EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4104192/2018

Held in Glasgow on 14 January 2019 (Preliminary Hearing)

Employment Judge: Ian McPherson

Miss Louisa Dillon	**Claimant** **In Person**
(1) DAG Marketing Ltd **(A Dissolved Company** **formerly No. 10856491)**	**First Respondents** **Represented by:** **Mr David Gorrie -** **former Director**
(2) Jones Whyte Law **C/o Greg Whyte**	**Second Respondents** **Represented by: -** **Mr Greg Whyte -** **Solicitor**
(3) DAG	**Third Respondents** **No Response**
(4) David Gorrie And Greg Whyte **DAG / Jones Whyte Law**	**Fourth Respondents** **No Response, but Mr Gorrie and Mr Whyte appeared in person**

E.T. Z4 (WR)

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The **reserved** Judgment of the Employment Tribunal, having heard parties' representatives at this Preliminary Hearing, is that: -

(1) The second and fourth respondents' applications for Strike Out of the claim, under **Rule 37 of the Employment Tribunals Rules of Procedure 2013**, is **refused** by the Tribunal, as it is not in the interests of justice to strike out the claim in circumstances where a fair trial of the case is still possible, at a continued Preliminary Hearing, to be assigned , as previously ordered by the Tribunal, following the part-heard Preliminary Hearing, adjourned on 3 October 2018, and to be relisted thereafter.

(2) Further, the fourth respondents' applications for a Deposit Order to be made by the Tribunal, under **Rule 39 of the Employment Tribunals Rules of Procedure 2013**, is **refused** by the Tribunal, neither Mr Gorrie, nor Mr Whyte, as individuals, having lodged an ET3 response defending the claim, insofar as brought against them directly, and accordingly they have no *locus* to make such application, in circumstances where they have not sought, as individuals, to make an application to the Tribunal seeking an extension of time to do so under **Rule 20,** nor intimated any draft of the ET3 response that they might wish to present to defend the claim late, and they accordingly cannot participate in these Tribunal proceedings except to the extent that might be allowed by a Judge at a Hearing.

(3) However, the Tribunal being satisfied that the claim against the second respondents, Jones Whyte Law, appears to have little reasonable prospects of success, where they continue to dispute employment of the claimant, and DAG Marketing Ltd have accepted in their ET3 response that they were her employer, the Tribunal **grants** the second respondents' application for a Deposit Order to be made by the Tribunal, under **Rule 39 of the Employment Tribunals Rules of Procedure 2013**, requiring the claimant to

pay a deposit as a condition for her continuing to advance her allegations against that second respondent.

(4) Having regard to the information provided to the Tribunal by the claimant at this Preliminary Hearing, in answer to the Judge's reasonable enquiries of her, in terms of **Rule 39(2)**, as to her ability to pay any deposit, if so ordered to do so by the Tribunal, the Tribunal restricts the amount of deposit to be paid by her to the sum of **One Hundred Pounds (£100),** as per the Deposit Order made by the Tribunal and issued under separate cover, along with this Judgment, and **refuses** the second respondents' application for a Deposit Order of **£1,000,** that sum being excessive and a barrier to justice having regard to the claimant's limited financial means, on the basis of the information provided by her to the Tribunal.

(5) In respect of relisting the part-heard Preliminary Hearing, adjourned on 3 October 2018, and to be relisted thereafter, the Tribunal **defers** relisting until the claimant has (a) paid the Deposit Order, **within 21 days of the date of issue of that Order,** and (b) confirmed to the Tribunal, **within 21 days of the date of issue of this Judgment,** whether, in respect of the first respondents, DAG Marketing Limited, dissolved as a company on 27 November 2018, she has made an application to the relevant Court in England and Wales to restore that company to the Register of Companies, and thereafter she seeks to progress her claim against the restored company, or whether she seeks to withdraw her claim, as against the first respondents, but proceed only against the other remaining respondents.

REASONS

Introduction

1 This case called before me again, as an Employment Judge sitting alone, for a 2-hour public Preliminary Hearing on the afternoon of Monday, 14 January 2019, at 1.30pm, further to Notice of Preliminary Hearing (Preliminary Issue) issued under cover of letter from the Tribunal to all

parties on 19 December 2018, to consider the second and fourth respondents' applications for Strike Out and the claimant's comments / objections.

2 It replaced an earlier Notice of Preliminary Hearing issued to all parties on 19 November 2018, at which stage there was only the second respondents' application for Strike Out and the claimant's objection

3 At that stage, the case was listed for a full day but, on Friday, 11 January 2019, I varied that listing period, and parties were advised by e-mail from the Tribunal clerk that the start time was changed from 10.00am, and would now be 1.30pm, with a maximum of up to 2 hours for this Preliminary Hearing.

4 The change in listing period was occasioned by the need to manage the Tribunal's diary, on account of another case listed for me, that morning, which could not be re-allocated to another Judge, on account of the need for judicial continuity.

Background

5 This case had first called before me, as an Employment Judge sitting alone, for a half day (3 hour) Preliminary Hearing on the morning of Wednesday, 3 October 2018, to determine the following preliminary issues: -

(1) The correct identity of the employer;

(2) Dates of employment;

(3) Whether, given that the claimant has less than 2 years' qualifying service, the Tribunal has any jurisdiction to consider her complaint of unfair dismissal and for redundancy payment; and

(4) Consider the procedure for the other complaints before the Tribunal, and whether any of the respondents should be dismissed or removed from the proceedings under **Rule 34.**

6 In terms of the Notice of Preliminary Hearing issued on 3 September 2018, that Preliminary Hearing was to be conducted in public, and parties were each advised that they were responsible for making sure that any witnesses they wanted to call could attend and know the place, date and time of the Preliminary Hearing, and ensure that those witnesses who could give evidence relevant to the preliminary issues identified attended on 3 October 2018.

7 Further, parties were instructed that they should ensure that they brought 3 copies, together with the originals (i.e. 4 sets of documents in total) of every document which they considered is relevant to their case and which they wished the Employment Judge to take into account.

8 When the case called before me, on 3 October 2018, the claimant was in attendance, unaccompanied, representing herself. Mr Gorrie, the Director of DAG Marketing Ltd, appeared as their representative, while Ms Vahija Ali, solicitor with EmployEasily Legal Services Limited, Glasgow, appeared for the second respondents, Jones Whyte Law. There was no appearance for the third and fourth respondents, who had, in any event, not lodged any ET3 response defending the claim.

Claim and Response

9 Following ACAS early conciliation between 12 and 21 March 2018, the claimant, acting on her own behalf, presented her ET1 claim form on 21 April 2018, citing all 4 respondents. She indicated that she was claiming unfair dismissal; claiming a redundancy payment; and also that she was owed notice pay, arrears of pay, and other payments (including bonus pay).

10 In the event of success with her claim, the claimant indicated that she was seeking an award of compensation from the Tribunal against the respondents. However, while she indicated, in broad terms, the type of payments that she sought, did not provide any detail about how those payments were being claimed, nor did she calculate any precise monetary

value to the payments that she says she is owed by the respondents, or any of them.

11 The claim was served on each of the 4 respondents, on 26 April 2018, requiring them to lodge an ET3 response by 24 May 2018 at the latest. On 24 May 2018, Mr Gorrie, acting on behalf of the First Respondents, DAG Marketing Ltd, lodged a response on their behalf defending the claim. The grounds of resistance to the claim accepted that the claimant had been employed by that company, but for different dates than those indicated by the claimant in the ET1 claim form.

12 That ET3 response accepted that the claimant was employed solely by that company, and that Jones Whyte Law and Greg Whyte at no point had anything to do with DAG Marketing Ltd, nor the employment of the claimant. It was further averred that that company had run out of funds, and it had to cease operating.

13 Further, on 24 May 2018, acting through their solicitor, Ms Ali, of EmployEasily Legal Services Limited, Glasgow, the second respondents, Jones Whyte Law, lodged an ET3 response defending the claim brought against them. Their response avers that the claimant was never an employee of them.

14 Their grounds of resistance, set forth in a five paragraph paper apart, state that they did not employ the claimant, she did no work for them, there was no mutuality of obligation between them and her, and they did not have any control over the way in which the claimant's work was done, the means to be employed in doing it, or the time and place it was required to be done.

15 In their ET3 response, the second respondents contended that the Tribunal does not have jurisdiction to hear any of the claims against that respondent because the claimant was not employed by that respondent for the purposes of **Section 230(1) of the Employment Rights Act 1996.**

16 It was further averred, in paragraph 5 of that paper apart, that the claimant's ET1 is in a form which cannot sensibly be responded to or is otherwise an

abuse of process, that she had adopted a "***scatter gun***" approach, naming various respondents and, for these reasons, it was submitted that there is no reasonable prospect of success and accordingly the claim should be struck out under **Rule 12 of the Employment Tribunals Rules of Procedure 2013.**

Initial Consideration

17 In terms of **Rule 12** (rejection; substantive defects), the staff of the Tribunal will refer a claim form to an Employment Judge if they consider that the claim, or part of it, may be (a) one which the Tribunal has no jurisdiction to consider; or (b) in a form which cannot sensibly be responded to, or is otherwise an abuse of process, and there are various other categories listed in that **Rule 12.** In the present case, the claim was not rejected by the staff of the Tribunal for a substantive defect and, accordingly, the case papers were referred for Initial Consideration by an Employment Judge.

18 On 31 May 2018, following Initial Consideration, I ordered that the claim would proceed, and gave certain instructions, which were thereafter intimated to all parties under cover of a letter from the Tribunal dated 18 June 2018. That letter set out the 4 preliminary issues for the half day (3 hour) Preliminary Hearing held on 3 October 2018. They were repeated in the subsequent Notice of Preliminary Hearing issued on 3 September 2018.

19 I also directed that the claimant should provide her comments on whether, given the ET3 responses lodged by (1) Jones Whyte Law and (2) DAG Marketing Ltd, she wished to pursue her claim against both, when Jones Whyte Law disputed that she was ever an employee, and DAG Marketing Ltd accepted she was an employee, but disputed her dates of employment. She was requested to reply by 25 June 2018.

20 Given a search of Companies House, disclosing that DAG Marketing Ltd was an active company, but with a proposal to strike off, a letter was sent to Companies House, by the clerk to the Tribunal on 18 June 2018,

resulting in a letter to the Tribunal, received on 6 July 2018, confirming that the strike off action for that company had been suspended until 26 September 2018.

21 On 12 July 2018, the Tribunal having received no reply from the claimant to the Tribunal's letter of 18 June 2018, requesting her comments by 25 June 2018, the claimant was asked by the Tribunal to reply no later than 19 July 2018. On 18 July 2018, the claimant wrote to the Tribunal office, apologising for not getting back sooner, stating that she had been ***"greatly stressed and busy with finding a new job and new home"***, and confirming that she still wished to proceed with the Tribunal Hearing.

22 On instructions from myself, by letter to parties dated 7 August 2018, I directed that the case should be listed for this Preliminary Hearing to consider the 4 preliminary issues identified in the letter of 18 June 2018, and parties were advised that they would be notified of the date and time of this Preliminary Hearing in due course.

23 Notice of Preliminary Hearing was then issued to all parties on 3 September 2018, in the terms indicated earlier in these Reasons. Following an enquiry from the claimant, on 9 September 2018, as to when the Preliminary Hearing date would be, a further copy of the Hearing Notice sent to her on 3 September 2018 was e-mailed to her by a clerk to the Tribunal on 13 September 2018.

Claimant's applications for Postponement of Preliminary Hearing listed for 3 October 2018 refused by the Tribunal

24 On 15 September 2018, the claimant e-mailed the Tribunal enquiring if her Hearing date could be changed to a later date and stating that she required more time to prepare. On 20 September 2018, she sent a further e-mail to the Tribunal office stating that 3 October 2018 was too short a time span for her to prepare for a Preliminary Hearing and she invited the Tribunal to delay the Hearing and provide another Hearing date.

25 Her correspondence requesting a postponement of the Hearing was referred to Employment Judge Mark Whitcombe, on 21 September 2018, who refused it, on the basis that there was plenty of time for the claimant to prepare for this Preliminary Hearing, and it was confirmed that the case remained listed for the Hearing on 3 October 2018.

26 Contrary to **Rule 92**, which requires a party, in communicating with the Tribunal, to copy their correspondence to the other party at the same time, and to evidence that to the Tribunal, the claimant did not do so on that occasion. In writing up my Note and Orders, following the Preliminary Hearing on 3 October 2018, I took the opportunity to remind the claimant that she must copy correspondence to the Tribunal to the other parties at the same as she communicates with the Tribunal, otherwise her correspondence will not be addressed by the Tribunal, until such time as she confirms compliance with **Rule 92.**

27 Notwithstanding the claimant's failure to comply with **Rule 92**, on that occasion, Employment Judge Whitcombe directed that his refusal of the claimant's postponement request be copied to each of the other parties, under cover of letters from the Tribunal dated 21 September 2018.

28 Despite refusal of that postponement request, the claimant made a further request to the Tribunal by e-mail, on 26 September 2018, again failing to comply with **Rule 92** requesting that the Preliminary Hearing on 3 October 2018 be postponed and stated that she might not be able to attend this Hearing on that date, and that she required extra time to prepare.

29 Her application was referred to me, on 26 September 2018, when I refused it, there having been no material change of circumstances (since Judge Whitcombe's refusal), and on the basis that it was not in the interests of justice to postpone the listed Preliminary Hearing on 3 October 2018.

Preliminary Hearing held on 3 October 2018

30 Arising from my pre-read of the ET1 claim form, and both ET3 responses, I sought to clarify certain matters with the claimant, Mr Gorrie, and Ms Ali,

before discussion at that Preliminary Hearing then focused on matters arising from the ET1 and ET3's, and the 4 preliminary issues before the Tribunal for determination at that Preliminary Hearing.

31 Matters discussed at that Preliminary Hearing were subsequently recorded, in my written Note and Orders dated 8 October 2018, and issued to all parties under cover of a letter from the Tribunal dated 10 October 2018. It will suffice here to record that, in my written Note and Orders, I ordered as follows:

> *(1) On the opposed application of the claimant, and it being in the interests of justice to so order, the Preliminary Hearing is* ***adjourned, part-heard****, and will resume before Employment Judge Ian McPherson, at the Glasgow Employment Tribunal, on a date to be hereinafter assigned by the Tribunal, in the listing period* ***November and December 2018, and January 2019****, following the issue of date listing stencils to the claimant, and representatives for the First and Second Respondents, and their return within 7 days;*
>
> ***(2) Reserves****, for consideration at that continued Preliminary Hearing, the matter of whether or not any expenses incurred by the respondents, arising from this Preliminary Hearing being adjourned, part-heard, and continued, to allow the claimant to lodge productions in support of her case, should be awarded against the claimant to be determined by the Judge at that continued Preliminary Hearing; and*
>
> *(3) Orders that the claimant shall, within 7 days of the date of this Preliminary Hearing, i.e.* ***by no later than 4 pm, on Wednesday 10 October 2018,*** *intimate to the Glasgow Tribunal office, marked for the attention of Judge McPherson, and copied to the representatives for the First and Second Respondents, all and any documents on which the claimant intends to rely in support of her claim at that continued Preliminary Hearing.*

32 At that Preliminary Hearing, when I enquired of the claimant whether she was insisting on her claim, as presented, she stated that she was, and albeit she accepted that she had less than 2 years' service, she insisted that the Tribunal had jurisdiction to determine her complaints of unfair dismissal, and for a redundancy payment, and that she was not withdrawing them.

33 Thereafter, when I asked if she had brought any documents to the Preliminary Hearing, for the Tribunal to consider, as part of her evidence, to help her establish that she was employed by the first and / or second respondents, the claimant stated that she had not done so, as she was not sure what documents she should bring.

34 I referred her to the clear and unequivocal terms of the Notice of Preliminary Hearing issued on 3 September 2018. She apologised for her failure to have any documents with her but stated that she could provide them at a later date, at the Final Hearing in this case.

35 Mr Gorrie, acting as representative for his company, the first respondents, stated that he had a bundle of documents with him, but he had not brought 4 copies for use at this Hearing, as directed in the Notice of Preliminary Hearing. He confirmed that he would be giving evidence on behalf of DAG Marketing Ltd and speaking to the documents which he had with him.

36 Ms Ali, for the second respondents, Jones Whyte Law, stated that she had no documents to produce, nor any witness to lead in evidence, as her clients were not, and never had been, the claimant's employer, and she sought to have her clients dismissed from these proceedings.

37 After an adjournment, to allow the clerk to the Tribunal to prepare 4 sets of Mr Gorrie's productions, which I directed him to number, page by page, for ease of common reference, and which he duly numbered from pages 1 to 31, the Preliminary Hearing resumed, and I proceeded, as agreed with all parties present, to ask questions of the claimant, designed to elicit, in a structured and orderly fashion, her evidence in chief relevant and

necessary for the purpose of determining the preliminary issues before this Tribunal at this Preliminary Hearing.

38 It had been agreed with all parties present that I would do so, following which the claimant would be cross-examined by Mr Gorrie, and, if required, by Ms Ali, and that the Tribunal would thereafter proceed to hear evidence-in-chief from Mr Gorrie, elicited by me as Judge, cross-examined by the claimant, and, if required, by Ms Ali, following which the Tribunal would hear closing submissions from all 3 parties.

39 In the event, while evidence-in-chief was taken from the claimant, it emerged, in the course of her evidence, that she had documents, at home, and not with her hardcopy, although she stated she could show the Tribunal, and both Mr Gorrie and Ms Ali, some documents by use of her mobile phone.

40 When I explained to her that, in terms of the Notice of Preliminary Hearing, it was her obligation to provide to the Tribunal, with copies to the other parties, at the Preliminary Hearing, any relevant documents on which she intended to rely, the claimant again apologised for her failure, and stated that, to have a fair Hearing of her case, it was necessary that she be allowed to lodge these documents, and the case be continued to a later date to allow her to do so.

Claimant's application to Postpone, and Relist, the 3 October 2018 Preliminary Hearing opposed by both defending Respondents, but granted by the Tribunal

41 In light of the claimant's application to adjourn, and re-list for a continued Preliminary Hearing on a later date, I invited comment from the representatives for both respondents.

42 Mr Gorrie, for the first respondents, DAG Marketing Ltd, stated that he objected, he was present, ready to give his evidence, and he had provided his documents for this Hearing.

43 Ms Ali stated that, while she had no witness to lead, and no documents to lodge, she was ready and prepared to cross-examine both the claimant, and Mr Gorrie, as may be required, and she sought to have the Tribunal continue with the listed Preliminary Hearing and seek to conclude it within the allocated ½ day sitting.

44 In the event, having enquired of all 3 representatives, about the likely duration of further evidence from the claimant, and further cross-examination, if I agreed to adjourn, and allow the claimant to lodge her documents, and then resume her evidence at a continued Preliminary Hearing, I decided, on what I described as ***"a finely balanced scale***", that it was in the interests of justice to adjourn the Hearing, part-heard, and to make consequential Case Management Orders. This I did, and I they were confirmed in writing in my Orders detailed above.

Second Respondents' Application for Strike Out / Deposit Order against the Claimant

45 On 9 October 2018, Ms Ali, solicitor with EmployEasily Legal Services Ltd, Glasgow, acting for the second respondents, Jones Whyte Law, wrote to the Tribunal, applying for a deposit order against the claimant, and asserting that they believed the claim against that respondent to be entirely without merit, and vexatious.

46 In her application, Ms Ali stated that:

> "***It is the respondent's position that the claimant was not employed by the respondents for the purposes of section 230(1) of the Employment Rights Act 1996. The tribunal had scheduled a preliminary hearing for 3 hours where the claimant was unprepared and failed to provide copies of the documents she sought to rely on despite it being clearly stated in correspondence from the tribunal. As a result, the preliminary hearing was part heard and will be arranged for another date. The respondent requests that, in accordance with rule 39 of the ET***

Rules, if the tribunal is not minded to strike out the claim against the respondent prior to the continued preliminary hearing, the tribunal makes an order that the claimant pay a deposit order of £1,000 in order to continue with the proceedings. It is the respondent's case that the claim has little or no reasonable prospect of success for the reasons set out in their ET3."

47 The application was copied to the claimant, as per **Rules 30(2) and 92**, advising her that any objection must be sent to the Tribunal as soon as possible and copied to her and the other respondents. At this Preliminary Hearing, on 14 January 2019, Mr Whyte, appearing for the second respondents, Jones Whyte Law, adopted Ms Ali's application, and made his application for Strike Out / Deposit Order in terms thereof.

Claimant applies for Extensions of Time to lodge Documents for Continued Preliminary Hearing

48 After the close of the Preliminary Hearing on 3 October 2018, the claimant emailed the Glasgow Tribunal office enclosing duplicate copy of her Nationwide bank statement 18/10/17 to 17/11/17, and then a further email asking the Tribunal to disregard her first email, and not forward them on to any parties until she was ready to produce all her documentation.

49 In a reply sent to her, on 4 October 2018, on my instructions, the claimant was reminded of her obligations under **Rule 92**, and while, as ordered, she should produce all and any further documents to be relied upon by her by no later than 4pm on Wednesday, 10 October 2018, and intimate them to Mr Gorrie and Ms Ali, she should not do so piecemeal, but as a complete set, and bring 4 hard copies of her Bundle to the continued Preliminary Hearing.

50 By email sent to the Tribunal, on 5 October 2018, the claimant advised that she required until the next Hearing date to provide relevant documents as she could not find, obtain or retrieve documents which might be relevant to her case, and she was not able to send them to the respondents, as this

would incur an added expense to herself which she stated she could not take on.

51 She stated that she required until the next Hearing date "***to build my case in order to represent myself fairly and to assist the Tribunal fully. I must feel ready and not feel pressurised to produce documents when I am unsure and experiencing issues retrieving relevant documents.***"

52 On 10 October 2018, not having heard from the Tribunal, the claimant applied to the Tribunal for an extension of time, stating that she was unable to access all details to gather all evidence by 10 October 2018, due to information / evidence being archived.

53 Also, on that same date, she sent to the Tribunal, copied to Ms Ali and Mr Gorrie, what she described as a bank statement showing "***the first wage payment by Jones Whyte Law".*** What was attached is a Nationwide bank statement showing a bank credit to her of **£275.00** on 20 October 2017 from Jones Whyte.

54 While the payer is identified, the bank statement does not show it is payment of wages. This bank statement mirrors the bank statement provided by her to the Tribunal, after the close of the Preliminary Hearing, on 3 October 2017, which shows bank credit transfers to her, all for £275.00, on 20 and 28 October, and 3, 10 and 17 November 2017, from Jones Whyte.

55 Further, the claimant later that same day, 10 October 2018, sent further emails to the Tribunal, again copied to Ms Ali and Mr Gorrie, described as "***evidence***" to show that Greg Whyte of Jones Whyte Law had direct involvement with Dag Marketing with Dave Gorrie.

56 By email at 23:50 on 10 October 2018, sent only to the Tribunal, the claimant advised that she had sent all details of documents which are retrievable, but other details, for evidence, were still not retrievable "***due to being archived."*** She apologised for the inconvenience caused and stated

that she would attempt to forward other documents / details as soon as she obtained more information.

57 Following referral to me, on 12 October 2018, the Tribunal clerk wrote to the claimant, by email on 17 October 2018, with copy to Ms Ali, saying that the claimant's correspondence of 5 and 10 October 2018 had been received, and an extension of time granted to her to provide a full response to the Tribunal's order dated 8 October 2018 by 4pm on Friday, 19 October 2018, and that she should provide any objection / comment to Ms Ali's application for Strike Out by the same time, and she was reminded again of the need for her **Rule 92** compliance.

58 In reply, by her email of 17 October 2018, at 22:26, to the Tribunal, but not copied to respondents' representatives, the claimant advised that she had a substantial amount of paperwork, emails, etc to obtain, read and to gather all evidence from. She requested a further extension of time to 31 October 2018, which she described as a reasonable time for her to comply, praying in aid: ***"I have not presented a case at an Employment Tribunal previously and thus I am extremely inexperienced of protocol, procedure and gathering detail for evidence purposes."***

59 On 6 November 2018, acting on my instructions, the Tribunal clerk wrote to parties, referring to the correspondence of 17, 18, 19 and 22 October 2018, and advising that I had granted the claimant's request for an extension until 31 October 2018, to provide a full response to the Tribunal Order of 8 October 2018.

60 As that extended date had passed the claimant was asked to provide a response, and parties were further advised that the case would proceed to a continued Preliminary Hearing in due course, at which the second Respondent's application for strike out, and the Claimant's objection will also be considered.

61 The claimant did not comply by her own extended date of 31 October 2018. On 9 November 2018, she emailed the Tribunal, at 16:50, but did not copy in the respondents' representatives, stating that:

> ***"I am unable to comply with your request as I cannot find the Order which you are referring to. Please send the Order details again for me to comply with your request. If the Order is related to document requests then I am unable to comply at this time, as most of the relevant documents are archived and I am experiencing great difficulty obtaining access to the details which are required.***
>
> ***I am in the process of creating a case. This is proving troublesome as I do not have legal training hence, submission of vital details to assist the Employment Tribunal is time consuming, especially when I cannot gain access to archived files."***

62 On my instructions, the clerk to the Tribunal emailed the claimant, with copy to Ms Ali and Mr Gorrie, on 14 November 2018, at 10:48, stating that:

> "***The attached correspondence of 8, 9 and 10 November 2018 has been referred to Employment Judge GI McPherson who directs me to advise you that Tribunal Orders dated 8 October 2018 were sent to you by letter of 10 October 2018, and Order (3) requiring you to intimate any further documents by no later than 4pm on Wednesday 10 October 2018, was given to you orally by the Employment Judge at the Preliminary Hearing on 3 October 2018.***
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> ***Your e-mail of 10 October 2018@15:28, seeking an extension of time, referred to your documents being "archived", but the Employment Judge is not clear why you have not yet retrieved your documents from archive. It is not appropriate that you produce your documents at the Continued Preliminary Hearing.***

The Respondents are entitled to fair notice, and proper specification.

Your failure to provide documents on 3 October 2018 led to discharge of the Preliminary Hearing, part heard. While in recent correspondence, you refer to being "inexperienced" of protocol, procedure and gathering details for evidence purposes", the Judges Orders have been clear and unequivocal. The matter of the £1,000 deposit sought by Jones Whyte Law will be subject of a further Preliminary Hearing on Strike Out/Deposit Order (3 hours) duration, where the Claimant will be heard. Notice of the Preliminary Hearing will follow under separate cover."

63 By her reply to the Tribunal, on 18 November 2018, at 23:21, but not copied to the respondents' representatives, the claimant stated that:

"***I have submitted the stencils prior and have made you aware of the dates that I am not available in January. I further write to express that I was unable to find the correspondence again, instructing me of the Order details. I believe I complied with the Order partly. The issues that I face are that I cannot recall/obtain the passwords required to gain access to emails which are crucial to evidence required to create a case. I have sent what details I have to you prior, but require more time to obtain all evidence.***

I make it clear that a substantial amount of emails where sent to me by Greg Whyte of Jones Whyte Law. Greg Whyte and David Gorrie both collaborated with one another on a daily basis with regard to running of the business. I also must express to you, Judge McPherson, I have had other matters which have hindered me and not allowed me to be in the right state of mind to create a case. I am currently making continuous attempts to gain access to emails which will comply with the Order to provide evidence."

64 On 24 November 2018, the clerk, on my instructions, copied Ms Ali and Mr Gorrie into the claimant's email of 18 November 2018, and asked for their comments by 3 December 2018.A copy of the Tribunal's Order of 8 October 2018 was attached for the claimant.

Claimant's Comments on Second Respondents' Application for Strike Out / Deposit Order

65 By email to the Tribunal clerk only, on 22 October 2018, entitled "***Letter of Counteraction",*** the claimant stated as follows:

> ***"I do have £1000 to pay and cannot raise this amount. The respondents have placed me in a vast amount of debt due to their unlawful and wrong full actions. I request that you deny the respondents request and allow the Employment Tribunal to progress without the payment of any requested amount.***
>
> ***I simply do not have the money..."***

66 Following instructions given to the Tribunal clerk, on 30 October 2018, a response was issued on my instructions, with copy to Ms Ali and Mr Gorrie, by email from the Tribunal on 8 November 2018, noting that no reply had been received by 30 October, and that the claimant should provide a full response to the Tribunal Order of 8 October 2018 by no later than 4pm on Friday, 9 November 2018.

67 It was further stated that while the case would be listed for the continued Preliminary Hearing in due course, in the meantime it would need to be listed for a public Preliminary Hearing to consider the second respondents' opposed application for Strike Out.

Applications by Mr Gorrie, and Mr Whyte, as Fourth Respondents, for Strike Out

68 On 26 November 2018, by email sent at 13:31, and copied to Ms Ali and the claimant, Mr Gorrie responded to the Tribunal's correspondence of 24 November 2018, and the claimant's of 18 November 2018

69 In his email, Mr Gorrie stated as follows:

> ***"Thank you for your email dated 24 November.***
>
> ***I am responding to this email and in reference to the Claimant's correspondence dated 18 November as requested.***
>
> ***The correspondence of 18 November is another in what is now a long list of excuses and missed deadlines all caused entirely by the Claimant.***
>
> ***Leaving aside the merits of the claim (of which I am of the opinion there are none) I am left frustrated and with the distinct feeling that the Claimant has myself, Mr Whyte and the Tribunal running around in circles and bending over backwards to accommodate her whims and excuses.***
>
> ***The matter has already cost me significant time and distress both at having to make sure I am not working and available to attend at tribunal (as done so for one half day already only for the matter to be adjourned as she wasn't prepared). The charade continues and again I am now in limbo as to whether I can now commit to working on the days provided for in the stencil or not.***
>
> ***I am a party litigant also. I am not familiar with the Tribunal but I am perplexed as to how many lives the Claimant is allowed and how many times she is allowed to ignore deadlines with vague excuses.***
>
> ***I was under the impression that the bold and underlined "by no later than 17 October 2018" was the final chance for the claimant to play ball.***
>
> ***In the hope that the matter can be dealt with just now I shall address the further points made in the email of 18 November below:***

1. Inability to recover passwords. – I am not sure I can assist here. In any event I don't believe there is any evidence contained in any emails that will prove the claimant's case

2. As explained in writing, Greg Whyte is a friend of mine who provided assistance and guidance to me in starting this business. The role was one of consultancy, though less formal than this. The company was mine.

3. The claimant's state of mind – I am not sure I can assist here. It is a familiar excuse. She was often of not in the correct state of mind to attend at work during the short period she worked for me.

My view is that this is a 'go to' excuse. I believe that the Claimant references being of a non-fit state of mind so that the Tribunal feels itself toothless to dismiss the claim so as not to open a can of worms regarding the claimant's unsubstantiated claims of being of unfit mental health.

I would ask that the Tribunal strike out the claim. I would ask that account is taken of the time and stress this matter has caused. The claim itself remains unquantified, without merit and, in relation to some heads of claim, impossible.

There are absolutely no winners here. The business failed and everyone getting the run around for a spurious claim is helping nobody move on with their lives.

70 On 26 November 2018, Greg Whyte, partner with Jones Whyte Law, having been forwarded Mr Gorrie's email of 26 November at 13:31, wrote to the Tribunal, by email sent at 13:56, stating he now represented himself in this action and confirmed that Employ Easily were no longer instructed as his solicitors.

71 Mt Whyte advised that he took the decision to instruct solicitors as he believed the matter to be straightforward, but the conduct of the claimant

had meant that the cost of defending the action had become significant, and he "***respectfully ask that Judge McPherson take this into account and dismiss the action due to the claimant's conduct despite numerous warnings and chances."***

72 On 27 November 2018, by email to the Tribunal entitled "***Counteraction",*** sent at 01:19, and copied to Mr Gorrie and Mr Whyte, the claimant responded that Mr Gorrie and Mr Whyte "***have been blatantly dishonest and continue to do so",*** and that they have used "***despicable scare tactics to have this case dismissed. This behaviour is vexatious and unacceptable***".

73 She accused the respondents of "***fabricating"*** and stated that she was "***in the process of creating a case and proving this" and*** apologised wholeheartedly and profusely for her failure to provide documents, as ordered, due to her "***experiencing problems accessing emails."***

74 On my instructions, given on 5 December 2018, but not actioned until 19 December 2018, due to administrative delay within the correspondence team, I directed that the fourth respondents' applications for Strike Out should be determined at the Preliminary Hearing listed for Monday, 14 January 2019, and that the claimant should provide any comments / objections to their application by 28 December 2018.8

75 Subsequently, on 21 December 2018, Mr Whyte again emailed the Tribunal, at 12:11, with copy sent to both the claimant and Mr Gorrie, seeking an update, and stating: "***I presume nothing further has been submitted timeously by the claimant. We are in a state of limbo somewhat and it would be good to be able to make plans for the new year."***

76 The claimant, in reply to the Tribunal at 14:45 that afternoon, copied by her to Messrs Whyte and Gorrie, stated that:

"Further details will be submitted shortly and this case should not be dismissed under any circumstances. David Gorrie of Dag Marketing and Greg Whyte of Jones Whyte Law have exhibited blatant dishonesty and behaved outrageously wrongfully towards me, as a prior employee. This case must absolutely be heard in a court of law fairly so that respondents can be held accountable for their actions and wrongful procedures."

77 Thereafter, on 4 January 2019, a clerk to the Tribunal emailed all parties, at 12:07, advising that parties' correspondence of 21 December 2018 had been received, and confirming that the claimant had submitted nothing further by 28 December 2018, or to that date, and that the case would proceed to this Preliminary Hearing on 14 January 2019 as set out in the Hearing Notice sent to parties on 19 December 2018.

78 By email sent at 12:09, Mr Whyte advised the Tribunal, but did not copy in the claimant or Mr Gorrie, stating: "***Given the claimant has failed on a number of occasions to produce documentation as ordered by the tribunal should the case not be struck out?"***

Documentation provided by the Claimant prior to this Preliminary Hearing

79 On 7 January 2019, by email to the Tribunal, sent at 02:36, and copied by her to Messrs Gorrie and Whyte, entitled "***Details of Evidence***", the claimant advised that she was sending her email (which had no attachments) : ***"exhibiting details, which prove that Greg Whyte of Jones Whyte Law and David Gorrie of Dag Marketing Ltd both collaborated in the running of the PPI business and both were my employers in 2017/2018/ I have also sent bank statements to display that I was an employee of Greg Whyte of Jones Whyte law and also of David Gorrie of Dag Marketing ass both parties deposited wages into my bank account. I have only managed to gain access again to the details presented, due to password problems, etc."***

80 By a further email, sent to the Tribunal, at 04:32 that same morning, 7 January 2019, and again copied by her to Messrs Gorrie and Whyte, the claimant provided a hyperlink so that details of her evidence could be received by clicking on the link. By email from Mr Whyte, sent to the Tribunal, at 08:51, and copied by him to Mr Gorrie, but not copied to the claimant, Mr Whyte stated that: "***These productions are out of time by virtue of missing multiple deadlines. I had previously asked about this case being dismissed due to the missing of these deadlines and multiple warnings to the claimant about doing so.***"

81 On parties' correspondence of 4 and 7 January 2019 being referred to me, on 11 January 2019, on my instructions, a clerk to the Tribunal emailed all parties, at 14:01, starting that the one day Preliminary Hearing on Monday, 14 January 2019, at 10am, would now start at 1.30pm, and last for no more than 2 hours, and that if the claimant failed to attend, then I would consider dismissal of the claim under **Rule 47**, subject to any representations from parties, or proceeding in the claimant's absence.

Dissolution of DAG Marketing Ltd

82 On 20 August 2018, Companies House advised the Tribunal that a strike off action in respect of DAG Marketing Ltd has been suspended until 12 November 2018 and, if a party wished to maintain an objection beyond that date, then they would need to apply, in writing, to Companies House, and that this should be received at least 2 weeks before the objection is due to expire.

83 If no further application was received by that time, Companies House advised that the striking off action would resume, and this may result in the company being struck off and dissolved. In these circumstances, if the claimant intended to insist on her claim against that respondent, then my written Note and Orders dated 8 October 2018 informed her that she should take steps to advise Companies House, Dissolution Section.

84 Despite parties' correspondence with the Tribunal, between 3 October 2018, and 7 January 2019, none of them advised the Tribunal that the first respondents had been dissolved as a company. That is a material change in circumstances, and it should have been flagged up with the Tribunal by the claimant, or Mr Gorrie, prior to the start of this Preliminary Hearing.

85 On the morning of Monday, 14 January 2019, in reviewing correspondence received from the claimant, in advance of this Preliminary Hearing, I discovered, from a search of Companies House website, that the first respondents, DAG Marketing Ltd, were dissolved as a company on 27 November 2018, and so no longer exist.

86 The claimant was advised, by email from the Tribunal clerk sent at 10:24am that morning, that I would wish to discuss with her at that afternoon's Preliminary Hearing whether she intended to withdraw that part of her claim against that respondent or seek to have that company restored to the Register of Companies, and thereafter proceed with her claim against them.

87 She was also advised, in that email, that I had refused her request by telephone for the Tribunal to print off 5 copies of her electronic Bundle, and that the hyperlink to Google photos, forwarded with her email to the Tribunal at 10:16 that morning, was accessible, but the voluminous images were small and unclear.

88 Further, the claimant was reminded that it was her responsibility to bring 4 copies of every document which she wished the Judge to consider relevant to her case, and that the Tribunal requires hard copy, paper productions, and service by email only is not appropriate, as that is the claimant transferring to the Tribunal Service, and so the public purse, what is her responsibility.

89 She was also reminded that this Preliminary Hearing was to consider her opposition to Strike Out / Deposit Order applications, and not a continued evidential Hearing from the part-heard Preliminary Hearing on 3 October

2018 which, dependent upon the outcome of this Preliminary Hearing, may or may not require to be relisted for a Continued Hearing.

Matters discussed at this Preliminary Hearing

90 When this Preliminary Hearing called before me, at just after 1.45pm on the afternoon of Monday, 14 January 2019, the claimant was in attendance, unaccompanied, and unrepresented. Mr Gorrie and Mr Whyte were also both in attendance. The delay in starting at 1.30pm, as listed, was on account of the claimant appearing at the Tribunal, with loose-leaf documents, and requesting the Tribunal clerk copy them, despite the email from the Tribunal clerk earlier that morning reminding the claimant that that was her responsibility.

91 She had appeared with 4 separate Bundles, her Bundle 1 with pages numbered 1 to 81, Bundle 2, with pages 1 to 18, a Schedule of Loss, Bundle 3 with pages 1 to 5, and Bundle 4 with pages 1 to 8. Mr Gorrie had appeared with his Respondents' Bundle, with pages 1 to 33, which I accepted as a new Bundle, it replacing the 31-page Bundle he had produced at the Preliminary Hearing on 3 October 2018.

92 I did not accept the claimant's Bundle, as she had not produced sufficient copies for use and, in any event, this was not a continued evidential Hearing, carrying on from where the earlier Preliminary Hearing had been adjourned, part-heard, and to be relisted at a later date.

Submission from the Claimant

93 In opening proceedings, I invited the claimant to speak, and address the Tribunal. She stated that she now appreciated that this was a Preliminary Hearing on Strike Out of her claim, and that she had tried, as best she could, to comply with the Tribunal's previous Orders, and send things to the Tribunal, and that she had produced all that she can, but now recognises this is not a Continued Hearing, but a Strike Out application where Greg Whyte is a lawyer appearing against her.

94 Further, the claimant advised she was not aware that DAG Marketing Ltd was dissolved on 27 November 2018, and she confirmed that she was "***absolutely not withdrawing***" her claim against them. She then added that she is not legally trained, and she does not have representation either, so she was concerned that she did not know what is involved in getting that company restored to the Register of Companies.

95 While the Tribunal has a duty, under **Rule 2 of the Employment Tribunals Rules of Procedure 2013**, to ensure the case is dealt with fairly and justly, including ensuring that parties are on an equal footing, I advised her that I could not act as an advocate for any party, and they all needed to take their own independent advice. Guidance on company restoration could be sought from Companies House.

Submission from Mr Gorrie

96 In reply, Mr Gorrie stated that my written Note of 8 October 2018, at paragraphs 55 to 57, had clearly told the claimant how to advise Companies House, to which the claimant replied stating that she was not fully aware that she had to write to Companies House, if she wanted to stop dissolution of DAG Marketing Ltd. The claimant then stated that she did not recall getting the Tribunal's Note and Orders, despite them having been copied to her at least twice by the Tribunal clerks.

97 Mr Gorrie stated that as far as he was concerned, the claimant had not complied with the Tribunal's order of 8 October 2018, and while the claimant had sent an email on 7 January 2019, while he had been away in China, he stated that that was just evidence pulled together by the claimant, and the claimant, despite **Rule 92** being continually referred to by the Tribunal, has consistently ignored the Tribunal's overriding objective under **Rule 2** at paragraphs (a) to (e).

98 Further, added Mr Gorrie, I had decided, "***on a finely balanced scale***", to adjourn the case part-heard on 3 October 2018, and yet the claimant had not complied with Orders, despite paragraphs 48 to 50 of my written Note

referring to the possibility of **Rule 37** Strike Out should Orders made by the Tribunal not be complied with in full, or timeously. He added that the claimant had failed in her duty to assist the Tribunal, and other parties.

99 As regards DAG Marketing Ltd, Mr Gorrie stated that the company no longer exists, as he had applied for Strike Off from the Companies Register, and it had been dissolved. While dissolution was suspended, the claimant had not written in to Companies House to seek an extension of the Strike Off pending conclusion of these Tribunal proceedings.

100 Mr Gorrie then clarified that he was attending this Preliminary Hearing as an individual to assist the Tribunal, and as the company was dissolved, he is no longer a company Director. He submitted that any claim against DAG Marketing Ltd should be struck out, on the basis of it now being a dissolved company.

101 Further, he added, he was joining Mr Greg Whyte, in making the same application as he had for the Tribunal to Strike Out the claim, for the claimant's failure to comply with Orders.

Submission from Mr Whyte

102 I then heard from Mr Whyte, from about 2.02pm. He advised me that he was appearing for both himself, and Jones Whyte Law. He added that he is not familiar with the technicalities of Employment Tribunal procedure, but he was here at this Hearing seeking what he referred to as a "***pragmatic outcome***".

103 Mr Whyte accepted that, as an Individual fourth respondent, he had not lodged any ET3 response resisting the claim. He sought "***an indulgence***", as he referred to it, for him to make representations to the Tribunal for himself, and Jones Whyte Law.

104 Further, he explained, he appeared as agent for Jones Whyte Law, who had lodged an ET3 response, and he confirmed that, as second respondents, they continue to resist the claim brought against them, and

that Ms Ali, of Employ Easily, are no longer acting for the second respondents, although they had never intimated their withdrawal to the Tribunal office.

105 I enquired of Mr Whyte whether he was insisting on the terms of Ms Ali's email application for Strike Out / Deposit Order, of 9 October 2018, seeking a deposit of £1,000, if the Tribunal was not minded to Strike Out the claim against the second respondents at that stage.

106 In reply, Mr Whyte stared that he was adopting that application of 9 October 2018, and also referred to his own email of 26 November 2018, replying to Mr Gorrie's application of 26 November 2018, and he further stated that he adhered to, and adopted as his own submissions, the points made by Mr Gorrie in that application.

107 In a refreshing frank and candid manner, Mr Whyte, albeit a qualified solicitor in private practice, stated that he had not researched the relevant law on Strike Out, and Deposit Orders. He spoke of knowing that employment law is complex, and frequently changing, and so he had no interest in it as an area of his own legal practice.

108 Bluntly, he explained, time and expense had already been incurred or him so far, and he was forced to decide whether or not to pay an employment solicitor to represent him in a claim which he stated he regards as "***frivolous"***, and against a background of the claimant behaving with a pattern of behaviour that is distorted by non-compliance with Orders, and the ***"feigning of ignorance to the point of distain, or disrespect"*** to the Tribunal, and to the first respondents and himself.

109 With that apology, Mr Whyte stated that his submissions to the Tribunal would not be practised to the letter of the law, and he simply adopted Mr Gorrie's written submissions which relate in principal to a continued pattern of failure by the claimant to comply with Tribunal requests and Orders.

110 He reminded me that the previous Preliminary Hearing had been adjourned, ***"on a finely balanced scale***", but to him and Mr Gorrie, as

laymen, it seemed to them that the pattern of non-compliance by the claimant has continued at every juncture since 3 October 2018.

111 By way of signposting to Mr Whyte, as also the claimant and Mr Gorrie, that the relevant law on Strike Out and Deposit Orders was well-known to me, from judicial experience, I referred, in very brief terms to well-known higher judicial guidance from familiar case law authorities – in particular, Lady Smith's comments in **Balls v Downham Market High School & college** that Strike Out is draconian ; Mrs Justice Simler in **Hemdan v Ishmail** about barriers to justice, and the sword of Damocles, and the EAT again in **HM Prison Service v Dolby,** about red and yellow cards.

112 In reply, Mr Whyte stated that he did not employ the claimant, to which the claimant replied "***yes, you did",*** requiring me to remind her not to interrupt, as she would get a right of reply later, once I had heard Mr Whyte's full submissions.

113 Mr Whyte then stated that : "***I should not be here***", and he further stated that he had "***not employed this lady***", and that the first respondents, DAG Marketing Ltd, had said in their ET3 reply that they did employ her, but he was only hereby virtue of the claimant needing to restore that company, and that she has a claim that she can pursue against that entity.

114 He added that the claimant had been given multiple chances and choices as to how to advance her claim, which had been a time-consuming business, with expenses for him from lawyer's' fees, from EmployEasily, in the hundreds of pounds, rather than thousands of pounds.

115 Mr Whyte added that this case has been stressful to Mr Gorrie, and to himself, but no so much to himself, but there was potential damage to his reputation against the background of this action which he did not accept that he should be involved in. He added that his firm, Jones Whyte Law, was involved, even if he personally had not lodged an ET3 before defending the claim.

116 Next, Mr Whyte stated that, "***in the legal goldfish bowl of lawyers in Glasgow"***, your firm becomes synonymous with yourself, and in the Tribunal waiting room, earlier that afternoon, he had met an employment lawyer who he knows professionally, and he had had to explain, red-faced, why he was at the Tribunal.

117 Continuing his submission, Mr Whyte stated that the respondents had complied timeously with Orders of the Tribunal, and the claimant does not comply with anything, without any sort of reasonable excuse, except for "***I'm not a lawyer."***

118 He then apologised again for his lack of reference to the appropriate standards and legal tests for Strike Out, and Deposit Orders, and stated that this Hearing was important for him, as he did not want an adverse Judgment against himself.

119 He submitted that DAG Marketing Ltd was the employer, and not him, nor Jones Whyte Law. He stated that while EmployEasily has sought a deposit of £1,000 from the claimant, he had no information about her means to pay any deposit if so ordered by the Tribunal.

120 Mr Whyte confirmed that he was seeking Strike Out of the claim, which failing a Deposit Order. On an ***esto*** basis, he added, if he might do so, that he sought a Final Hearing on employer identity, and stated that the first respondents, DAG Marketing Ltd, did not hide the fact that they had employed the claimant. He further stated that he had been advised by EmployEasily to seek a Deposit Order, and he hoped that that would urge the claimant "***to play by the rules***."

121 When I referred him to Mrs Justice Simler's comment, in **Hemdan,** that a deposit should not be set so high that claimant could not access justice, Mr Whyte stated the barrier to justice argument works both ways, and if a claimant enters the Tribunal process, then the very least is she should play by the rules.

Reply from the Claimant

122 It then being 2.29pm, I invited the claimant to reply. She opened by stating that she was "***shocked***", and she stated that both Mr Whyte and Mr Gorrie had been "***dishonest",*** as she had emails to prove that Mr Whyte did things to do with the DAG Marketing business, and that Ms Ali, the solicitor acting for Jones Whyte Law, had lied at the first Preliminary Hearing when she had stated that Mr Whyte had nothing to do with that business.

123 The claimant then added that she had tried to comply with Tribunal orders, and she had provided documents, but she could not get into passwords, and that money from Mr Gorrie at DAG and Mr Whyte at Jones Whyte Kaw was shown coming into her bank statements. She then stated that she did not know about the Tribunal's Rules, and compliance, and that while she knew that now, she further stated that she was "***not to blame***" for the present situation.

124 Due to this legal action against the respondents, the claimant stated that she has fallen into debt, just after the last payment of wages was made to her on 4 or 5 February 2018. She had been paid no notice pay, and no redundancy pay "***to cushion her fall".*** Further, she added, she had fallen into debt, lost her flat, and become homeless, as she could not go to a family member, and she could not keep up with her financial obligations, until she got employment in April 2018.

125 In answer to my reasonable enquiry of her, in terms of **Rule 39(2)**, about her current means and assets, the claimant advised me that she is in severe debt, and she suffers from emotional distress and anxiety, but she is now in employment, and she has been working for a company dealing with utilities since she started working there in November 2018. She described her current earnings as a basic salary of £17,100 gross *per annum*, plus a bonus.

126 No specific details were provided, nor was any vouching documentation produced. She stated that her monthly basic pay was £1,100 net, but she did not have her payslip with her, but it could be produced, if required, and likewise she could produce up to date bank statements vouching her

means. While she added she has a mobile phone, she stated that she did not want them (the respondents) to see it, as it is her private business, and she has debts as she could not keep up to date with loans.

127 The claimant then described the respondents' application for a **£1,000** deposit as "***a scare tactic***". She further stated that the respondents have shown no responsibility, or duty of care, given what they had done to her, and she could not believe that Greg Whyte was being ***"blatantly dishonest***" and telling a ***"complete and utter lie***", as both he and Mr Gorrie had corresponded in many emails, and they had paid her.

128 Then, acknowledging that she "***did not know the ins and outs of who"*** had paid her, and who had employed her, she submitted that both Mr Gorrie and Mr Whyte collaborated at 12 Fitzroy Place, Glasgow, where the business she was working in operated from, and that she cannot afford to pay £1,000 – indeed, she added "***I can't afford to pay anything",*** explaining that they had already put her into debt.

129 Continuing her reply, the claimant stated that they had made her homeless, and they did not have the right to do that, and so they had caused her intentional distress. She added that her debts were "***roughly £8,000 or £9,000, in arrears***", to a number of debtors, and she had had to take out some loans. Stating that "***I'm not a lawyer***", the claimant further added that she dies not understand "***all these Rules***", and that the respondents had got her into debt, and they had "***had no regard to their duty of care"*** to her.

130 The claimant then stated that she "***totally opposes both Strike Out, and Deposit Order"***, and described what the respondents were doing as ***"not correct",*** and that it was "***an insult to me***." She then added that she cannot afford representation, and Mr Whyte knows that, and while he has friends who may be employment lawyers, he had basically been given advice to apply for this Strike Out.

131 She further stated that she sought to continue with the party-heard Preliminary Hearing from last October 2018, and that she will argue, then as now, that they both employed her, and that she will now have to take advice about restoring DAG Marketing Ltd to the company register.

Mr Whyte in Reply

132 It then being about 2.50pm, Mr Whyte stated that restoration of DAG Marketing Ltd "***seems to me to smell of unnecessarily prolonging proceedings"***, and he invited the Tribunal to Strike Out the case at this Preliminary Hearing.

133 Further, Mr Whyte stated that the claimant had already had plenty of opportunity to do things before this Hearing date, despite her pleas of ignorance. He described her as "***not an unintelligent person***", but "***extremely eloquent****",* and while she had called him a liar, he referred to her as "***very much a damsel in distress***", a role being played out by her which, he submitted, is not the truth.

134 Mr Whyte disputed that the claimant had been "***left on the scrap heap***", with no hope, as she managed to take up another job in the same building at Fitzroy Place, attended a few times, and then didn't further attend, and he stated that that showed she was not desperately seeking employment.

135 Prefacing his next comment with, "***it doesn't give me any pleasure to say it"***, Mr Whyte then stated that what the claimant had presented as her objection to the Strike Out application is "***a lie, intended to prolong these proceedings."***

Mr Gorrie in Reply

136 It then being 2.54pm, I invited Mr Gorrie to reply to the claimant's submissions. He disputed that he had been dishonest, and he referred back to his opening statement to me referring to what I had written up in the Case Management PH Note and Orders, and unless the claimant was

implying that the Employment Judge is dishonest, his position is that he was not lying to this Tribunal.

137 Further, added Mr Gorrie, while the claimant had spoken of arrears in debts of £8,000 / £,9000, he submitted that those amounts seemed ***"quite extreme for DAG Marketing to be liable for."*** He then submitted that the claimant had not been honest with the Tribunal at this Hearing, as she had managed to get a job "***immediately after DAG Marketing ceased to trade***", and he understood that that new employment had started in the week preceding 5 February 2018.

Intervention by Mr Whyte, and Reply by the Claimant

138 At that point, Mr Whyte entered the discussion, and intervened stating that he had emails with him which showed that "***the claimant is lying***." Unlike the claimant, and Mr Gorrie, he had not sought to lodge any documents with the Tribunal at the start of this Hearing.

139 Mr Whyte then provided to me, with copies for the claimant and Mr Gorrie, emails of 9 and 10, and 13 to 15 February 2018, showing that after Mr Gorrie had sought to wind up his company, the claimant needed a job, and through a David Williamson, of CAB Claims Management, a business similar to DAG Marketing, Mr Whyte had sought to find the claimant another job with this other company.

140 These emails, between him and Miss Dillon, showed that, on 15 February 2018, at 18:11, he had advised her that he had made a business loan to DAG, and further that "***David's company doesn't owe you money. Neither do I***." This was a direct reply to her email to him, earlier that day, at 17:51, when she queried why her wages payments from her previous role showed that they had been deposited by Jones Whyte Law.

141 The claimant, at around 3.04pm, stated that, with regard to these documents just produced by Mr Whyte, she accepted they showed an email exchange between them, at that time, but she disputed Mr Whyte's understanding of her employment with Mr Williamson's company, and she

stated that, rather than Mr Whyte's understanding that she did not turn up for work there, it was Mr Williamson who terminated her employment, and she described that as a "***retaliation"*** by Mr Williamson.

142 Further, the claimant stated, perhaps Mr Whyte has asked Mr Williamson to employ her as a favour, so he (Mr Whyte) could deny any responsibility to her. Continuing her reply, she then stated that: "***I'm not to blame for all this carry on. If they'd paid notice to cushion the fall, we'd have not needed to go further."***

143 She then added that Mr Gorrie had told her he would meet her in the Tribunal, and not on the phone, and she further stated that: "***They've caused me a lot of stress and anxiety, and they continue to deny they acted adversely towards me, and they paint a picture I'm a liar, but I'm not - they terminated the contract, not paying anybody."***

144 Concluding her submissions, the claimant reiterated that she cannot pay a Deposit Order, and that if made by the Tribunal, it would put her further into debt, and she again described it as a "***scare tactic***" deployed by the respondents to stop her going forward with her case, when both Mr Gorrie and Mr Whyte had collaborated to employ her.

Reserved Judgment

145 Mr Whyte and Mr Gorrie advised they had nothing further to say, other than invite the Tribunal to grant their applications, so at 3.11pm, I reserved Judgment, and stated that it would be issued in writing, with Reasons, as soon as possible, and it would thereafter be published online, in accordance with Employment Tribunal practice to now do so with Judgments.

Relevant Law

146 No party to these proceedings addressed me on the relevant law. Given the claimant and Mr Gorrie are both, unrepresented, party litigants, this was not surprising, but given Mr Whyte appeared for the second respondents,

as well as in his own right, and he is a qualified, practising solicitor, it was disappointing that he had not at least acquainted himself with the Tribunal's Rules, nor relevant case law, in support of his application for Strike Out / Deposit Order against the claimant.

147 As such, to ensure all parties were on an equal footing, I had to give them a direction in very brief terms to well-known higher judicial guidance from familiar case law authorities, as narrated above at paragraph 111 of these Reasons.

148 Further, I have had regard to the **Employment Tribunals Rules of Procedure 2013**, in particular, so far as material for present purposes, **Rule 37** (Striking Out) and **Rule 39** (Deposit Orders), and the other Rule that is relevant is **Rule 2,** the Tribunal's "***overriding objective***", to deal with the case fairly and justly.

149 **Rule 37** entitles an Employment Tribunal to strike out a claim in certain defined circumstances. Even if the Tribunal so determines, it retains a discretion not to strike out the claim. As the Court of Session held, in **Tayside Public Transport Co Ltd (t/a Travel Dundee) v Reilly [2012] IRLR 755**, the power to strike out should only be exercised in rare circumstances.

150 A Tribunal can exercise its power to strike out a claim (or part of a claim) '***at any stage of the proceedings'*** - **Rule 37(1).** However, the power must be exercised in accordance with "***reason, relevance, principle and justice***": **Williams v Real Care Agency Ltd [2012] UKEATS/0051/11 (13 March 2012), [2012] ICR D27**, per Mr Justice Langstaff at paragraph 18.

151 In **Abertawe Bro Morgannwg University Health Board v Ferguson UKEAT/0044/13**, [**2014] I.R.L.R. 14,** the learned EAT President, Mr Justice Langstaff, at paragraph 33 of the judgment, remarked in the course of giving judgment that, in suitable cases, applications for strike-out may save time, expense and anxiety.

152 However, in cases that are likely to be heavily fact-sensitive, such as those involving discrimination or public interest disclosures, the circumstances in which a claim will be struck out are likely to be rare. In general, it is better to proceed to determine a case on the evidence in light of all the facts. At the conclusion of the evidence gathering it is likely to be much clearer whether there is truly a point of law in issue or not.

153 Special considerations arise if a Tribunal is asked to strike out a claim of discrimination on the ground that it has no reasonable prospect of success. In **Anyanwu and anor v South Bank Students' Union and anor 2001 ICR 391,** the House of Lords highlighted the importance of not striking out discrimination claims except in the most obvious cases as they are generally fact-sensitive and require full examination to make a proper determination.

154 In **Ezsias v North Glamorgan NHS Trust 2007 ICR 1126**, the Court of Appeal held that the same or a similar approach should generally inform whistleblowing cases, which have much in common with discrimination cases, in that they involve an investigation into why an employer took a particular step. It stressed that it will only be in an exceptional case that an application will be struck out as having no reasonable prospect of success when the central facts are in dispute. An example might be where the facts sought to be established by the claimant are totally and inexplicably inconsistent with the undisputed contemporaneous documentation.

155 Lady Smith in the Employment Appeal Tribunal expanded on the guidance given in **Ezsias** in **Balls v Downham Market High School and College [2011] IRLR 217,** stating that where strike-out is sought or contemplated on the ground that the claim has no reasonable prospect of success, the Tribunal must first consider whether, on a careful consideration of all the available material, it can properly conclude that the claim has no reasonable prospect of success.

156 The test is not whether the claim is likely to fail; nor is it a matter of asking whether it is possible that the claim will fail. It is not a test that can be

satisfied by considering what is put forward by the respondent either in the ET3 or in submissions and deciding whether their written or oral assertions regarding disputed matters are likely to be established as facts. It is a high test.

157 In **Balls**, at paragraph 4, Lady Smith emphasised the need for caution in exercising the power, as follows:

> "*to state the obvious, if a Claimant's claim is struck out, that is an end of it. He cannot take it any further forward. From an employee Claimant's perspective, his employer 'won' without there ever having been a hearing on the merits of his claim. The chances of him being left with a distinct feeling of dissatisfaction must be high. If his claim had proceeded to a hearing on the merits, it might have been shown to be well founded and he may feel, whatever the circumstances, that he has been deprived of a fair chance to achieve that. It is for such reasons that 'strike-out' is often referred to as a draconian power. It is. There are of course, cases where fairness as between parties and the proper regulation of access to Employment Tribunals justify the use of this important weapon in an Employment Judge's available armoury but its application must be very carefully considered and the facts of the particular case properly analysed and understood before any decision is reached."*

158 Further, in Lambrou **v Cyprus Airways Ltd [2005] UKEAT/0417/05**, an unreported Judgment on 8 November 2005 from His Honour Judge Richardson, the learned EAT Judge stated, at paragraph 28 of his judgment, as follows:

> "*Even if a threshold ground for striking out the proceedings is made out, it does not necessarily follow that an order to strike out should be made. There are other remedies. In this case the other remedies may include the ordering of specific Particulars and, if appropriate when Particulars are ordered, further provision for a report which, in furtherance of the overriding objective, will usually be by a single*

expert jointly instructed. A Tribunal should always consider alternatives to striking out: see HM Prison Service v Dolby [2003] IRLR 694."

159 So too have I considered **Dolby**, where, at paragraphs 14 and 15 of the judgment, Mr Recorder Bowers QC, reviewed the options for the Employment Tribunal, as follows:

"*14. We thus think that the position is that the Employment Tribunal has a range of options after the Rule amendments made in 2001 where a case is regarded as one which has no reasonable prospect of success. Essentially there are four. The first and most draconian is to strike the application out under Rule 15 (described by Mr Swift as "the red card"); but Tribunals need to be convinced that that is the proper remedy in the particular case. Secondly, the Tribunal may order an amendment to be made to the pleadings under Rule 15. Thirdly, they may order a deposit to be made under Rule 7 (as Mr Swift put it, "the yellow card"). Fourthly, they may decide at the end of the case that the application was misconceived, and that the Applicant should pay costs.*

15. Clearly the approach to be taken in a particular case depends on the stage at which the matter is raised and the proper material to take into account. We think that the Tribunal must adopt a two-stage approach; firstly, to decide whether the application is misconceived and, secondly, if the answer to that question is yes, to decide whether as a matter of discretion to order the application be struck out, amended or, if there is an application for one, that a pre-hearing deposit be given. The Tribunal must give reasons for the decision in each case, although of course they only need go as far as to say why one side won and one side lost on this point."

160 I recognise, of course, that the second stage exercise of discretion under **Rule 37(1)** is important, as commented upon by the then EAT Judge, Lady Wise, in **Hasan v Tesco Stores Ltd [2016] UKEAT/0098/16**, an

unreported Judgment of 22 June 2016, where at paragraph 19, the learned EAT Judge refers to "***a fundamental cross-check to avoid the bringing to an end of a claim that may yet have merit."***

161 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.

162 In **H M Prison Service v Dolby [2003] IRLR 694**, at paragraph 14 of Mr. Recorder Bower' QC's judgment on 31 January 2003, a Deposit Order is the "***yellow card***" option, with Strike Out being described by counsel as the "***red card***."

163 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.

164 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**, who concluded it followed 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.

165 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.

166 **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.

167 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.

168 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.

169 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.

170 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.

171 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)."

172 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."***

173 Further, I wish to note and record that in the EAT's judgment in **Wright v Nipponkoa Insurance (Europe) Ltd [2014] UKEAT/0113/14,** dealing with the *quantum* of Deposit Orders, it was held that separate Deposit Orders can be made in respect of individual arguments or allegations, and that if making a Deposit Order, a Tribunal should have regard to the question of proportionality in terms of the total award made.

174 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.

175 In the present case, the claimant's complaints in the ET1 claim form are registered by the Tribunal under four separate administrative jurisdictional codes for unfair dismissal ("***UDL***"), failure to pay redundancy payment ("***RPT***"), breach of contract / failure to pay notice pay ("***BOC***"), and unlawful deduction from wages / arrears of wages ("***WA***"), so this is thus a case where I need to concern myself with separate heads of complaint, 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.

176 Finally, I am aware that there is also the more recent guidance from Her Honour Judge Eady QC, in **Tree v South East Coastal Ambulance Service NHS Foundation Trust [2017] UKEAT/0043/17**, referring to Mrs Justice Simler, President of the EAT, in **Hemdan v Ishmail & Another [2017] ICR 486 ; [2017] IRLR 228,** and Judge Eady QC holding that when making a Deposit Order, an Employment Tribunal needs to have a proper basis for doubting the likelihood of a claimant being able to establish the facts essential to make good their claim.

177 **Hemdan** is also of interest because the learned EAT President, at paragraph 10, characterised a Deposit Order as being "***rather like a sword of Damocles hanging over the paying party***", and she then observed, at paragraph 16, that: ***"Such orders have the potential to restrict rights of access to a fair trial."***

178 Mrs Justice Simler's judgment from the EAT in **Hemdan**, at paragraphs 10 to 17, addresses the relevant legal principles about Deposit Orders, 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."

179 For the purposes of this Judgment, I need to address the differing approaches identified by Lady Smith in **Simpson**, and Mrs Justice Simler in **Hemdan**. There are competing views of these two learned EAT Judges, which I need to consider, and determine what is the correct approach under the current 2013 Rules.

180 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**. I return to this matter in my discussion and deliberation below.

Discussion and Deliberation

181 Having now carefully considered parties` submissions, written and oral, 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 consider that, in terms of **Rule 37(2),** the claimant has been given a reasonable opportunity at this Preliminary Hearing to make her own representations opposing the second and fourth respondent's written application for Strike Out, which failing Deposit Order.

182 **Rule 37** entitles an Employment Tribunal to strike out a claim in certain defined circumstances, (a) to (e), as follows: -

(a) that it is scandalous or vexatious or has no reasonable prospect of success;

(b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as

the case may be) has been scandalous, unreasonable or vexatious;

(c) for non-compliance with any of these Rules or with an order of the Tribunal;

(d) that it has not been actively pursued;

(e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).

183 Here, Ms Ali's written application of 9 October 2018, adopted by Mr Whyte, and also Mr Gorrie, at this Preliminary Hearing, focussed on the claimant's then unpreparedness for the Preliminary Hearing on 3 October 2018, and her failure to provide documents she intended to rely upon, despite it being clearly stated in the Tribunal's correspondence. That, of course, was then, and at this Preliminary Hearing, the claimant had made some attempt to comply, although very late on.

184 Although not stated by Ms Ali, for she makes no specific reference to which of the defined circumstances, (a) to (e), she is relying upon, as regards the second respondents' application, it seems to me that it was likely (b), which failing (c) or maybe (d).

185 Mr Gorrie's' application of 26 November 2018, adopted by Mr Whyte, is similarly silent on which of the defined circumstances is being relied upon by him, but given its terms, it looks like an amalgam of (a), (b) and (c). He focussed on he too being a party litigant and stated that he was "***perplexed as to how many lives the Claimant is allowed and how many times she is allowed to ignore deadlines with vague excuses".***

186 Given the history of this case, his comments are perfectly understandable, and perhaps an expression of his frustration. However, at no stage was there any application by any respondent for an "***Unless Order***" to be issued under **Rule 38.** Nor was there any real prejudice to the respondents, for

the Order was on the claimant to produce documents she intended to rely upon at the Continued Final Hearing.

187 After most careful consideration of the competing arguments, taking into account the relevant law, as ascertained in the legal authorities referred to above, I am satisfied that this is not one of those cases where it is appropriate to Strike Out the whole of the claim without the case proceeding to be determined at the Continued Preliminary Hearing.

188 There are a number of core facts disputed, and these required to be adjudicated upon by the Tribunal having heard evidence from all parties. The Preliminary Hearing on 3 October 2018 went part-heard, and it is in the interests of justice that that Hearing be reconvened at the earliest opportunity.

189 Accordingly, I have refused the second and fourth respondents' applications for Strike Out of the claim, as it is not in the interests of justice to strike out the claim in circumstances where a fair trial of the case is still possible, at a continued Preliminary Hearing, to be assigned , as previously ordered by the Tribunal, following the part-heard Preliminary Hearing, adjourned on 3 October 2018, and to be relisted thereafter.

190 Further, I have also refused Mr Gorrie's and Mr Whyte's applications, as the fourth respondents, for a Deposit Order, because neither Mr Gorrie, nor Mr Whyte, as individuals, have ever lodged an ET3 response defending the claim, insofar as brought against them directly.ET3s were only ever lodged in the name of each of the first and second respondents.

191 In my view, while they were both present at this Preliminary Hearing, and I allowed them to participate, in terms of my powers under **Rule 21(3),** that was because Mr Gorrie had been at the previous Hearing, representing his company, DAG Marketing Ltd, now dissolved, and Mr Gorrie was now appearing, in lieu of Ms Ali, for Jones Whyte Law, as second respondents.

192 Accordingly, I decided that they have no *locus* to make such application, in circumstances where they have not sought, as individuals, to make an

application to the Tribunal seeking an extension of time to do so under **Rule 20,** nor intimated any draft of the ET3 response that they might wish to present to defend the claim late, and they accordingly cannot participate in these Tribunal proceedings except to the extent that might be allowed by a Judge at a Hearing.

193 Further, being satisfied that the claim against the second respondents, Jones Whyte Law, appears to have little reasonable prospects of success, where they continue to dispute employment of the claimant, and DAG Marketing Ltd have accepted in their ET3 response that they were her employer, I have decided to grant the second respondents' application for a Deposit Order requiring the claimant to pay a deposit as a condition for her continuing to advance her allegations against the second respondents.

194 It seems to me that the claimant's reliance on payments into her bank account from Jones Whyte Law meaning, of itself, she was employed by them, when that is disputed by them, and DAG Marketing Ltd argue that they employed her, means the claimant's case against the second respondents is weak, but I appreciate that whether or not she can establish they were her employer has not yet been judicially determined.

195 That judicial determination will require the part-heard Preliminary Hearing from 3 October 2018 to be reconvened, further evidence led, and only then can the Tribunal then decide the matter of employer identity, with the benefit of all parties' tried and tested evidence at that Continued Hearing. While I cannot say her claim against Jones Whyte Law has no reasonable prospect of success, based on the limited information to hand, I am satisfied that I can say that part of her claim has little reasonable prospect of success against the second respondents.

196 Having decided that it is appropriate to make a Deposit Order, on that basis, the next matter that arises for my consideration is the amount to be paid by the claimant.

197 Having regard to the information provided to the Tribunal by the claimant at this Preliminary Hearing, in answer to my reasonable enquiries of her, in terms of

Rule 39(2), as to her ability to pay any deposit, if so ordered to do so by the Tribunal, I have decided to restrict the amount of deposit to be paid by her to the total sum of **One Hundred Pounds (£100),** as per the Deposit Order made by the Tribunal and issued under separate cover, along with this Judgment. I have made this a *cumulo* amount, based on **£25** for each of her 4 allegations against the second respondents.

198 In these circumstances, I have refused the second respondents' application for a Deposit Order of **£1,000,** that sum being excessive and a barrier to justice having regard to the claimant's limited financial means, on the basis of the information provided by her to the Tribunal.

199 In coming to this decision, I have had regard to the proportionality of the amount awarded as against the claimant's financial circumstances, insofar as known to the Tribunal, and as such I have not required to reconcile any apparent inconsistency between Lady Smith's approach in **Simpson**, and Mrs Justice Simler's approach in **Hemdan.**

200 In her oral submissions at this Preliminary Hearing, the claimant stated that she could not afford to pay any amount, and that to pay a deposit would put her ***"further into debt".*** I am not satisfied that she cannot pay anything, and I reject the latter argument as it is a matter for her to decide whether or not to pay £100, or units of £25 per allegation, as she sees fit, to continue her claim, in whole or in part, against the second respondents.

201 It is clear that the claimant feels strongly about this case and, as like many other unrepresented, party litigants, she may well have persuaded herself of the justice of her cause, and she may indeed sincerely believe in her cause. However, I have had to assess her claim before this Tribunal against these second respondents, Jones Whyte Law, based on my independent and objective judicial scrutiny of her ET1 claim form, taking what she says there, at its highest.

202 In coming to my decision on this opposed application, I have taken into account that the claimant is, in these Tribunal proceedings, an unrepresented, party litigant. In **A Q Ltd v Holden [2012] IRLR 648,** His

Honour Judge Richardson, the EAT Judge, held, particularly at paragraphs 32 and 33, that that justice requires that Tribunals do not apply professional standards to lay people, who may be involved in legal proceedings for the only time in their life, and that lay people are likely to lack the objectivity and knowledge of law and practice brought by a professional legal adviser.

203 Further, I consider it appropriate, in relation to the claimant's frequent references to herself, as not a lawyer, but an unrepresented, party litigant, to refer to the recent Supreme Court judgment in **Barton v Wright Hassall LLP [2018] UKSC 12**, particularly Lord Sumption, at paragraph 18, where he stated that:

> "*18. Turning to the reasons for Mr Barton's failure to serve in accordance with the rules, I start with Mr Barton's status as a litigant in person. In current circumstances any court will appreciate that litigating in person is not always a matter of choice. At a time when the availability of legal aid and conditional fee agreements have been restricted, some litigants may have little option but to represent themselves. Their lack of representation will often justify making allowances in making case management decisions and in conducting hearings. But it will not usually justify applying to litigants in person a lower standard of compliance with rules or orders of the court. The overriding objective requires the courts so far as practicable to enforce compliance with the rules: CPR rule 1.1(1)(f). The rules do not in any relevant respect distinguish between represented and unrepresented parties. In applications under CPR 3.9 for relief from sanctions, it is now well established that the fact that the applicant was unrepresented at the relevant time is not in itself a reason not to enforce rules of court against him: R (Hysaj) v Secretary of State for the Home Department [2015] 1 WLR 2472, para 44 (Moore-Bick LJ); Nata Lee Ltd v Abid [2015] 2 P & CR 3, [2014] EWCA Civ 1652. At best, it may affect the issue "at the margin", as Briggs LJ observed (para 53) in the latter case, which I take to mean that it may increase the weight to be given*

to some other, more directly relevant factor. It is fair to say that in applications for relief from sanctions, this is mainly because of what I have called the disciplinary factor, which is less significant in the case of applications to validate defective service of a claim form. There are, however, good reasons for applying the same policy to applications under CPR rule 6.15(2) simply as a matter of basic fairness. The rules provide a framework within which to balance the interest of both sides. That balance is inevitably disturbed if an unrepresented litigant is entitled to greater indulgence in complying with them than his represented opponent. Any advantage enjoyed by a litigant in person imposes a corresponding disadvantage on the other side, which may be significant if it affects the latter's legal rights, under the Limitation Acts for example. Unless the rules and practice directions are particularly inaccessible or obscure, it is reasonable to expect a litigant in person to familiarise himself with the rules which apply to any step which he is about to take."

204 More recently, Lord Carloway, the Lord President of the Court of Session, in giving the Opinion of the Court, in **Khaliq v Gutowski [2018] CSIH 66**, having quoted from Lord Sumption in **Barton**, referred, at paragraph 36 of his judgment to a recent judgment by Lady Paton, following **Barton**, stating that:

"... *the fair balance achieved by the rules of court will inevitably be disturbed if an unrepresented litigant is entitled to greater indulgence in complying with them than his represented opponent".*

205 In the present case, I have taken into account that the claimant is representing herself, but that factor does not in any way allow her any special indulgences where the Tribunal decides, as I have done, that it is appropriate to grant the second respondents' application for a Deposit Order.

206 While the respondents, and Mr Whyte in particular, focused on the costs incurred to date, parties should be aware that, in terms of **Rule 76(2),** a

Tribunal may make an Expenses or Preparation Time Order where a party has been in breach of any Order or Practice Direction or where a Hearing has been postponed or adjourned on the application of a party. Any application in that regard can be considered at the Continued Preliminary Hearing, or on case management application by any of the defending respondents.

Further Procedure

207 In respect of relisting the part-heard Preliminary Hearing, adjourned on 3 October 2018, and to be relisted thereafter, I have decided to defer relisting until the claimant has (a) paid the Deposit Order, **within 21 days of the date of issue of that Order,** and (b) confirmed to the Tribunal, **within 21 days of the date of issue of this Judgment,** whether, in respect of the first respondents, DAG Marketing Limited, dissolved as a company on 27 November 2018, she has made an application to the relevant Court in England and Wales to restore that company to the Register of Companies, and thereafter she seeks to progress her claim against the restored company, or whether she seeks to withdraw her claim, as against the first respondents, but proceed only against the other remaining respondents.

208 Should any other matters arise between now and the start of any Continued Preliminary Hearing, on a date to be hereinafter fixed by the Tribunal, then written case management application should be intimated, in the normal way to the Tribunal, preferably by e-mail, with copy to the other parties' representatives, sent at the same time, and evidencing compliance with **Rule 92**, for comment/objection within 7 days.

209 Dependent upon subject matter, and any objection / comment by other parties' representatives, any such case management application shall be dealt with on paper by Employment Judge Ian McPherson, or by a Case Management Preliminary Hearing fixed, either in person or by telephone conference call, as might be most appropriate.

Importance Notice

210 Meantime, parties' representatives' attention is drawn to the Orders made in this Judgment, and the need for full and timeously compliance.

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

212 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**.

Closing Remarks

213 At the previous Preliminary Hearing held on 3 October 2018, it was clear to me, as indeed I recorded in my written Note and Orders, that the claimant had been doing her best, as an unrepresented, party litigant, unfair with the Tribunal and its practices and procedures. While to that date the claimant had been acting on her own behalf, since her ET1 claim form was lodged, as she is perfectly entitled to do, I encouraged her to seek out independent and objective advice.

214 At this Preliminary Hearing, she was again unrepresented. This was disappointing as my earlier written Note and Orders had signposted her to various *pro bono* voluntary agencies (such as the Glasgow Caledonian University or Strathclyde University Law Clinics) providing advice and assistance to individuals bringing Tribunal proceedings.

215 On 28 January 2019, the claimant emailed the Tribunal, but did not copy in Mr Gorrie or Mr Whyte, despite the **Rule 92** requirement, advising that she was in the process of contacting Companies House to reinstate the dissolved company, DAG Marketing Ltd, and in process of talking with the Law Clinics, to assist her *pro bono* with her case, and apologising for not carrying this out before, She sought the opportunity to liaise with Companies House and the Law Clinics so that her case can be heard fairly.

216 On my instructions, on 29 January 2019, a clerk to the Tribunal, wrote to the claimant, with copy to the respondents' representatives, noting her

position, and asking her to advise the Tribunal once she had written to Companies House, and when she had received a reply.

217 Further, in that email, the clamant was also informed that, unless and until a representative formally advises the Tribunal, and Messrs Gorrie and Whyte, that they are now acting for her as her representative, correspondence will continue to be sent to her, unless and until a representative is placed on record as acting for her.

218 On 11 February 2019, the claimant emailed the Tribunal, but again did not copy her correspondence to Messrs Gorrie and Whyte, although she did copy in Ms Ali, although she is no longer acting for the second respondents. She has again been reminded of **Rule 92**, and the need for her compliance.

219 As the Tribunal is an independent judicial body, and it cannot give advice to any party, she has been signposted to Companies House about the procedure to seek restoration of a dissolved company. That is not a matter within the jurisdiction of the Employment Tribunal.

220 It is suggested that, on her receipt of this Judgment, the claimant takes advice, and provides a copy to the student advisers at Strathclyde University Law Clinic, whom she has advised the Tribunal she has met with to assist her in this Tribunal claim.

221 In issuing this Judgment, I remind all parties that, as per **Rule 3 of the Employment Tribunals Rules of Procedure 2013:**

Alternative dispute resolution

A Tribunal shall wherever practicable and appropriate encourage the use by the parties of the services of ACAS, judicial or other mediation, or other means of resolving their disputes by agreement.

222 While the circumstances of this dispute do not fall within the criteria for Judicial Mediation, as the claim does not involve discrimination, and it is not likely to last three or more days at a Hearing, I do take this opportunity

to encourage all parties to use ACAS, or other means to resolve their disputes by agreement.

Employment Judge: Ian McPherson
Date of Judgment: 13 February 2019
Entered in register: 16 February 2019
and copied to parties