pm on Friday, 22 September 2017**, to provide further and better particulars for the claimants, to augment what is provided at Section 5 (Employment Details) and Section 6 (Earnings and Benefits), so as to provide employment start date for each claimant, as currently there is only specified an employment end date of 14 April 2016, to provide specification of job title, and specification of normal hours of work per week, and weekly/monthly gross, or net, pay, for each of the 3 claimants.

(d) Instructs the clerk to the Tribunal to issue date listing letters to both parties' representatives, to enquire about their availability and proposed witnesses for listing the case for Final Hearing before the Tribunal, on dates to be hereinafter assigned by the Tribunal, in the listing period of **November/December 2017, or January 2018**,and **orders** parties' representatives, when doing so, to address the Tribunal on whether they seek to have that Final Hearing heard by a full Tribunal, or by an Employment Judge sitting alone;

(4) Finally, in respect of the documents produced to the Tribunal in a sealed envelope by the respondents' representative, on 23 May 2017, under cover of asserted confidentiality, in reply to the Tribunal's Order to the respondents for Production of Documents dated 9 May 2017, notes and records parties' joint agreement that the sealed envelope lodged by the respondents' representative can be opened by an Employment Judge, in chambers, and the respondents' asserted confidentiality for those documents then considered by an Employment Judge, sitting alone , in chambers, and without the need for any Hearing, on the basis of the

contents of that sealed envelope, and both parties' previously submitted written representations, and accordingly instructs the clerk to the Tribunal to list the case for a private Case Management Preliminary Hearing for that purpose, in chambers,, as soon as possible, time estimate **3 hours.**

REASONS

Introduction

1. This case called again before me on the morning of Friday, 8 September 2017, at 10.00am, for a public Preliminary Hearing, previously intimated to parties` representatives by the Tribunal by Notice of Preliminary Hearing (Preliminary Issues) dated 16 August 2017.

2. It was fixed to determine two preliminary issues: (1) the respondents' application for Strike Out of the claims under **Rule 37**, and (2) the respondents' application for Deposit Orders under **Rule 39**. Three hours were allocated for this Preliminary Hearing to be conducted in public.

3. That Notice of Preliminary Hearing postponed Monday, 11 September 2017, previously assigned by an earlier Notice of Preliminary Hearing, issued on 25 July 2017, and relisted to suit the joint availability of both parties' representatives.

Background

4. This Preliminary Hearing was originally assigned by me, as advised to parties' representatives in a letter from the Tribunal dated 18 July 2017, on the respondents' application, dated 13 July 2017, because, in light of much

exchange of correspondence between parties' representatives, and the Tribunal, I was becoming concerned that the case should not become "***litigation by correspondence***", following significant correspondence after an earlier Case Management Preliminary Hearing, held before me on 5 May 2017.

5. On 9 May 2017, and as detailed in my Written Note, issued of even date with it, I issued various Documents Orders for compliance, within 14 days, by the respondents, and also against two third parties, being James Stephen, from liquidators BDO, and Hansteen Property Investments Limited.

6. On 1 June 2017, I had refused, as not appropriate, an earlier application by Mr Meth, the respondents' representative, submitted on 11 May 2017, for a Strike Out Preliminary Hearing, because at the then very recently held Case Management Preliminary Hearing, on 5 May 2017, I had canvassed the matter (as recorded at paragraphs 19 and 20 of my written Note), given the terms of paragraph 97 of Mr Meth's ET3 response seeking such a Preliminary Hearing, where he had described the claims as "***entirely misconceived"***, and given them a costs warning from the respondents.

7. Mr Meth had himself explained to me, on 5 May 2017, that he was not seeking a Strike Out Preliminary Hearing, as he felt it was not likely to succeed, and the case may as well proceed to hear all the evidence, resulting in a 5 day Final Hearing being agreed by both parties' representatives as appropriate.

8. While, on 23 May 2017, Notice of Final Hearing was issued by the Tribunal, assigning the case to Final Hearing before a full Tribunal, over 5 days on Monday to Friday, 4 to 8 September 2017, in the event, those dates for Final Hearing were postponed, on my order on 18 July 2017, following consideration of parties' correspondence of 30 June and 13 July 2017.

Preliminary Hearing before this Tribunal

9. When the case called before me, at around 10.05am, Mr Meth, consultant, appeared for the respondents, unaccompanied, while Mr Allison appeared for the claimants, all 3 of whom were present, together with an observer, Mr Gary Aitken, who is the husband of Elizabeth .and father of Courtney, and who was a director of the liquidated company Aitken Multipurpose Arenas Ltd ("***AMPA Ltd***"). I clarified the purpose of the Preliminary Hearing, from the two primary issues identified, and enquired of both parties` representatives, as to how they intended the Preliminary Hearing should be conducted. For the respondents, Mr Meth advised that he would speak to a written submission, which he had helpfully pre-prepared and circulated to me and Mr Allison at the start of this Preliminary Hearing.

10. However, Mr Meth did not have any case law authorities to cite in argument, or to produce to me, even although his written submission (at paragraph 30) did refer to, and indeed quote a selected passage from, the European Court of Justice`s Judgment in ***Spijkers –v- Gebroeders Benedik Abattoir CV*** albeit without giving its judgment citation ***[1986] ECR 1119 (ECJ),*** nor identifying where, within that judgment, I would find the quote provided by him, in his written submission. While he would be making oral submissions, reading from his written submission, running to 44 paragraphs, over 6 typewritten pages, Mr Meth clarified that he would not be leading any evidence on behalf of the respondents.

11. For the claimants, Mr Allison stated that all 3 claimants were present, and they were potential witnesses, in the case, in the event that evidence needed to be given, to whatever might be in Mr Meth`s submissions on behalf of he respondents. He indicated that he would be replying, orally, to whatever was within Mr Meth`s submission seeking Strike Out of the claims, and that there might be a need for him to reserve his position about leading evidence from his clients in that regard.

12. As regards Mr Meth's alternative application, for Deposit Orders to be made against his clients, Mr Allison submitted that that would only arise at stage 2 of the process, if and when the Tribunal were satisfied that there was little reasonable prospects of success with their claims, and it was his submission that I should not be so satisfied, and that therefore there would be no need for any evidence from his clients as regards their means.

13. If evidence were to be required, Mr Allison indicated that he had no specific vouching documents available with him for lodging with the Tribunal, although the individual claimants could speak to their own financial circumstances. By way of general observation, he stated that all 3 claimants are of fairly limited means, and he has been dealing with their cases under legal aid from the Scottish Legal Aid Board, and so he has seen some financial vouching of their circumstances, although he indicated that he felt that the grant of legal aid to them is an adminicle of evidence that they can afford to pay any Deposit Order, if so ordered by the Tribunal.

14. Given the respondents' application for Strike Out under **Rule 37**, which failing Deposit Orders, under **Rule 39,** had been intimated some time prior to this Preliminary Hearing, namely by Mr Meth on 13 July 2017, I expressed surprise that there was no information, or vouching documentation, provided by him to the Tribunal as regards his clients' means, that clearly being a relevant matter for consideration by the Tribunal, given the terms of Rule **39(2).**

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15. I referred then to the terms of **Rule 2 of the Employment Tribunals Rules of Procedure 2013,** and the Tribunal`s overriding objective to deal with the cases fairly and justly, including saving of time and expense, and further stated that a party`s representative had a duty to assist the Tribunal in furthering the overriding objective, and having regard to **Rule 39(2),** which obliges the Tribunal to make reasonable enquiries into the paying party`s

ability to pay the deposit and have regard to any such information in deciding the amount of the deposit, such information / vouching ought to have been provided by Mr Allison, but I also stated that recognised that we were where we were, and that matters should proceed to hear the respondents` principal application for Strike Out, and alternative application for Deposit Order, and then hear from Mr Allison, as the claimants` solicitor, in reply.

Bundles and Authorities

16. Mr Meth lodged a small bundle of productions, on behalf of the respondents, comprising only 7 pages, being the Tribunal's Orders dated 1st June 201`7, addressed to Mr James Stephen, the liquidator of AMPA Ltd, and letters of 8 and 16 June 2017, from Mr Stephen, liquidator at BDO LLP, Glasgow, in reply to the Tribunal's Orders , while Mr Allison lodged a larger bundle, comprising 17 separate documents, extending across some 87, unnumbered pages, on behalf of the claimants, as per an index of documents.

17. Mr Meth had no copy case law authorities to produce to the Tribunal, while Mr Allison produced an indexed list of authorities, comprising:-

(1) ***Cheesman –v- R. Brewer Contracts Ltd [2001] IRLR 144 (EAT***);

(2) ***Lightways (Contractors) Ltd –v- Associated Holdings Ltd [2000] SC 262 (CSIH);***

(3) ***ECM (Vehicle Delivery Services Ltd) –v- Cox [1999] IRLR 559 (CA);***

(4) ***Transfer of Undertakings (Protection of Employment) Regulation 2006 (SI 2006 No.246).***

18. Further, Mr Allison also produced three further case law authorities, downloaded and printed from ***Bailii*** being:-

    (1) ***Hasan –v- Tesco Stores Ltd [2016] UK/EAT/0096/16;***

    (2) ***Balls –v- Downham Market High School & College [2011] IRLR 217 (EAT);***

    (3) ***Ezsias -v- North Glamorgan NHS Trust [2007] EWCA Civ 330 (CA).***

Submissions for the Respondents

19. It then being around 10.15am, I invited Mr Meth to make his submissions to the Tribunal on behalf of the respondents. He spoke to his written submission, extending to 44 separate, numbered paragraphs, and addressed the principal application for Strike Out, and the alternative application, for a Deposit Orders.

20. 20. In the event, as after Mr Allison`s comments/objections in reply, Mr Meth withdrew his application for Strike Out, it is neither appropriate, nor proportionate, to repeat his submissions here at any length, when a full copy of his 6 page written submission is held on the casefile.

21. In summary, it is fair to say that while Mr Meth recognised that where there is a factual dispute between the parties, it is highly unlikely that a Strike Out will be made, his application, at this Preliminary Hearing, on behalf of the respondents, for Strike Out of the claims, for having no reasonable prospects of success, was based on the fact that, as far as he was concerned, the claimants here do not seem to know the legal mechanism by which they allege that a relevant transfer of their employment took place, and he wished to rely, in his submissions on behalf of the respondents, on what he referred to as the "***known and agreed facts***".

22. At this point, there was an interjection by Mr Allison, solicitor for the claimants, stating that there was no agreed joint statement of facts, and Mr Meth stated that he relied specifically on the Liquidator, Mr Stephen`s letter of 8 June 2017 (as produced at page 5 of the respondents' bundle of documents), and while he did not argue that Mr Stephen`s letter is determinative, Mr Meth referred to it as being the "***missing link***", on the basis of which he submitted that the claims were "***destined to fail, and cannot succeed".*** When Mr Meth then appeared to be giving evidence for the respondents, Mr Allison objected, resulting in Mr Meth clarifying that he was not giving evidence, but making submissions to the Tribunal.

23. Further, Mr Meth stated that he was familiar with the Strike Out case law authorities cited by Mr Allison, and he left the decision on Strike Out firmly in my hands as the Employment Judge. In the alternative, he stated that he sought a Deposit Order at up to £1,000 per claimant, on the basis that the claims had little reasonable prospects of success.

24. While the claimants` individual means did not matter to him, he stated that it was a "***symbolic point***" for an Employment Judge to make a Deposit Order in a case, as that highlighted a risk of expenses being awarded against the claimants, if unsuccessful. After an intervention by Mr Allison, who had taken Mr Meth`s comments to mean that it did not matter to him if a Deposit Order was £1, or £1,000, Mr Meth clarified that he was not suggesting a specific figure for a Deposit Order, and that, if it were to be made, the amount was a matter for me as the Judge to decide.

Submissions for the Claimant

25. When, at around 10.55am, Mr Meth`s submissions for the respondents had concluded, I invited Mr Allison to reply on behalf of the claimants. He requested, and I granted, a 5 minute adjournment, in order that he could take instructions from his clients, and when proceedings resumed, in the

public Hearing, at around 11.10am, Mr Allison opened his submissions observing that Mr Meth, on behalf of respondents, was only relying on the claims having no reasonable prospects of success, and not any of the other subsections founding an application for Strike Out under **Rule 37**.

26. In particular, Mr Allison noted it was not being submitted that the claims were scandalous or vexatious, or that the manner in which the proceedings have been conducted by or on behalf of the claimants has been scandalous, unreasonable or vexatious. Further, even if there were no reasonable prospects of success, which he disputed, he highlighted that that does not necessarily mean that there is an automatic Strike Out of the claims, as the power to Strike Out if permissive, and the Tribunal must always consider if it is appropriate to do so.

27. In this regard, Mr Allison stated that as a general statement of the applicable law, it was helpful and instructive to have regard to what the Employment Appeal Tribunal Judge, Lady Wise, had stated at paragraphs 16, 18 and 19 of the Judgment in ***Hasan –v- Tesco Stores Ltd***, as he was "***astonished"*** that Mr Meth, on behalf of the respondents, was inviting the Tribunal to rely on "***limited, and cherry picked aspects of the factual matrix",*** without any factual enquiry when, the decision made at the Case Management Preliminary Hearing, held on 5 May 2017, when the Tribunal had fixed a 5 day Final Hearing in this case, showed that this case is factually complex. Mr Allison also referred to the oft quoted Judgment from the Court of Appeal, in ***Ezsias –v- North Glamorgan NHS Trust***, that where there is a "***crucial core of disputed facts***", it is an error of law for an Employment Tribunal to pre-empt the determination of a full Hearing by striking out a claim.

28. While he did not have a copy to provide to me of the Court of Session`s Judgment in ***Tayside Public Transport Co Ltd (t/a Travel Dundee) –v- Reilly [2012] CSIH 46 , [2012] IRLR 755 (CSIH),*** Mr Allison referred me to paragraphs 29 and 30 of the opinion of the Lord Justice Clerk (Lord

Carloway) that while an Employment Tribunal has a power to Strike Out a claim where it determines that it has no reasonable prospect of success, even if the Tribunal so determines, it retains a discretion not Strike Out the claim, and Strike Out may be exercised only in rare circumstances, it having been described by the EAT Judge, Lady Smith, in ***Balls –v- Downham Market High School & College***, as a Draconian power (at paragraph 4). ***Reilly*** is, of course, regularly cited before the Tribunal, as it is referred to in the standard text book, ***IDS Employment Law Handbook*** on "***Employment Tribunal Practice and Procedure***" (at paragraph 18.18), and it is also on the EAT's ***"familiar authorities***" list as the well-known authority on the exercise of the Employment Tribunal's powers on Striking Out cases.

29. In inviting me to refuse the respondents' application for Strike Out of the claims, Mr Allison stated that I should consider the full case file, now 2 full files of papers, as laid out upon my bench, and the fact that, at the Case Management Preliminary Hearing, on 5 May 2017, Mr Meth, the respondents` representative, had accepted that there was an arguable case in law, if what is in the ET1 claim forms is established at an evidential Hearing by the claimants.

30. As set forth at paragraph 19 and 20 of my written Note, issued following that Case Management Preliminary Hearing, Mr Meth had then explained that he was not seeking a Strike Out Preliminary Hearing at that stage, as he felt it was not likely to succeed, and the case may as well proceed to hear all the evidence. He did not, at that stage, insist on the point, noted at paragraph 97 of his ET3 response, that the claims were entirely misconceived, and he did not then seek a Preliminary Hearing on no reasonable prospects of success.

31. Now, however, submitted Mr Allison, it seems that Mr Meth is seeking such a Strike Out, and it seemed to Mr Allison that Mr Meth`s change in position derived from something that had occurred in the intervening period, since 5

May 2017, and that appears to be what is contained in Mr Stephen`s letter of 8 June 2017, although Mr Allison highlighted that the Tribunal had not heard from Mr Stephen, just seen his letter of 8 June 2017, produced in reply to the Order of the Tribunal made on 1 June 2017, being document number 11 in the claimants` bundle of documents at this Preliminary Hearing.

32. Further, stated Mr Allison, whether or not there has been a business transfer under the **TUPE Regulations 2006, Regulation 3(1) (a)**, is not just a factual issue, but it is a mixed law and fact issue, and Mr Stephen, as the Liquidator of AMPA Ltd, is not a party to these Tribunal proceedings, and no weight can be attached to his opinion.

33. In Mr Allison's view, Mr Stephen could have been led at this Preliminary Hearing, as a witness for the respondents, but he had not been called, and while Mr Meth had stated that Mr Stephen was on the claimants` list of witnesses, as discussed at the Case Management Preliminary Hearing on 5 May 2017, Mr Allison made the point that Mr Meth could nonetheless have invited Mr Stephen to attend at this Preliminary Hearing as a witness for the respondents.

34. By way of clarifying his principal submission, Mr Allison stated that you cannot answer this case, on *ex parte* submissions, from parties` representatives only, at a 3 hour public Preliminary Hearing, and that the various adminicles of evidence justify a full factual enquiry, as had previously been ordered by the Tribunal. In his view, you do not decide a Strike Out application based on "***a cherry picked, single adminicle of evidence"***, which is what he felt Mr Meth was seeking to invite the Tribunal to do at this Preliminary Hearing.

35. Mr Allison added that, as was clear from the Employment Appeal Tribunal`s Judgment in ***Cheesman***, where the ***Spijkers***` case quoted by Mr Meth was cited and discussed, and even the quotation from the ***Spijkers***` case given

by Mr Meth itself, at its last sentence (reading : ***".. all those circumstances are merely single factors in the overall assessment which must be made and cannot therefore be considered in isolation.***") makes clear that you do not focus on a single factor, but it is an overall assessment of a variety of factors in play.

36. Mr Allison recognised that he might need to amend and/or give further and better particulars of the claim, as currently pled, in light of the provision of information/documents in terms of Orders of the Tribunal, since the Case Management Preliminary Hearing held on 5 May 2017, but in his view, these cases should go forward to proof, particularly where the views given by Mr Stephen, in his letter, with him being the Liquidator, but a third party to these Tribunal proceedings, means that is an "***even greater need for judicial scrutiny of the evidence"*** in this case.

37. In Mr Allison's submission, he added that "***any attempts to evade, or avoid, the application of the TUPE Regulations requires close scrutiny***" and, in his view, there are some factors in favour of a transfer of an undertaking being established here , and that shows that there is a need for evidence to be heard at a Final Hearing,

38. Further, submitted Mr Allison, there were adminicles of evidence in this case, Mr Stephen`s letter of 8 June 2017 being one relied upon by Mr Meth, but there were other adminicles of evidence, which would be relied upon by the claimants, and this shows that there is a need to attach weight to the various adminicles of evidence, and to view them in the context of ***"the full picture".***

39. Mr Meth, on the other hand, was, submitted Mr Allison, inviting the Tribunal to ***"bypass its judicial function***", and this Tribunal should not allow an i*mpromptu* trial to take place at this Preliminary Hearing, without any evidence, where Mr Meth was inviting the Tribunal to attach weight to only

one factor, and that without reference to the other factors to be relied upon by the claimants.

40. At this Preliminary Hearing, Mr Allison commented that there was no joint agreed statement of facts, and accordingly, both representatives had made *ex parte* statements to the Tribunal, and both the ET1 claim form, and the ET3 response, were now somewhat out of date, and they may need to be amended/augmented to clarify both parties up to date pleadings, but what is obvious, he submitted, is that there is a dispute on facts in this case, and about the weight to be attached to the various adminicles of evidence, and that shows that these cases should go forward to proof and evidence at a Final Hearing.

41. Finally, on the respondents' application for a Deposit Order to be made, if Strike Out of the claims was not granted by the Tribunal, Mr Allison stated that he did not propose to refer to the various case law authorities on the lesser threshold required for a Deposit Order, but he commented that it still requires the respondents to satisfy the Tribunal that the claims have little reasonable prospects of success, and, based on his objections to the principal application for Strike Out, he submitted that this Tribunal could not do that exercise at this Preliminary Hearing without hearing evidence.

Claimants` Up to Date Financial Circumstances

42. At this stage, Mr Allison then sought to make *ex parte* statements, on behalf of each of the 3 claimants, as regards their up to date financial circumstances, based on information provided to him by his clients during the earlier adjournment that I allowed, and to so provide the Tribunal with some information about their ability to pay, if the Tribunal were to be minded to make any Deposit Order, and so as to assist the Tribunal to assess their ability to pay any such Deposit Order, if made by the Tribunal.

43. He stated that all 3 claimants are in receipt of legal aid, and making no contribution to their legal aid. As regards the first claimant, Mr Brian Aitken, he was described as being in full time employment, on a gross salary of £18,000 per annum, and with no savings, or substantial assets. It was further stated his income is sufficient to meet his outgoings, and no more, and that he was granted fee remission for his Employment Tribunal fees. In answer to a later question of clarification asked by me, about Mr Aitken's whole means, I was advised that, by way of capital assets, he owns the flat in which he resides, valued at approximately £90,000, but with no equity.

44. As regards the third claimant, Mrs Elizabeth Aitken, she was described by Mr Allison as being in receipt of State benefits, identified as Employment & Support Allowance at the rate of £341 per fortnight, and Personal Independence Payment at the rate of £227 per month, and that she is not fit to work. It was further stated that she has no savings, and no assets, other than her personal possessions.

45. In reply to a question of clarification later in the course of the Preliminary Hearing, from Mr Meth on behalf of the respondents, Mr Allison clarified that the payment of £341 per fortnight for Employment & Support Allowance was for a joint claim of Gary and Elizabeth Aitken, and therefore only one half of that sum was attributable to Mrs Aitken.

46. As regards the second claimant, Miss Courtney Aitken, Mr Allison stated that she is a Student, aged 25, and that she stays in rented accommodation in St Andrews University, where she is about to commence a PhD degree. He further advised that her bursary will be her only income, and that that will be for a set purpose, and that while her tuition fees will be paid, the amount of her bursary is yet to be confirmed. Her net savings were described as £1,300 in a "Help to Buy" ISA.

47. If a Deposit Order were to be made by the Tribunal, Mr Allison submitted that "***it should be not set at a level that curtails the claimants` access***

to justice", and while Mr Meth had invited the Tribunal to issue a Costs Warning, Mr Allison submitted that it was not appropriate for the Employment Tribunal to do that, and that is a matter for the respondents to do, if so minded, but if a Deposit Order were to be made in the present cases, then it should be in a nominal sum in each case, as the circumstances of the 3 claimants are different.

48. Arising from Mr Allison`s *ex parte* statements about the claimants` circumstances, Mr Meth sought some clarifications. He stated that he assumed that the address of 17 Roddinghead Road, Whitecraigs, shown on the P45 of 14 April 2016 for Courtney Aitken, being production 3 in the claimants' bundle, was Mr and Mrs Aitken`s home address, and he stated that he believed it would have a value significantly north of £500,000, and probably around £750,000 to possibly more than £1 million.

49. In reply, Mr Allison confirmed that 17 Roddinghead Road is the out of term home address of Miss Aitken, and that the 3 claimants are all still at the addresses shown on the ET1 claim form. Further, he stated that Gary Aitken, is sequestrated, and his house is rented, and not owned.

50. From records on Zoopla, which he had accessed online during the Hearing, Mr Allison then disputed Mr Meth's valuation of the property at 17 Roddinghead Road, and he stated that the absence of records on Zoopla suggested that the property had not recently been transferred, or sold. He also provided clarification about the two benefits for Mrs Elizabeth Aitken, as detailed above, at paragraph 45 of these Reasons.

Respondents` application for Strike Out withdrawn

51. At this point, around 12.20pm, Mr Meth stated that he came back to the point that this case is a case pleaded solely by he claimants under **Regulation 3(1)(a) of the TUPE Regulations 2006**, yet the cases cited by Mr Allison all predate the current TUPE Regulations.

52. Then, very much like a bolt out of the blue, Mr Meth then conceded that for the Tribunal to grant a Strike Out Order would be draconian, and he submitted that a Deposit Order would be more appropriate, and, on that basis, he stated that he was withdrawing the respondents' application for Strike Out of the claims on the basis of no reasonable prospects of success, and that he was proceeding only on the alternative argument, that the claims have little reasonable prospects of success, and that therefore Deposit Orders should be made by the Tribunal, and that he remained in the Judge`s hands as to the amount of any Deposit to be ordered.

Judgment Reserved

53. Having heard from both parties' representatives, and they having concluded their respective submissions to the Tribunal, I advised all present that I would be reserving my decision on the only remaining matter before the Tribunal, namely whether or not to make any Deposit Order, and that I would issue that reserved Judgment as soon as possible.

54. I also stated that, in determining matters, I would have regard to two unreported judgments from Lady Smith, Judge of the Employment Appeal Tribunal, well known to me from judicial experience of submissions in Strike Out./Deposit Order applications, being:

(a) ***Shields Automotives Ltd –v- Greig [2011] UK/EATS/0024/10***, as regards assessing a paying party`s means, including income, and capital/assets, which requires looking at a party's "***whole means***"; and

(b) a further judgment by Lady Smith, in ***Simpson –v- Chief Constable of Strathclyde Police & Another [2012] UK/EATS/0030/11,*** about the test to be applied in the imposition of any Deposit Order, and how

its issue should be to make a claimant stop and think carefully before proceeding with an evidently weak case.

55. Further, as neither parties` representative had drawn it to my attention, despite it being a reported judgment of the EAT President, I also stated that, as regards the appropriate test for imposition of a Deposit Order, I would also have regard to the more recent Judgment of the President of the Employment Appeal Tribunal, Mrs Justice Simler, on 10 November 2016, in ***Hemdan –v- Ishmail & Ali-Megraby [2016] UKEAT/0021/16***, now reported at ***[2017] ICR 486*** (May 2017), and ***[2017] IRLR 228*** (March 2017).

56. In ***Hemdan,*** the learned EAT President has held that an order to pay a deposit must be capable of being complied with, and that a party without the means or ability to pay should not therefore be ordered to pay a sum that they are unlikely to be able to raise, and that if a Deposit Order is set at a level at which the paying party cannot afford to pay, the Order will operate to "***impair access to justice".***

57. I observed and commented from the bench that this was a point which, noted, seemed to resonate with some of the objections made by Mr Allison, on behalf of the claimants, about any Deposit Order being imposed in this case not being set at a level that would ***"curtail the claimants` access to justice".***

Further Procedure

58. It then being around 12.30pm, given that Mr Meth, for the respondents, had withdrawn his Strike Out application, and parties' representatives were agreed that the case should go to a Final Hearing (subject, only, to whether or not I were to make any Deposit Order, albeit opposed by Mr Allison on

behalf of the claimants), I stated that there might be merit in some brief discussion, with both parties` representatives present, about further procedure in this case.

59. I had noted, in the course of the Preliminary Hearing, that Mr Allison appeared not to have obtempered one of the standard case management Orders issued by me previously, on 9 May 2017, being standard order No 3, requiring detailed schedules of loss, and supporting mitigation document from the claimants, within 21 days. Mr Allison offered his apologies to the Tribunal, for his inadvertent failure to do so, saying that he must have lost sight of the Tribunal's Orders, in the abundance of papers now held on file, and Mr Meth, for the respondents, stated that he had no objection to an extension of time being granted in the circumstances. Against that background, I made an order for compliance within 14 days of this Preliminary Hearing.

60. On the matter of further housekeeping / updating of parties` ET1 and ET3 pleadings, I referred to the terms of paragraphs 25 to 27 of the written Note issued following the Case Management Preliminary Hearing held on 5 May 2017, and noted that Mr Allison appeared not yet to have turned his attention to providing the further and better particulars required in respect of required information for all of the claimants, rather than simply the first named claimant, Brian Aitken. While recognising that no formal Order had been made to that effect, given the extension of time granted for compliance with standard Order No 3, I decided it was appropriate to order production of this information, and that again within 14 days of this Preliminary Hearing. The ET1, as lodged, is very brief, and stands in marked contrast to the detail of the ET3 response.

61. While I would not wish to promote an overly formal approach to pleading a case before the Employment Tribunal, I think it is probably trite to record that the most helpful written pleadings from any party before the Tribunal are those which are expressed in plain language as far as possible, brief

with relevant and necessary detail of the case, based on a common sense approach to the issues which are seen to arise, give fair notice of the issues, focus on the issues which are in dispute, and are confined to expressing simple matters of fact and basic legal propositions to justify the claim being made, or the response to that claim. In short, reading of the ET1 and ET3 in any case before the Tribunal should enable any reader to understand the crux of the dispute between the parties and the kind of evidence which will probably have to be led to resolve these issues.

62. I pause to note and record here that the importance of the ET1 claim form, as commented upon by Mr Justice Langstaff, sitting in the Employment Appeal Tribunal, in **Chandhok v Tirkey, [2015] IRLR,** should be taken into account by Mr Allison. As the learned EAT President stated, at paragraphs 16 to 18, so far as material, for present purposes:

> "***16….. The claim, as set out in the ET1, is not something just to set the ball rolling, as an initial document necessary to comply with time limits but which is otherwise free to be augmented by whatever the parties choose to add or subtract merely upon their say so. Instead, it serves not only a useful but a necessary function. It sets out the essential case. It is that to which a Respondent is required to respond. A Respondent is not required to answer a witness statement, nor a document, but the claims made – meaning, under the Rules of Procedure 2013, the claim as set out in the ET1.***
>
> ***17. I readily accept that Tribunals should provide straightforward, accessible and readily understandable fora in which disputes can be resolved speedily, effectively and with a minimum of complication. They were not at the outset designed to be populated by lawyers, and the fact that law now features so prominently before Employment Tribunals does not***

mean that those origins should be dismissed as of little value. Care must be taken to avoid such undue formalism as prevents a Tribunal getting to grips with those issues which really divide the parties. However, all that said, the starting point is that the parties must set out the essence of their respective cases on paper in respectively the ET1 and the answer to it. If it were not so, then there would be no obvious principle by which reference to any further document (witness statement, or the like) could be restricted. Such restriction is needed to keep litigation within sensible bounds, and to ensure that a degree of informality does not become unbridled licence. The ET1 and ET3 have an important function in ensuring that a claim is brought, and responded to, within stringent time limits. If a "claim" or a "case" is to be understood as being far wider than that which is set out in the ET1 or ET3, it would be open to a litigant after the expiry of any relevant time limit to assert that the case now put had all along been made, because it was "their case", and in order to argue that the time limit had no application to that case could point to other documents or statements, not contained within the claim form. Such an approach defeats the purpose of permitting or denying amendments; it allows issues to be based on shifting sands; it ultimately denies that which clear-headed justice most needs, which is focus. It is an enemy of identifying, and in the light of the identification resolving, the central issues in dispute.

18. In summary, a system of justice involves more than allowing parties at any time to raise the case which best seems to suit the moment from their perspective.

It requires each party to know in essence what the other is saying, so they can properly meet it; so that they can tell if a Tribunal may have lost jurisdiction on time grounds; so that the costs incurred can be kept to those which are proportionate; so that the time needed for a case, and the expenditure which goes hand in hand with it, can be provided for both by the parties and by the Tribunal itself, and enable care to be taken that any one case does not deprive others of their fair share of the resources of the system. It should provide for focus on the central issues. That is why there is a system of claim and response, and why an Employment Tribunal should take very great care not to be diverted into thinking that the essential case is to be found elsewhere than in the pleadings."

Listing for Final Hearing

63. Next, discussion focused on what might be an appropriate window for a listing period, in order that I might instruct the clerk to the Tribunal to issue the usual date listing stencil letters to both parties` representatives as soon as possible.

64. After discussion with both parties` representatives, it was agreed that the current listing window of October to December 2017 was too soon, given matters yet to be addressed, and, after further debate, when Mr Meth stated that document 4, as included in Mr Allison`s bundle of documents, being a "***to whom it may concern***" letter from Kirklee Associates Ltd, relating to Mrs Elizabeth Aitken, may be an impediment to going straight to a Final Hearing, including her, as there may be a jurisdictional issue, I stated that I would instruct listing letters for the proposed listing period of **November / December 2017, and January 2018,** as I was conscious, from the case

files, that these 3 claims have been in the system for some time now, and the target date for Final Hearing was in fact March 2017.

65. While Mr Allison expressed some surprise that Mr Meth might be identifying a further, jurisdictional issue, at this late stage of the proceedings, I stated that, of course, either party was entitled, at any stage in the proceedings, to make a case management application to the Tribunal and, if so made, the other party would be provided with the usual 7 day period for comment/objection. As presently minded, I stated that there being no further preliminary issue identified, at this stage, I ordered that these cases would proceed to Final Hearing, as previously ordered by the Tribunal on 5 May 2017.

66. Mr Allison then queried whether the Final Hearing should be before a full Tribunal of 3, or before an Employment Judge sitting alone. Mr Meth expressed the view that it should before an Employment Judge sitting alone. Rather than proceed there and then to further discuss that matter, given the limited available time remaining, in the 3 hour allocation, I advised both parties` representatives to address any views they had on the matter of full Tribunal / Judge sitting alone, when replying to the date listing stencils to be issued to each of them by the clerk to the Tribunal.

67. Finally, it was noted that an Employment Judge had yet to rule on the contents of the sealed white envelope with documents produced by Mr Meth, in May 2017, in compliance with the 9 May 2017 Order of the Tribunal, and, after discussion with both parties` representatives, and in light of their previous correspondence to the Tribunal, it was agreed that this should be considered by an Employment Judge sitting alone, in chambers, on a date to be assigned.

68. As regards that outstanding matter, determining whether or not documents produced by the respondents are, or are not, "***confidential",*** Mr Meth suggested that I should take the Final Hearing in this case, given my judicial

continuity over two Hearings now, and that, as far as the respondents were concerned, he felt there was nothing to stop me addressing the confidentiality issue, even if I were to be the Judge hearing the Final Hearing.

69. Mr Allison, for the claimants, stated that it was a matter for the Tribunal to decide upon which Employment Judge dealt with the confidentiality application, and which Judge dealt with the Final Hearing, either sitting alone, or as chair of a full Tribunal.

Close of Preliminary Hearing

70. I invited parties` representatives if there were any further matters which either of them wished to address, but none were intimated. I stated that my Judgment and Reasons on the opposed application for Deposit Orders would follow as soon as possible, and I thanked both parties` representatives, and the claimants in attendance, for their attendance and contribution. There being no other matters raised, I brought this Preliminary Hearing to a close at around 12.45pm, it having lasted just short of the allocated 3 hours.

Issues for the Tribunal

71. In light of Mr Meth's withdrawal of the respondents' application for a Strike Out Order in respect of each of the 3 claims having no reasonable prospects for success, the only application remaining before me for judicial determination is the respondents' application for Deposit Orders, on the basis that the respondents submit that these 3 claims have little reasonable prospects of success, a contention vigorously resisted by Mr Allison, solicitor for the claimants.

Relevant Law

72. At this Preliminary Hearing, I was not addressed by either party's representative on the relevant law relating to Deposit Orders. As such, I have required to give myself a self direction in law. The relevant statutory provisions are to be found within **Rules 2 and 39 of the Employment Tribunals Rules of Procedure 2013,** which, so far as material for present purposes, provide as follows:-

"***Overriding objective***

2. The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—

(a) ensuring that the parties are on an equal footing;

(b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;

(c) avoiding unnecessary formality and seeking flexibility in the proceedings;

(d) avoiding delay, so far as compatible with proper consideration of the issues; and

(e) saving expense.

A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal.

Deposit Orders

39(1) Where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party ("the paying party") to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.

(2) The Tribunal shall make reasonable enquiries into the paying party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit."

73. Further, as neither Mr Meth, nor Mr Allison, referred me to any relevant case law, on the subject matter of Deposit Orders, I have again required to give myself a self direction. Fortunately, Mrs Justice Simler's judgment from the EAT in ***Hemdan –v- Ishmail & Ali-Megraby,*** at paragraphs 10 to 17, addresses the relevant legal principles, and I gratefully adopt it as a helpful and informative summary of the relevant law, as follows:-

"10. A deposit order has two consequences. First, a sum of money must be paid by the paying party as a condition of pursuing or defending a claim. Secondly, if the money is paid and the claim pursued, it operates as a warning, rather like a sword of Damocles hanging over the paying party, that costs might be ordered against that paying party (with a presumption in particular circumstances that costs will be ordered) where the allegation is pursued and the party loses. There can accordingly be little doubt in our collective minds that the purpose of a deposit order is to identify at an early stage claims with little prospect of

success and to discourage the pursuit of those claims by requiring a sum to be paid and by creating a risk of costs ultimately if the claim fails. That, in our judgment, is legitimate, because claims or defences with little prospect cause costs to be incurred and time to be spent by the opposing party which is unlikely to be necessary. They are likely to cause both wasted time and resource, and unnecessary anxiety. They also occupy the limited time and resource of courts and tribunals that would otherwise be available to other litigants and do so for limited purpose or benefit.

11. The purpose is emphatically not, in our view, and as both parties agree, to make it difficult to access justice or to effect a strike out through the back door. The requirement to consider a party's means in determining the amount of a deposit order is inconsistent with that being the purpose, as Mr Milsom submitted. Likewise, the cap of £1,000 is also inconsistent with any view that the object of a deposit order is to make it difficult for a party to pursue a claim to a Full Hearing and thereby access justice. There are many litigants, albeit not the majority, who are unlikely to find it difficult to raise £1,000 by way of a deposit order in our collective experience.

12. The approach to making a deposit order is also not in dispute on this appeal save in some small respects. The test for ordering payment of a deposit order by a party is that the party has little reasonable prospect of success in relation to a specific allegation, argument or response, in contrast to the test for a strike out which requires a tribunal to be satisfied that there is no reasonable prospect of success. The test, therefore, is less rigorous

in that sense, but nevertheless there must be a proper basis for doubting the likelihood of a party being able to establish facts essential to the claim or the defence. The fact that a tribunal is required to give reasons for reaching such a conclusion serves to emphasise the fact that there must be such a proper basis.

13. The assessment of the likelihood of a party being able to establish facts essential to his or her case is a summary assessment intended to avoid cost and delay. Having regard to the purpose of a deposit order, namely to avoid the opposing party incurring cost, time and anxiety in dealing with a point on its merits that has little reasonable prospect of success, a mini-trial of the facts is to be avoided, just as it is to be avoided on a strike out application, because it defeats the object of the exercise. Where, for example as in this case, the Preliminary Hearing to consider whether deposit orders should be made was listed for three days, we question how consistent that is with the overriding objective. If there is a core factual conflict it should properly be resolved at a Full Merits Hearing where evidence is heard and tested.

14. We also consider that in evaluating the prospects of a particular allegation, tribunals should be alive to the possibility of communication difficulties that might affect or compromise understanding of the allegation or claim. For example where, as here, a party communicates through an interpreter, there may be misunderstandings based on badly expressed or translated expressions. We say that having regard in particular to the fact that in this case the wording of the three allegations in the claim form, drafted by the Claimant acting in person, was

scrutinised by reference to extracts from the several thousand pages of transcript of the earlier criminal trials to which we have referred, where the Claimant was giving evidence through an interpreter. Whilst on a literal reading of the three allegations there were inconsistencies between those allegations and the evidence she gave, minor amendments to the wording of the allegations may well have addressed the inconsistencies without significantly altering their substance. In those circumstances, we would have expected some leeway to have been afforded, and unless there was good reason not to do so, the allegation in slightly amended form should have been considered when assessing the prospects of success.

15. Once a tribunal concludes that a claim or allegation has little reasonable prospect of success, the making of a deposit order is a matter of discretion and does not follow automatically. It is a power to be exercised in accordance with the overriding objective, having regard to all of the circumstances of the particular case. That means that regard should be had for example, to the need for case management and for parties to focus on the real issues in the case. The extent to which costs are likely to be saved, and the case is likely to be allocated a fair share of limited tribunal resources, are also relevant factors. It may also be relevant in a particular case to consider the importance of the case in the context of the wider public interest.

16. If a tribunal decides that a deposit order should be made in exercise of the discretion pursuant to Rule 39, sub-paragraph (2) requires tribunals to make reasonable

enquiries into the paying party's ability to pay any deposit ordered and further requires tribunals to have regard to that information when deciding the amount of the deposit order. Those, accordingly, are mandatory relevant considerations. The fact they are mandatory considerations makes the exercise different to that carried out when deciding whether or not to consider means and ability to pay at the stage of making a cost order. The difference is significant and explained, in our view, by timing. Deposit orders are necessarily made before the claim has been considered on its merits and in most cases at a relatively early stage in proceedings. Such orders have the potential to restrict rights of access to a fair trial. Although a case is assessed as having little prospects of success, it may nevertheless succeed at trial, and the mere fact that a deposit order is considered appropriate or justified does not necessarily or inevitably mean that the party will fail at trial. Accordingly, it is essential that when such an order is deemed appropriate it does not operate to restrict disproportionately the fair trial rights of the paying party or to impair access to justice. That means that a deposit order must both pursue a legitimate aim and demonstrate a reasonable degree of proportionality between the means used and the aim pursued (see, for example, the cases to which we were referred in writing by Mr Milsom, namely Aït-Mouhoub v France [2000] 30 EHRR 382 at paragraph 52 and Weissman and Ors v Romania 63945/2000 (ECtHR)). In the latter case the Court said the following:-

> ***"36. Notwithstanding the margin of appreciation enjoyed by the State in this area, the Court emphasises that a restriction on access to a***

court is only compatible with Article 6(1) if it pursues a legitimate aim and if there is a reasonable degree of proportionality between the means used and the aim pursued.

37. In particular, bearing in mind the principle that the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective, the Court reiterates that the amount of the fees, assessed in the light of the particular circumstances of a given case, including the applicant's ability to pay them and the phase of the proceedings at which that restriction has been imposed, are factors which are material in determining whether or not a person enjoyed his or her right of access to a court or whether, on account of the amount of fees payable, the very essence of the right of access to a court has been impaired …

42. Having regard to the circumstances of the case, and particularly to the fact that this restriction was imposed at an initial stage of the proceedings, the Court considers that it was disproportionate and thus impaired the very essence of the right of access to a court …"

17. An order to pay a deposit must accordingly be one that is capable of being complied with. A party without the means or ability to pay should not therefore be ordered to pay a sum he or she is unlikely to be able to raise. The

proportionality exercise must be carried out in relation to a single deposit order or, where such is imposed, a series of deposit orders. If a deposit order is set at a level at which the paying party cannot afford to pay it, the order will operate to impair access to justice. The position, accordingly, is very different to the position that applies where a case has been heard and determined on its merits or struck out because it has no reasonable prospects of success, when the parties have had access to a fair trial and the tribunal is engaged in determining whether costs should be ordered."

Discussion and Disposal

74. In coming to my determination on the matter of whether or not to grant any Deposit Orders in these 3 cases, I have done so after a period for private deliberation, taking account of the submissions made to me on 8 September 2017 by both Mr Meth and Mr Allison, for no evidence was led at the Preliminary Hearing, and also reading again the ET1 claim form, and the ET3 response, as also parties' correspondence with the Tribunal since the Case Management Preliminary Hearing on 5 May 2017.

75. Having carefully considered parties` competing submissions, and also my own obligations under **Rule 2 of the Employment Tribunals Rules of Procedure 2013**, being the Tribunal's overriding objective to deal with the case fairly and justly, I considered that, in terms of **Rule 37(2),** the claimants, through their solicitor, Mr Allison, had been given a reasonable opportunity at this Preliminary Hearing to make oral representations opposing the respondents' written application for Strike Out, which failing Deposit Orders.

76. Under **Rule 39(1),** at a Preliminary Hearing, if an Employment Judge considers that any specific allegation or argument in a claim or response

has "***little reasonable prospect of success***", the Judge can make an order requiring the party to pay a deposit to the Tribunal, as a condition of being permitted to continue to advance that allegation or argument.

77. As it is referred to in counsel for the appellant's submissions to the EAT, in ***H M Prison Service v Dolby*** ***[2003] UKEAT/0368/12,*** at paragraph 14 of Mr Recorder Bower' QC's judgment on 31 January 2003, this is the ***"yellow card***" option, Strike Out being described by counsel as the "***red card***."

78. The test for a Deposit Order is not as rigorous as the "***no reasonable prospect of success***" test under **Rule 37(1) (a),** under which the Tribunal can strike out a party's case. This was confirmed by the then President of the Employment Appeal Tribunal, Mr Justice Elias, in ***Van Rensburg v Royal Borough of Kingston upon Thames*** ***[2007] UKEAT/0096/07,*** where the learned EAT President held that ***"a Tribunal has a greater leeway when considering whether or not to order a deposit"*** than when deciding whether or not to Strike Out.

79. Where a Tribunal considers that a specific allegation or argument has little reasonable prospect of success, it may order a party to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument. The EAT's judgment on 17 September 2014, by Her Honour Judge Eady QC, in ***Wright v Nipponkoa Insurance (Europe) Ltd*** ***[2014] UKEAT/0113/14,*** *d*eals with the relevant legal principles on Strike Out applications, as well as the *quantum* of Deposit Orders. Although I was not referred to it by either Mr Meth, or Mr Allison, from my own judicial experience I know that, although unreported, it is a case law authority commonly cited to Employment Judges determining Strike Out / Deposit Order applications.

80. HHJ Eady QC discusses the relevant legislation and legal principles, at paragraphs 29 to 31, and in particular I would refer here to the summary of HHJ Eady QC's judgment at paragraph 3, on the *quantum* of Deposit

Orders, stating that the Tribunal Rules 2013 permit the making of separate Deposit Orders in respect of individual arguments or allegations, and that if making a number of Deposit Orders, an Employment Judge should have regard to the question of proportionality in terms of the total award made. Paragraphs 77 to 79 of the **Wright** judgment refer.

81. In the present cases, the claimants' complaints in the ET1 claim form are registered by the Tribunal under 2 separate administrative jurisdictional codes, for unfair dismissal ("***UDL***"), and failure of the employer to consult with an employee representative or trade union or a transferor with a transferee about a proposed transfer ("***FCT"***), so each separate head of complaint is liable, in the event of a Deposit Order being granted by the Tribunal, to require a deposit of up to £1,000 per allegation or argument.

82. **Rule 39(1)** allows a Tribunal to use a Deposit Order as a less draconian alternative to Strike Out where a claim (or part) is perceived to be weak but could not necessarily be described by a Tribunal as having no reasonable prospect of success. In fact, it is fairly commonplace before the Tribunal for a party making an application for Strike Out on the basis that the other party's case has ***"no reasonable prospect of success"*** to make an application for a Deposit Order to be made in the alternative if the '***little reasonable prospect'*** test is satisfied.

83. The test of '***little prospect of success'*** is plainly not as rigorous as the test of '***no reasonable prospect'***. It follows that a Tribunal accordingly has a greater leeway when considering whether or not to order a deposit. But it must still have a proper basis for doubting the likelihood of the party being able to establish the facts essential to the claim – **Van Rensburg** cited above**.**

84. Prior to making any decision relating to the Deposit Order, the Tribunal must, under **Rule 39(2),** make reasonable enquiries into the paying party's ability to pay the deposit, and it must take this into account in fixing the level of the deposit.

85. At this Preliminary Hearing, as detailed earlier, I made specific enquiries of the claimant's solicitor, Mr Allison, as regards his clients' ability to pay, if I decided to order any of them to do so, because, under **Rule 39(2),** I had a duty to make reasonable enquiries into their ability to pay, and to have regard to any such information when deciding on the amount of any deposit.

86. That enquiry of the claimants, at this Preliminary Hearing, proceeded on the basis only of *ex parte* statements through their solicitor, Mr Allison, and I heard no evidence, and no vouching documents were produced by, or on behalf of, the 3 claimants. Mr Meth, for the respondents, sought some clarifications of the information provided, *ex parte*, as did I, all as recorded earlier in these Reasons.

87. The respondents' application for Strike Out of the claims having been withdrawn, by Mr Meth, after I had heard Mr Allison's objections, the only live issue left for determination in this reserved Judgment is whether or not it is appropriate for me to make any Deposit Orders.

88. After careful consideration, I have decided that it is not appropriate for me to do so, and so I have refused Mr Meth's application. I cannot be satisfied, on the limited information provided at the Preliminary Hearing, that I can decide, at this stage of the proceedings, that the claims have little reasonable prospects of success.

89. There are many factors to be taken into account, and, as such, a factual enquiry being for another day, at a Final Hearing to be fixed sometime later this autumn, I agree with Mr Allison that the case is best addressed by parties leading evidence, and the Tribunal coming to a determination, with

the benefit of evidence led by both parties, tried and tested through cross-examination in the usual way, any necessary clarifications of that evidence by the Tribunal, and both parties' representatives then making closing submissions to the Tribunal on the basis of the evidence as led, and their submissions on the factual and legal issues arising in these claims .

90. Even if I am wrong, and it could be held now that the cases do have little reasonable prospects of success, I have to note and record here that, even if I had held that the making of a Deposit Order was appropriate, on that basis, I would not have considered it proportionate to make a Deposit Order for anything more than a nominal sum for each claimant.

91. The real and practical difficulty for the Tribunal, had I required to assess the claimant's respective whole means, is that I only had *ex parte* statements to work with, and no supporting, vouching documentation. While Mr Allison submitted that the 3 claimants, being in receipt of legal aid from SLAB, could be regarded as of limited financial means, I do not accept that, of itself, a party being in receipt of legal aid is indicative of that party's inability to pay a Deposit Order.

92. Legal aid is granted having regard not only to a party's means, but also probable cause for litigation, and taking a legal aid certificate into account (which, of course, I did not have lodged as a production here for the claimants, as Mr Allison simply made an *ex parte* statement to that effect) does not fetter my judicial discretion in this matter, as I cannot allow any decision by SLAB to grant legal aid to interfere with my own, independent and objective decision making process as to whether or not it is appropriate for me to grant any Deposit Order in these Tribunal proceedings.

93. Where a Deposit Oder is being sought against a party, as also any Costs / Expenses Order, it is my view that, consistent with the obligation to assist the Tribunal to further the overriding objective, under **Rule 2**, parties'

representatives should make full disclosure, in advance of any Preliminary Hearing, and, if such information is not provided voluntarily to the other party, then recourse can, of course, be made to the Tribunal, by the other party, by way of case management application, for the Tribunal to order the production of a statement of means and assets, and supporting, vouching documentation, if such an Order is not made by the Tribunal, acting on its own initiative, when listing a case for a Strike Out / Deposit Order Preliminary Hearing.

94. Had I decided to grant any Deposit Orders in the present cases, I would, of course, have required to further consider the appropriate amount for a Deposit Order, having regard to the individual claimant's reported whole means, and taking their respective ability to pay into account, I would have required to decide what specific amount that I could be satisfied that each of the claimants could afford to pay in that regard.

95. As stated by Lady Smith, in the unreported EAT judgment of 10 January 2012, given by her in **Simpson v Strathclyde Police & another [2012] UKEATS/0030/11,** at paragraph 40, there are no statutory rules requiring an Employment Judge to calculate a Deposit Order in any particular way; the only requirement is that the figure be a reasonable one.

96. Further, at paragraph 42 of her judgment in **Simpson**, Lady Smith also stated that:

> ***"It is to be assumed that claimants will not readily part with money that they are likely to lose – particularly where it may pave the way to adding to that loss a liability for expenses or a preparation time order (see rule 47(1)). Both of those risks are spelt out to a claimant in the order itself (see rule 20(2)). The***

> ***issuing of a deposit order should, accordingly, make a claimant stop and think carefully before proceeding with an evidently weak case and only do so if, notwithstanding the Employment Tribunal's assessment of its prospects, there is good reason to believe that the case may, nonetheless succeed. It is not an unreasonable requirement to impose given a claimant's responsibility to assist the tribunal to further the overriding objective which includes dealing with cases so as to save expense and ensure expeditious disposal (rule 3(1)(2) and (4)."***

97. Lady Smith's judgment was referring to the then 2004 Rules. Further, at paragraph 49, she also stated that: "***it is not enough for a claimant to show that it will be difficult to pay a deposit order; it is not, in general, expected that it will be easy for claimants to do so."***

98. Given that I have refused the respondents' application for Deposit Orders, I will not need to address the differing approaches identified by Lady Smith in ***Simpson***, and Mrs Justice Simler in ***Hemdan***. I suspect, however, that it will only be a matter of time before another Employment Judge somewhere else, in another case, will have to wrestle with the competing views of these two learned EAT Judges, and decide what is the correct approach under the current 2013 Rules.

99. It is not necessary for me to do so in the present cases. For any future case, however, I note from the ICR law report, and the list of cases cited in argument before Mrs Justice Simler in ***Hemdan***, as listed at ***[2017] ICR 487 C/F,*** that Lady Smith's unreported judgment in ***Simpson*** was not cited, although various other unreported EAT judgments were cited in argument before her, and ***Simpson*** is not referred to in the EAT's reported Judgment in ***Hemdan.***

Further Procedure

100. Any further procedure will be addressed by correspondence with the Tribunal, in the first instance. Should any other matters arise between now and whatever date is to be assigned for a Final Hearing, then written case management application should be intimated, in the normal way to the Tribunal, by e-mail, with copy to the other party's representative, sent at the same time, and evidencing compliance with **Rule 92**, for comment/objection within seven days.

101. Dependent upon subject matter, and any objection/comment by the other party's representative, any such case management application may be dealt with on paper by the allocated Employment Judge, or a Preliminary Hearing fixed, either in person, or by telephone conference call, as might be most appropriate.

Important Notice

102. Meantime, parties' representatives' attention is drawn to the Orders made at this Preliminary Hearing, and the need for full and timeous compliance.

103. If these Orders are not complied with, the Tribunal may make an Order under **Rule 76(2) of the Employment Tribunal Rules of Procedure 2013** for expenses or preparation time against the party in default.

104. Further, if these Orders are not complied with, the Tribunal may Strike Out the whole or part of any claim or response under **Rule 37**.

Employment Judge: Ian McPherson
Date of Judgment: 18 September 2017
Entered in register: 20 September 2017
and copied to parties