Neutral Citation Number: [2023] EAT 167

Case No: EA-2022-000071-LA
EA-2022-000073-LA

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 6 December 2023

Before:

HIS HONOUR JUDGE BEARD

- -

Between:

MRS D CARRYL

Appellant

- and -

GOVERNING BODY OF MANFORD PRIMARY SCHOOL

Respondent

- -
- -

MS CHESCA LORD (instructed by **ADVOCATE**) for the **Appellant**
MR TOM WILDING (instructed by **Legal and Constitutional Services) London Borough of Redbridge**) for the **Respondent**

Hearing date: 6 December 2023

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JUDGMENT

SUMMARY

PRACTICE AND PROCEDURE

The Appeal had been given permission but the issue of time limits for appeal had not been addressed. It was appropriate to address these issues as applying to jurisdictional issues. The Employment Tribunal did not provide the Judgment leaflet which informs parties of the process of appealing that is usually included with final judgments. The EAT found that the Appellant, because of the wording of orders and in the absence of the leaflet, was not aware that it was possible to appeal a deposit order. This was treated as an exceptional reason for the purposes of granting an extension to appeal **Hancocks v Cambian Education Services Ltd** UKEAT/0824/10 followed.

Applying **Adams v Kingdom Services Group Limited** UKEAT/0235/18/LA and **Hemdan v Ishmael** UKEAT/0021/16/D the Appeal was upheld. The EJ had not given reasons for the decision that the Appellant could meet the deposits ordered within the time set out and had failed to make an analysis of the income and outgoings of the claimant.

Per curiam where a deposit is being considered it would be advantageous for a party to be warned and advised what issues the Employment Tribunal is considering in respect of ability to pay so that parties have the opportunity to come to the hearing with relevant evidence of means.

HIS HONOUR JUDGE BEARD:

1. I will refer to the parties as Claimant and Respondent, as they were before the Employment Tribunal. This is an appeal against a judgment making deposit order against the Claimant. Further the Claimant appeals reconsideration decisions in respect of that deposit order and also in respect of a strike out order which arose because of the deposit order not having been paid by the Claimant.

2. The history of this case is very unusual. The case involved claims of unfair dismissal based on a constructive dismissal claim and of discrimination arising out of the part-time worker status of the Claimant. The Claimant and Respondent went through a fully contested hearing. However, that contested hearing was before an employment judge sitting alone; Judge Barrowclough. Because there was a discrimination claim, that discrimination claim should have been dealt with by a full tribunal panel. That issue was the subject of an application for reconsideration by the Claimant. At that reconsideration hearing the Judge, who had heard the previous full hearing, listed the matter to be heard afresh before a panel. However on that same occasion he made deposit order, taking account of the view he had taken of the facts in the hearing he had set aside.

3. I think I ought to set the grounds of appeal out in detail for the purposes of this judgment. The Claimant contends that in making the 1st July 2021 deposit order in a total of £500, in refusing to vary that order on 21st July 2021 and 25th October 2021, and striking out the Claimant's claim on 17th January 2022 for non-payment thereof, the Tribunal erred in law, in that it:

i) Failed, contrary to Rule 39(2) of the Employment Tribunal Rules 2013, to make reasonable enquiries as to the Claimant's ability to pay the deposit;

ii) Failed, contrary to Rule 39(2) of the Employment Tribunal Rules 2013, to have regard to the Claimant's ability to pay the deposit of £500 within 28 days when deciding the amount of the deposit to set and maintain;

iii) Failed to reconsider its decision in light of the subsequent evidence provided by the Claimant and maintained the deposit at a level the Claimant could not afford to pay, thereby impeding their access to justice; and

iv) Failed to give adequate reasons:

a) firstly as to why it had set the level of deposit order at the level it had;

b) secondly how the Claimant's ability to pay had been taken into account in fixing the amount of the deposit; and

c) why it considered it considered the requirements to pay such an amount within the period specified was reasonably capable of being paid.

4. In May 2020 the Claimant presented the ET1 form beginning her claim. The response came by 24th July 2020. In March of 2021, the full hearing took place before the judge alone. Judge Barrowclough dismissed the Claimant's claims

at that hearing. In response the Claimant wrote to the Employment Tribunal raising the matter of the constitution of the panel as part of a letter. Certainly, by 1st May 2021, the Claimant applied for reconsideration of that Judgment.

5. That reconsideration hearing took place on 1st July 2021. Judge Barrowclough ordered a total re-hearing upon reconsideration. However, in addition to that, the Judge made an order requiring the Claimant to pay a deposit of £250 in respect of each complaint if she wished to pursue them; a total of £500. I note, for the purposes of considering this appeal, that the notes to the order on reconsideration makes it clear that if the order not be complied with, the Tribunal can take action on its own initiative, including reviewing or varying the terms of the order and also that an application could be made for the order to be varied, suspended or set aside.

6. The order setting aside Judgment on reconsideration was accompanied by the reasons for making a deposit order, which were: that the Tribunal had already determined the Claimant's complaints; that the Claimant's representative at that hearing had indicated that the Claimant's complaints would stand or fall together; that there were only a limited number of issues which would have led to the complaint of less favourable treatment. These seem to be the only reasons referred to in the order, there is no indication of how the Tribunal had identified the Claimant's means and the detail of how it thought that the Claimant was able to pay the deposit sum.

7. The notes accompanying the order set out, under various headings, when the deposit is to be paid, what happens to the deposit and how to pay the deposit. However, under the heading 'Enquiries', the notes indicate that enquiries

relating to the case should be made to the Tribunal office dealing with the case but enquiries relating to the deposit should be referred either to an address which was set out in a slip attached to the order, or be telephoning a particular number. It was envisaged that an administration team would then discuss the deposit with the party contacting them.

8. The order was sent to the Claimant and, I am told and I accept for the purposes of this hearing, it was not accompanied by the usual judgment document that would accompany a full judgment, from the Employment Tribunal. That is the document which informs the parties how to appeal an Employment Tribunal decision. My own knowledge of the operation of the Employment Tribunals tells me that case management orders of various sorts are sent out regularly by the Employment Tribunal and would not be usually accompanied by the judgment leaflet. That, in any event, is, it seems to me, of some importance in the way that this case has developed.

9. The order was promulgated on 6th and 7th July but sent to the parties on 9th July 2021. On 13th July 2021 the Claimant applied for the order for a deposit to be rescinded or reduced. I should make it clear that in this appeal, I am not concerned with the making of the deposit order in principle, only the amount of deposit the order set. In point 3 of the email letter sent to the Tribunal on 13th July, the Claimant sets out the following:

> **"The amount set represents a high proportion of my salary. This will drive me even further in the debt that I amassed when I had to leave the Respondent suddenly."**

10. Then she goes on to say the reasons why she believed she was dismissed, and then this:

> **"The deposit order set is a financial barrier to seeking justice. From my understanding, a deposit order should not be used in this manner."**

11. In the light of that letter from the Claimant, it appears that the matter was put before Judge Barrowclough who instructed, it would seem, that a response be given to the Claimant as follows: in its first bullet point that the complaint had little reasonable prospect of success and, therefore, demonstrating the substance, in principle, of making the deposit orders then this is set out:

> **"The amount of the deposit orders, £250, takes into account the Claimant's means, appropriate enquiries having been made at the reconsideration hearing, and reflects the fact that the Claimant should consider carefully before deciding whether or not to proceed on either claim."**

12. In terms of the appropriate enquiries having been made it is, generally, common ground between the parties that that amounted to the Judge asking the Claimant two questions. Firstly whether the Claimant was willing to pay a deposit of up to £1,000 and, secondly, as to how much the Claimant's salary was at that time.

13. In answer to the point in point 3 of the Claimant's letter, the Employment Judge caused this to be written:

> **"The Claimant's third point is addressed in the previous answer, although it is not correct to suggest that the amount set represents a high proportion of the Claimant's monthly salary."**

14. That is a point to which I will return, in due course. The refusal to reconsider on 21st July 2021 was met with a further application by the Claimant on 22nd July 2021 for further reconsideration. That letter was, in some ways, in similar terms to those points that had been made in the Claimant's letter of 13th July. However, once again, at point 3 the Claimant referred to the deposit as being a high proportion of her monthly salary. She further indicated that the

deposit order amounted to a financial barrier. My understanding is that on this occasion the letter was accompanied by evidence of means. That evidence being copies of the Claimant's then current bank balances and of her salary. The latter was referred to as a temporary salary, in July of 2021. Further, there was a document setting out what the Claimant said was her ordinary salary in the first payroll month of 2021.

15. As submitted by Ms Lord on behalf of the Claimant the documents demonstrated, it appears to me, that some three or four days prior to payment of her salary, the Claimant was already approaching the limits of her overdraft facility and her credit card use. It is also to be noted that her take home pay in that document was set at £1,354.87.

16. The case then seemed to fall into an administrative back hole for a period of time because it is not until 25th October 2021 when the Claimant receives a response to her 22nd July application for reconsideration. That letter from the Employment Tribunal again sets out what the clerk to the Employment Tribunal has been asked to convey by the Judge. It states:

> **"For the reasons given in the Tribunal's deposit order dated 6th July 2021 and the subsequent letter dated 21st July 2021, the Claimant's application to remove or vary the terms of that order is refused."**

17. The Claimant, in response to that, requested reasons for the decision and, in terms, the response was dealt with in a letter of 2nd November 2021. I shall set out the letter in full:

> **"Further to the Tribunal's letter dated 25th October, there have been administrative failures which have regrettably affected the progress of matters. For the avoidance of doubt, we make clear that the parties' correspondence in late July was forwarded to Employment Judge Barrowclough on 2nd August and that his instructions to respond as in our letter of 25th October were received on 15th August. Unfortunately,**

> **those instructions were not then actioned and the claim was subsequently overlooked. Employment Judge Barrowclough instructs that, in relation to the Claimant's subsequent request for modification of the deposit order, the position remains as set out in the Tribunal's letter of 25th October. That for the reasons provided in the deposit order dated 6th July, and the letter of 21st July, that request is refused. If the Claimant wishes to take the matter further, then she should do so by way of appeal to the Employment Appeal Tribunal, since this Tribunal's final determination of the matter has now been reached."**

Again, I note from that letter there is no indication that any other documents were enclosed, such as the judgment leaflet which generally accompanies a final Judgment.

18. Having received that letter, on 4th November 2021 the Claimant wrote, by email, to the Employment Appeal Tribunal. This attached a letter rather than the forms generally used and required by the Employment Appeal Tribunal to commence an appeal. The letter is at pages 8 to 11 of the supplementary bundle. Mr Wilding, for the Respondent, indicated that it could not really be clear whether that was the letter sent to the Employment Appeal Tribunal on 4th November 2021. However, it seems to me, given the details of the case that are provided and although the letter is addressed to the Employment Tribunal, on the balance of probabilities, the letter was sent to the Employment Appeal Tribunal. This is particularly because on 4th November there is an email to the Employment Appeal Tribunal which indicates that there are attached documents which relate to the Claimant's council tax bill and her account balances. It seems to me very unlikely that such material would have been sent without a detailed letter from the Claimant explaining the circumstances.

19. What is clear to me is that, in terms of the Claimant's approach to the Employment Appeal Tribunal, she chased matters on 30th November 2021 and 6th January 2022. Both of these communications being prior to her claim

having been struck out because of non-payment of the deposit. The Claimant further chased the Employment Appeal Tribunal on other dates in January and February of 2022.

20. On 10th February 2022 the Claimant was informed that she needed to use the correct forms in order to institute an appeal. She did so and submitted a notice of appeal on that same day and, within two days, sent further documents as required to deal with the institution of the appeal. Because, it would appear, more than one element of decision making was appealed, it does not seem that the administration had been picked up, at any stage, that there were time limit issues in relation to the case. The case was not, as it would usually be, dealt with by the registrar to consider time limits.

21. However, in October of 2022 Her Honour Judge Tucker considered the documents in the appeal and rejected the appeal at the sift stage. The appeal, however, was the put before Michael Forbes KC, sitting as a Deputy High Court Judge under rule 3:10. He considered the matter and permitted the amended grounds of appeal to advance to this hearing. He does not, as part of his decision, consider the time point but considers the substantive law. In his reasons he refers to the case of **Adams v Kingdom Services Group Limited** UKEAT/0235/18/LA about the duty to give reasons for the particular amount of the deposit.

22. Those are the relevant facts in this appeal. However, I should mention that I have been assisted by Mr Wilding having provided a note he prepared contemporaneously of the oral judgment given by Judge Barrowclough on 1st July. The notes show that, although consideration was given to little

reasonable prospect of success, there was nothing to demonstrate the reasoning for the sums of money that were ordered as a deposit.

23. The Claimant's arguments before me are twofold. First, in respect of the reasoning to be engaged with when a deposit is ordered. Secondly, there is a response to the time limit issues raised, quite properly, by the Respondent. However, it appeared to me that there was also a "failsafe" argument it which argues that the deposit was wrongly made and it could be considered an abuse of process for the strike out to be upheld in those circumstances.

24. With regard to the deposit issues, the Claimant relies on Rule 39(2) and the requirement that reasonable enquiries should be made into the ability to pay the deposit. Along with that it is argued that it is necessary to pay regard to that information when deciding the amount of the deposit. Further, it is contended that reasons for making the order should be provided.

25. Reference was made to the case of **Hemdan v Ishmael** UKEAT/0021/16/DM in support of that proposition. It was held that the purpose of the deposit order was not intended to make justice difficult or to effect a strike out by the back door. It is an order which is not meant to restrict disproportionately fair trial rights or to impair access to justice. The Claimant argued that this is precisely what was done in this case because, in proportion terms, the amount of £500, solely in relation to the monthly income of the Claimant, was disproportionate, given that it had to be paid within 28 days.

26. The Claimant also relied upon **Adams** (above) and the decision that there was a need to give reasons for the amount of the deposit that was to be ordered. It was argued that the Judge was required to give reasons as to how he had come

to the conclusion as to the particular figure specifically by demonstrating that he had taken account of the ability to pay. It was argued that in this case there was a complete failure to provide that reasoning.

27. In dealing with the respondent's argument that appeal, in part, was presented after the time limit, the Claimant contends that the appeal against the striking out of the claim was in time. The Claimant argues that the decision to strike out is inherently linked to the earlier decisions made. The claimant has accepted the lateness of the response to the second application to reconsider, of itself, does not amount to exceptional circumstances. However, it was argued that there were other exceptional circumstances in this case. The original judgment in respect of the deposit was misleading because of its wording and the indication that there should be telephone contact. The Claimant was someone who did not know that she could appeal. She saw the deposit order only as an administrative element of the Tribunal's processes. The Claimant, when she was made aware that she could appeal in November of 2021, did so immediately. Although the Claimant had not appealed in the correct form, that could be attributed to the communications from the Employment Tribunal and that the usual judgment leaflet with instructions as to appeal was missing.

28. The Claimant also argues that the continuing communications she had with the Employment Appeal Tribunal demonstrate that the Claimant was diligent in making and keeping contact. After she had sent her letter enquiring on the status of the appeal and once she was told by Employment Appeal Tribunal of the correct process to follow, she complied with that promptly.

29. The final argument was that even if there are no exceptional circumstances to justify extending time, the strike out should be overturned in any event because of the significant failings in the making of the orders requiring a deposit.

30. Mr Wilding, in his response, although not conceding the point, accepts that the due consideration of the Claimant's means is not apparent from the judgment or reasons given. However, he makes his argument in two ways: the first is that all of these matters are out of time for presenting an appeal save for that in respect of the strike out and a strike out is the inevitable consequence of a regular, unless type, order not being complied with; secondly he argues that, in respect of the other orders appealed, they are out of time and there are no exceptional circumstances.

31. Mr Wilding contended that the deposit that was ordered was a regular order and had not been overturned. The order was, in effect, an unless order. The appeal against the strike out cannot succeed because that strike out is an inevitable result of that regular order without any further steps being taken.

32. Mr Wilding's argument in respect of time limits was that the Claimant could have done more than effectively to consider how to approach matters with the Appeal Tribunal. On that basis there was nothing exceptional in the circumstances.

33. His further argument was that, if I did not accept the submission on exceptional circumstances, the Claimant has not demonstrated that there would be a material difference in the outcome and that, therefore, the appeal should be dismissed on that basis. In order to advance that argument, he relies

on the documentary material provided by the claimant which he says is limited and does not show anything other than a snapshot of what the position was. Therefore, he argues, the reconsideration decisions were correctly made on the basis of the evidence before the Judge.

34. Mr Wilding argues that the exceptionality and abuse of process decisions must run together. Either these are exceptional circumstances to extend time or they are not. If they are not exceptional then there would be no good reason to say that there was, in some way, an abuse which would be a means of overturning the strike out order.

35. The Employment Tribunal's Rules of Procedure 2013 at Rule 39 imposes mandatory requirements. 39(2) provides:

> **"(3) 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.**
>
> **(3) The Tribunal's reasons for making the deposit order shall be provided with the order and the paying party must be notified about the potential consequences of the order."**

36. In **Hemdan** (above) it was held that the purpose of the deposit order was not to make access to justice difficult or to effect a strike out through the back door. At paragraph 17 it was made clear that a deposit order should not disproportionality affect a party's article 6 rights to a fair trial. An order to pay a deposit must be, practically, capable of being complied with. A party without the means or ability to pay should not be ordered to pay a sum they are unlikely to be able to raise. That means a proportionality exercise must be carried out in relation to a deposit order or series of deposit orders. If a deposit order is set at a level which the paying party cannot afford to pay, the order will operate to impair access to justice.

37. In **Adams** the ET had not explained why it set the amount of the deposit at the level it did. There were, in that case, some unusual circumstances. The deposit order was set at £900 and then reduced by further order to £300. Through a failure to recognise that there was a separate order, the appeal was brought on the basis of the £900 order. However, in any event, the EAT came to the conclusion that an amendment should be permitted because there was no prejudice to any party. As part of the reasoning for allowing that amendment the failure (an error of law) not to give reasons for the particular amount of the deposit was taken into account.

38. It appears to me that, in straightforward day to day language, an employment judge is required to find out the following if they are considering making a deposit order: how much money is coming in and how much money is going out in respect of that party's finances. Having come to a conclusion about that they will have a view as to the disposable income available within a particular period. An employment judge is able then to draw a conclusion as to the amount that someone will, practically, be able to pay in order to pursue a particular claim or case. The purpose of the deposit order is not to achieve strike out by another means. Where a judge considers a claim or case has little reasonable prospects of success, the purpose of making a deposit is to make parties stop and think prior to pursuing a claim or case further. In short, a judge is required to attempt to create a balance sheet which will relate to the amount of deposit and when a party would be able to pay that deposit. Once the judge has that information they can set a deposit at a level which has sufficient impact to cause a party to reflect but not to prevent pursuit of a claim or case.

39. The case law in respect of time limits begins with the decision in **United Arab Emirates v Abdelghafar** [1995] ICR 65. What should be considered first is the explanation for the default. The second consideration is whether that explanation amounts to a good or acceptable excuse. Finally, it must be considered whether there are particular circumstances which can properly be described as exceptional and which would allow the grant of an extension of time. I also note, although it was not referred to me by the parties, that the reasoning in **Abdelghafar** was upheld by the Court of Appeal in **Green v Mears Ltd** [2018] EWCA Civ 751.

40. The Court of Appeal in **Aziz v Bethnal Green City Challenge Company Ltd** [2000] IRLR 111 makes it clear that the time limit begins to run when the decision is sent. Further, it makes the point that the limitation date is a limit and not a target. The case also shows, accepting the approach in **Abdelghafar**, that an extension of time is an indulgence, not an entitlement.

41. In **Abdelghafar**, there are specifics in the details of the approach to be taken to an application for an extension. Mummery J, as he then was, indicated that the grant or refusal of an extension of time is a matter of judicial discretion. As such the discretion is to be exercised "*not subjectively or at a whim, or by rule of thumb, but in a principled manner in accordance with reason and justice*". The exercise of the discretion is a matter of weighing and balancing all the relevant factors which appear from the material before the Appeal Tribunal. The result is not susceptible to a set of rules which would result in programmed responses.

42. I have been taken to the decision of the Master of the Rolls in **Costellow v Somerset County Council** 1 All ER 952 where the principle that the rules of court and practice are devised in the public interest to promote the expeditious despatch of litigation were set out. It does indicate the competing principle that a plaintiff should not be denied an adjudication of the claim on merits because of a procedural point, unless that causes prejudice to an opponent. However, that principle has to be considered to reflect the stage which proceedings have reached. A procedural default at an interlocutory step in first instance proceedings can amount to special circumstances. Whereas at the appeal stage, when there has already been a full and detailed hearing of a case, the approach should be different.

43. **Hancocks v Cambian Education Services Ltd** UKEAT/0824/10 where the judge accepted, in that case, that the Appellants were unaware of the right to appeal. Having written to the ET within the time for appealing and where the ET had not responded as to the process of appeal until the time limit had already passed. The parties believed that the ET was dealing with matters in the meanwhile. Although His Honour Judge McMullen indicated it was not for the Claimant to seek advice from an ET he held that all the ET needed to do or say was that the parties had contacted the wrong place and to go to the EAT. The accepted that if there had been such a response that would be what Mr Hancocks would have done; exemplified by what he in fact did. There was a combination of circumstances in that case which included ill health of family members and the lack of knowledge of the right to appeal which made the circumstances exceptional. Ms Lord for the Claimant says there are many similarities in those facts with the facts before me.

44. It seems to me, clearly, that for all but the strike out, these appeals are clearly beyond the time limit for making an appeal. The various authorities show, even if a party did not receive a judgment, a time limit still applies in those circumstances. So it must apply, in my judgment, when the party receives a decision from the Employment Tribunal. That is the starting point. 42 days from 9th July 2021 means that those cases are clearly out of time.

45. Mr Wilding, in my judgment, is correct to say that this is a case where the answer to the question as to whether these circumstances are exceptional for the claims that are out of time, will also answer whether the strike out should be overturned. I do not accept that procedural or substantive defects in the making of an order, where that order is a regular order, mean that the order can be effectively considered a nullity, despite the absence of any stay or appeal in respect of that order.

46. So dealing with **Abdelghafar**, what have I heard? I have heard an explanation that the original judgment was misleading. That judgment referred to making telephone contact on issues that arose with the deposit. There was no indication of an appeal in that documentation. This led to the Claimant being unaware that an appeal was the proper step to take where she disputed the level of the deposit ordered. The claimant did not know that that was the proper step until 2nd November 2021, when the Employment Tribunal told her so. It is at that stage, with some alacrity, that she applied to both the Employment Tribunal asking for a stay of the order and applied on 4th November to the Employment Appeal Tribunal. The Claimant did not follow the correct procedure. However, in my judgment that failure is understandable

in circumstances where none of the material which would normally accompany an ET judgment was included within the communications from the ET. Even the communication of the 2nd November which stated that an appeal was the next step did not contain that standard document.

47. There was a clear delay between July and October of 2021. That is a delay caused by the ET and not the Claimant. I have seen from the evidence before me that the Claimant is someone who keeps in contact and enquires on a regular basis about the status of her case. It appears to me that she did so with the Employment Appeal Tribunal and did so until she was told that forms needed to be used. Once she was told the correct process, the Claimant complied with that process.

48. In terms, that explanation, it seems to me, might not be, generally, considered acceptable. This is because it is possible for individuals in this day and age to use the internet to make enquiries and take steps to find out what is necessary to appeal to the EAT. However, these circumstances in my judgment are exceptional. It is the combination of those matters given as the explanation which I consider make this an exceptional case. In addition to that the background circumstances to this case, where the claim would have already been successful on a reconsideration but for a procedural failing by the ET.

49. Mr Wilding argues that these circumstances are not exceptional. I would simply say that I have never seen a case of this nature before. Here the Claimant is in regular communication and making points which are both relevant and apposite to the decision making that is underway. I have come to the conclusion, therefore, that in the circumstances of this case, for those

matters which relate to the out of time appeals, I should extend time limits to the date when the Claimant instituted her appeal in February of 2022.

50. I then move on to the question of the grounds of appeal. It seems to me, quite clear, that in terms of decisions on 1st July and 21st July and 25th October, the Employment Judge failed to give adequate reasons, as required and I have set out. There is no indication at any stage, in any of the ET documents, which show the judge's reasoning as to why he had set the level of deposit order at the particular level of £250 per claim.

51. There is no reasoning as to how the Claimant's ability to pay had been taken into account. It seems to me simply asking what the gross annual pay amounts to, along with asking a question about whether someone is willing to pay a deposit of up to £2,000 is insufficient material on which to base a decision. The Claimant's ability to pay is not in my judgment explained by the judge on any of the occasions when he gave a decision. Further to that it also is clear that there is no reasoning to explain how he considered that the claimant was reasonably capable of paying those amounts within a 28 day period.

52. That deals with ground 4 and, therefore, the appeal would succeed in any event. However, I should consider the other grounds. It is a requirement of the rules that enquiries are made. Those enquiries, particularly where an individual has not been warned prior to a hearing that a deposit order may be considered, is something which will generally involve a level of interrogation by an Employment Judge or Tribunal. In other words, the approach would be an inquisition as opposed to the usual adversarial approach.

53. Reasonable enquiries would require consideration not of a gross annual income but, because annual income can break down to monthly pay, which has other regular deductions above those of tax and National Insurance. These days it is commonplace for pension deductions to be made for instance. On that specific enquiries ought to be made as to actual weekly or monthly take home pay. Along with that, the differences in the amounts of regular commitments that individuals have, in terms of their income, is of equal importance. Some will have contractual commitments for monthly payments for mobile telephones for instance. In any event, in this case, that was not done and it is a mandatory requirement of the rule that enquiries are made into the ability to pay, not simply the gross salary, and the appeal on that ground succeeds.

54. The ability to pay a particular sum is of importance in respect of ground 2. Even in circumstances where the judge was considering gross income, they would have in mind that income would, generally, be subject to tax and National Insurance deductions. A judge, therefore, would have at least an idea about the monthly take home pay. To impose a deposit of some £500 to be paid within a month, when even on a rough and ready guide, that would amount to somewhere above a third of the take home pay, does not seem to me to be having regard to the ability to pay. A judge is not entitled, as part of a deposit decision to take account of the merits or lack of merits in a case in deciding the amount. That forms part of the principled decision as to whether there ought to be a deposit. The level of the deposit is solely to be dealt with under Rule 39(2).

55. In terms of the reconsideration, there is no explanation as to why the judge did not reconsider matters by explaining why the evidence he had been provided with did not meet the requirements for reconsideration. He had been told that the Claimant could not afford to pay. In circumstances where the judge has made enquiries and the evidence is not available at the time, it can be imagined that a deposit could be ordered. However, when the material is then provided which shows that, *prima facie*, it is an order that the Claimant would not be capable of complying with, it would have been appropriate for a reconsideration hearing to take place. Orders for disclosure would need to be made, particularly as these were documents which were not disclosed to the Respondent, which of course they should have been on any application under the ET rules.

56. In those circumstances, it seems to me that the failure to reconsider when there was evidence which, *prima facie*, indicated that the deposit was at an unaffordable level, is also ground of appeal, which I should uphold.

57. That being the case, both parties agree that I should now consider the appropriate deposit. I should consider that because, on the basis of Rule 39(2) and not on the basis of the Claimant's ability to pay in July 2021, but on the Claimant's ability to pay such a deposit based on her current financial circumstances and within a time limit set by me. Which I shall after discussion with the parties.

58. Following discussion my order is that the Claimant should pay a deposit of £30 in respect of each complaint. The total of £60 should be paid by 4pm on 18 December 2023.

59. There is, in my judgment, as I have set out, a requirement for careful consideration of a party's financial matters under the terms of the rules. Therefore, it would be better, where an ET is considering making a deposit order, that there should be forewarning so that a party can come to a hearing prepared with the information and documentation to explain their finances.