EMPLOYMENT TRIBUNALS

Claimant: **Mr. D Briscoe**

Respondent: **Derby City Council**

Heard at: **Nottingham**

On: **Tuesday, 28th January 2020**

Before: **Employment Judge Heap (Sitting Alone)**

Representatives

Claimant: **In person**
Respondent: **Mr P McMahon - Solicitor**

JUDGMENT AND DEPOSIT ORDER

1. Allegations 1, 2, 3, 4, 5 and 6 as set out within the Schedule of Allegations dated 15th January 2020 is struck out under Rule 37 Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 on the basis that they have no reasonable prospect of succeeding.

2. Allegation number 7 as set out within the Schedule of Allegations dated 15th January 2020 is not pursued by the Claimant and therefore it is dismissed on withdrawal under Rule 52 Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013.

3. Allegation number 8 as set out within the Schedule of Allegations dated 15th January 2020 is made subject to a Deposit Order in the sum of £250.00 on the basis that the Claimant's allegations or arguments in respect of race discrimination as set out in that complaint have little reasonable prospect of success. The Claimant is ordered to pay that Deposit of £250.00 not later than 21 days from the date that this Order is sent as a condition of being permitted to continue to advance that allegation or argument. The Judge has had regard to any information available as to the Claimant's ability to comply with the Order in determining the amount of the Deposit.

4. Case Management Orders are attached.

REASONS

BACKGROUND TO THIS HEARING

1. This Preliminary Hearing followed on from one which I conducted last year on 9th September 2019 that had essentially been to consider whether all or any of the claims should be struck out as having no reasonable prospect of succeeding or a deposit Ordered as a condition of allowing it to proceed if it had little reasonable prospect of succeeding.

2. That hearing was not effective on the basis that the Claimant had not been sent information from an earlier Preliminary Hearing which he needed in order to prepare his case. As set out in the particular Orders relating to that hearing I obviously make no criticism of either the Claimant or Respondent in relation to that matter. That was a situation laying firmly at the door of the Tribunal.

3. At the Preliminary hearing on 9th September 2019 I Ordered the Claimant to provide some additional information about the factual and legal basis of the claims that he was advancing. We had identified at the hearing that the claims fell into eight broad allegations, albeit one of those allegations was to be given further consideration by the Claimant because he was not able to identify the facts relied upon. That is allegation 7 which the Claimant has helpfully confirmed today he no longer pursues.

4. The Claimant complied with the Orders that I had made by setting out in table format the factual and legal basis of his complaints. By that stage those complaints were formed entirely of direct discrimination relying upon the protected characteristic of race. The Claimant complied in that regard on 4th November 2019. The Respondent replied by way of a separate column within the table setting out their stall in relation to each of the allegations raised by the Claimant. The Respondent did that on 15th November 2019. Thereafter, on 10th December 2019 the Respondent renewed their earlier application for the claim to be struck out or, in the alternative, for Deposit Orders to be made. This Preliminary hearing was accordingly listed to determine those applications.

5. The Claimant submitted a revised Schedule of Allegations which was received by the Respondent and the Tribunal on 15th January 2020. The Respondent, via Mr. McMahon contended today that the Claimant should not be permitted to rely on that revised schedule given that he had had the opportunity after the last Preliminary hearing to set out the basis of his claim and had done so on 4th November 2019.

6. However, having sought an explanation as to the reason for the most recent incarnation of the schedule from the Claimant I understand that to have been done after he had taken the benefit of legal advice and assistance which he has now been able to secure after a change in his financial circumstances. I therefore allowed the Claimant, on that basis, to rely on the revised schedule so as to refine the legal basis of his claims having had the benefit of taking some advice. I would note in that regard that the allegations made by the Claimant did not change in substance and it was merely the legal basis for them of which there was some refinement. I was therefore satisfied that the Respondent was not

prejudiced by that position and that no formal amendment application was necessary.

THE LAW

7. Before turning to my findings of fact, it is necessary for me to set out a brief statement of the law which I shall in turn apply to those facts as I have found them to be.

Striking out a claim or part of it – Rule 37 Employment Tribunal Constitution and Rules of Procedure Regulations 2013

8. Employment Tribunals must look to the provisions of Rule 37 Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 when considering whether to strike out a claim.

9. Rule 37 provides as follows:

"At any stage of the proceedings, either on its own initiative or on the application of a party, the Tribunal may strike out all or part of a claim or response on any of the following grounds:

(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;
(b) For non-compliance with any of these Rules or with an order of the Tribunal;
(c) That it has not been actively pursued;
(d) That the Tribunal considers it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out.)"

10. The only consideration for the purposes of this Preliminary hearing is whether the claim, or any part of it, can be said to have no reasonable prospect of success. A claim can have no reasonable prospect of success if there is no jurisdiction for a Tribunal to entertain it.

11. In dealing with an application to strike out all or part of a claim a Judge or Tribunal must be satisfied that there is "no reasonable prospect" of success in respect of that claim or complaint. It is not sufficient to determine that the chances of success are fanciful or remote or that the claim or part of it is likely, or even highly likely to fail. A strike out is the ultimate sanction and for it to appropriate, the claim or the part of it that is struck out must be bound to fail. As Lady Smith explained in **Balls v Downham Market High School and College [2011] IRLR 217, EAT** (paragraph 6):

"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 prospects of success. I stress the words "no" because it shows the test is not whether the Claimant's claim is likely to fail nor is it a matter of asking whether it is possible that his claim will fail. Nor is it a test

which can be satisfied by considering what is put forward by the Respondent either in the ET3 or in the submissions and deciding whether their written or oral assertions regarding disputed matters are likely to be established as facts. It is, in short, a high test. There must be no reasonable prospects…"

12. Claims or complaints where there are material issues of fact which can only be determined by an Employment Tribunal will rarely, if ever be, apt to be struck out on the basis of having no reasonable prospect of success before the evidence has had the opportunity to be ventilated and tested.

13. Particular care is required where consideration is being given to the striking out of discrimination claims and that will rarely, if ever, be appropriate in cases where there are disputes on the evidence. However, if a claim can properly be described as enjoying no reasonable prospect of succeeding at trial, it will nevertheless be permissible to strike out such a claim.

Deposit Orders – Rule 39 Employment Tribunals (Constitution & Rules of Procedure Regulations 2013

14. Different considerations apply, however, in relation to Deposit Orders made under Rule 39 of the Regulations. Rule 39 provides as follows:

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

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

15. Thus, a Tribunal may make a Deposit Order where a claim or part of it has little reasonable prospect of succeeding. However, this is not a mandatory requirement and whether to make such an Order, even where there is little reasonable prospect of success, remains at the discretion of the Tribunal to determine whether or not such should be made.

Direct Discrimination

16. It is also necessary to consider the law in respect of the discrimination claim that the Claimant advances.

17. Section 13 Equality Act 2010 provides that:

"A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others".

18. It is for a Claimant in a complaint of direct discrimination to prove the facts from which the Employment Tribunal could conclude, in the absence of an adequate non-discriminatory explanation from the employer, that the employer committed an unlawful act of discrimination (**Wong v Igen Ltd**

[2005] ICR 931).

19. If the Claimant proves such facts, the burden of proof will shift to the employer to show that there is a non-discriminatory explanation for the treatment complained of. If such facts are not proven, the burden of proof will not shift.

20. In deciding whether an employer has treated a person less favourably, a comparison will in the vast majority of cases be made with how they have treated or would treat other persons without the same protected characteristic in the same or similar circumstances. Such a comparator may be an actual comparator whose circumstances must not be materially different from that of the Claimant (with the exception of the protected characteristic relied upon) or a hypothetical comparator.

21. Guidance as to the shifting burden of proof can be taken from that provided by Mummery LJ in **Madarassy v Nomuna International Plc [2007] IRLR 246**:

"'Could conclude' ….. must mean that 'a reasonable tribunal could properly conclude' from all the evidence before it. This would include evidence adduced by the complainant in support of the allegations of …… discrimination, such as evidence of a difference in status, a difference in treatment and the reason for the differential treatment. It would also include evidence adduced by the respondent contesting the complaint. Subject only to the statutory 'absence of an adequate explanation' at this stage …. the tribunal would need to consider all the evidence relevant to the discrimination complaint; for example evidence as to whether the act complained of occurred at all; evidence as to the actual comparators relied on by the complainant to prove less favourable treatment; evidence as to whether the comparisons being made by the complainant were of like with like….. and available evidence of the reasons for the differential treatment.

The absence of an adequate explanation for differential treatment of the complainant is not, however, relevant to whether there is a prima facie case of discrimination by the respondent. The absence of an adequate explanation only becomes relevant if a prima facie case is proved by the complainant. The consideration of the tribunal then moves to the second stage. The burden is on the respondent to prove that he has not committed an act of unlawful discrimination. He may prove this by an adequate non-discriminatory explanation of the treatment of the complainant. If he does not, the tribunal must uphold the discrimination claim."

22. The protected characteristic need only be a cause of the less favourable treatment but need not be the only or even the main cause. A Tribunal when considering the cause of any less favourable treatment will be required to consider that question having regard not only to cases where the grounds of the treatment are inherently obvious but also those where there is a discriminatory motivation (whether conscious or unconscious) at play (see **Amnesty International v Ahmed [2009] ICR 1450**.)

CONCLUSIONS

23. Having set out the law to be applied, that then brings me to my conclusions in relation to the remaining allegations advanced raised by the Claimant. I take each of those in turn. I make it plain that I have heard no evidence and therefore have made no findings of fact but I have taken the Claimant's case at its absolute highest.

24. Whilst I have not set out in detail here the respective positions of the parties as advanced during the course of this Preliminary hearing, they can be assured that I have paid close regard to everything that each has said.

25. The first of the allegations, allegation one, is the failure to appoint an independent investigator to consider allegations against the Claimant or, put another way, the decision to appoint somebody who was not independent. The essence of that allegation is that the investigator was somebody within the Claimant's line management chain rather than outside of the particular directorate in which he was employed at the material time.

26. The Claimant has candidly accepted today when asked by me that he has no factual evidence to say that that decision had anything to do with race. The best that he can say is to point to the fact that he was the only black person in his particular team and that it could be concluded therefore that the reason for selecting a particular investigator was because of race.

27. I take into account in considering this allegation that the Claim Form was issued over 14 months ago and the Claimant has recently has the benefit of some legal advice in relation to the revised schedule at which we are presently looking. There are no facts and matters set out within that schedule relating to race, nor has the Claimant been able to advance anything today other than the fact that he was the only black member of staff within a particular team. The focus on the revised schedule clearly is entirely on fairness or, more accurately, unfairness.

28. Unfair or unreasonable treatment of a complainant by an employer cannot, of itself, however lead to an inference of discrimination, even if there is nothing to explain it (see **Bahl v The Law Society [2004] EWCA Civ 1070)**. Again, I am not saying that the decision in relation to the investigator was unreasonable, but I am taking the Claimant's case at its absolute highest. If the Claimant cannot, as he candidly accepts, identify any facts to suggest that the treatment of which he complains was on the grounds of race at this stage it is inconceivable that he would be any better placed to do so at trial. I repeat here that we are some months on from the Claimant issuing this claim and he has had the benefit of guidance from the Tribunal as to what he will have to demonstrate to prove his case and also the benefit, as I have already referred to above, of recent legal advice.

29. It follows that there are no facts and matters identified which the Claimant is able to rely upon at this stage to suggest that race had anything to do with the treatment complained of and therefore I strike out this particular allegation on the basis that it has no reasonable prospect of succeeding as a race discrimination complaint.

30. I turn then to allegation two which is the decision of the Respondent not to renew the Claimant's fixed term contract. It is not disputed that the Claimant was employed on a fixed term contract which was due to expire in April 2018. It is also common ground that the Claimant resigned before the end of the fixed term contract to take up employment elsewhere.

31. The Claimant's case as set out today, however, was that he was told in January 2018 that his fixed term contract was not going to be renewed. He contends that that was an oddity given the timing and the way in which the decision was communicated to him, especially as there was an ongoing investigation by that time in relation to his alleged misconduct. The Claimant says that a decision about ongoing employment should have fallen to be considered as part of the disciplinary outcome. I have assumed for the purposes of this particular aspect of the claim that it is correct that the Claimant was told that in January 2018 that the fixed term contract was not to be renewed. That is only an issue which has arisen today and upon which Mr. McMahon was not able to confirm either way on behalf of the Respondent. However, I have assumed that the Claimant is right about that for the purpose of taking his claim today at its highest.

32. The Claimant says that that decision related to race because he was aware of the abrupt ending or managing out of four black agency staff and was unaware or did not have any knowledge of those things happening to white members of staff. That would have been over a period of twelve months from April 2017 to April 2018.

33. The Claimant's case in that regard is effectively that the Respondent is predisposed to treat black workers less favourably than white counterparts. That is, however, not founded on any evidence. The Claimant relies on four contracts being terminated of black members of staff and that that does not happen to white workers. The Claimant cannot however possibly know that out of the entire huge organisation that the Respondent operates that what he is saying in this regard is accurate.

34. There was no suggestion that any of the four individuals who would have represented a small proportion of the Respondent's workforce brought successful race discrimination claims or anything otherwise to suggest that the termination of those contracts was done on the basis of the race of the individuals concerns. There is less still that the comments made in January 2018 that the Claimant's fixed term contract was not to be renewed had been decided because of the Claimant's race. There were no doubt a multitude of reasons why that could have been but the Claimant has not been able to take me to take me to anything at this stage to suggest that it was his race or race generally that caused the Respondent to make that comment. Again, I look to the fact that if the Claimant cannot point now to facts and matters to support his contention that race was a factor in the January 2018 comment, there is no greater likelihood of him being able to now do so at trial. For those reasons I also strike out allegation number two on the basis that it has no reasonable prospect of succeeding.

35. I turn then to allegation number three. The Claimant relies, as with all allegations, so far on a hypothetical comparator. The basis of this complaint it that is asserted that the Respondent failed to consider medical

findings. Again, I take the Claimant's case at its highest and assume that that did occur. Again, however, it is telling that in the present incarnation of the schedule, the facts and matters section upon which the Claimant was to set out all basis upon which he said that race was the reason for the treatment complained of relates only to points of unfairness and nothing at all relating to race. I remind myself that that is after the Claimant had had the benefit of taking legal advice and assistance. For the reasons that I have already given, mere unfairness is not enough. That would found an unfair dismissal claim if the Claimant had sufficient continuous service but it does not found a claim of race discrimination or, indeed, discrimination on the basis of any other protected characteristic.

36. The Claimant has said today essentially the same as for allegation number two with regard to the four black members of staff and the termination of their contracts and that those are the facts and matters relied upon regardless of them not being set out in the revised Schedule of Allegations. However, for the same reason that I have already given in relation to allegation number two, that is not sufficient to found a discrimination claim in his particular circumstances. Again, the Claimant has had the opportunity to provide this information over an extended period and has not pointed to anything to suggest that race was the reason for the treatment complained of and so I cannot assume that he will do any better in establishing that at trial. Accordingly, this allegation is struck out on the basis of it having no reasonable prospect of succeeding.

37. I then turn to allegation number four which was the delay in completing the investigation into the allegations against the Claimant. It does not appear to be disputed that there was delay in this investigation being concluded. Rather than the six weeks which appears in the Respondent's disciplinary policy the investigation into the allegations against the Claimant took some twenty one weeks. I find it unsurprising that the Claimant is concerned about that.

38. However, I do take judicial notice of the fact that it is regrettably not unusual, particularly within the public sector, for investigations of this nature to become protracted. That is not, however, to take away anything from the Claimant's obvious and understandable dissatisfaction with that particular position. However, I have to consider whether the Claimant is might possibly establish that that was an act of race discrimination as opposed to simply an act of unfairness on the Respondent's part. It is notable in this regard again that the facts and matters section of the 15th January 2010 schedule were left blank, even with the benefit of having received legal advice.

39. Again, the issue of delay is clearly a matter which goes to fairness but unfair treatment alone, as I have already set out above, is not going to be sufficient to establish a prima facie case of race discrimination. There must be facts and matters that point to the matters complained of being racially motivated. I remind myself again that this is not an unfair dismissal claim. There were no facts advanced at all in the revised Schedule of Allegations as to how race was said to be the reason for the treatment complained of and that is in my view telling.

40. The Claimant has said today in terms that the basis of that complaint is essentially the same as for allegations two and three. Again, for the

reasons that I have already given I find that insufficient, even if it was made out, to advance an argument that the Respondent is inherently predisposed to treat black members of staff less fairly and that that extended to delaying the investigation into the allegations against the Claimant. Again, I find that having had time to consider those matters and seek advice it is inconceivable that the Claimant would be in a better position to advance such matters at trial and for the same reason allegation four is struck out as having no reasonable prospect of success.

41. I turn then to allegation number five which is the failure to take into account inconsistencies in the evidence during the course of the investigation. The Claimant relies upon a hypothetical comparator. Again, the points in the facts and matters section of the 15th January 2010 Schedule of Allegations relate to matters of fairness and not to issues of race. That is again with the benefit of legal advice and assistance.

42. The Claimant has today said that he relies upon the same basis as for allegation number two, three and four but again for the same reasons I have already given I cannot see that there is any prospect at all of the Claimant establishing at trial a state akin to institutional racism on the basis of his case at its absolute highest and, further, that that was the cause of the treatment which he complains at allegation number five. For those reasons this aspect of the claim is struck out as having no reasonable prospect of success.

43. I turn then to allegation number six. This relates to the fact that there was a finding by the Respondent that the Claimant had breached professional standards. The Claimant points of course to the fact that the Respondent did not report him to his professional body despite those particular findings. Whilst I understand the Claimant's position in that regard, this allegation regrettably suffers from the same fatal problems as the others that I have already explored. Even after legal advice and assistance the Claimant sets out no basis whatsoever within the Schedule of Allegations to any matters relied upon to say that the findings made by the Respondent had anything to do with race. Again, it is fourteen months on since the Claim Form was issued and the Claimant has had plenty of time to consider and refine his case. It is noteworthy that the column in that regard has been left blank against that background, even with the Claimant having had the benefit of legal advice and assistance to put it together.

44. The Claimant has contended today that he will rely on the same facts as for allegation number two, three and four, that is a predisposition to treat black members of staff less favourably than white members of staff. For the reasons given in relation to that allegation and all others where that particular contention is relied upon, that is going to be woefully insufficient to reverse the burden of proof and show that the Claimant himself was treated in the manner he complains of because of race for the reasons already given. Accordingly, I strike out that complaint also as having no reasonable prospect of succeeding.

45. That brings us to allegation number seven which the Claimant has confirmed today is not an issue which is pursued in these proceedings.

46. I turn then finally to allegation number eight. This is the only complaint for which the Claimant relies on an actual comparator, a Team Manager. The Respondent says today that there are material differences between the circumstances of that comparator and that of the Claimant, although it is accepted that the comparator relied upon was taken through a disciplinary process albeit that did not culminate in findings of gross misconduct but in demotion. There is no dispute on that particular issue.

47. The Claimant, however, has not had any full knowledge of the circumstances of his comparator until today and accordingly he is not able to speak to that and will there will have to be disclosure on that particular issue. However, even if there were material differences in the circumstances of the Claimant and his comparator, he may still nevertheless be able to use those circumstances in seeking to evidence that a hypothetical comparator would not have been treated in the same way given that both the Claimant and his comparator were Social Workers and both had allegations of safeguarding issues raised against them. The comparator is white and the Claimant of course is black. They were, on the face of it, treated differently although from what is said by the Respondent - and appears to be accepted by the Claimant - there was a change of policy about the ability to demote which saw that no longer being available at the time of the disciplinary proceedings against the Claimant.

48. However more importantly than that, even where there is a difference in treatment and a difference in race that in itself is not going to be sufficient and something more is needed. The Claimant suggested that information provided from the Respondent shows that black employees are more likely than their white counterparts to be taken through to a disciplinary hearing. However, there are no details of the proportions that led to dismissal in relation to those matters or findings of gross misconduct and that is the crux of this particular aspect of the claim.

49. There is nothing to show that predominantly more black than white staff were dismissed after a disciplinary process involving the sorts of allegations that the Claimant faced. In addition, there is nothing to show that the decision in the Claimant's own case was motivated by race but there are clear issues that arise so that I cannot say that this aspect of the claim has no reasonable prospect of success.

50. The circumstances of a comparator do lend some, albeit limited weight to this aspect that the other allegations did not have. Therefore, it cannot be said that this claim has no reasonable prospect of succeeding but on the facts of the Claimant's own case there are little reasonable prospects of success so as to make a Deposit Order appropriate.

51. That brings me to the amount of the Deposit Order. I have determined that this should be in the sum of £250.00. I have taken the Claimant's means into account when determining whether to make the Order and also as to the amount. He tells me that the imposition of a Deposit in the maximum sum available to me would not have been a bar to him proceeding. I do not make it in that full amount but a quarter of it to allow the Claimant to reflect on whether that should be paid and he should continue with the claim and also to provide some security for the Respondent if this case were to fail for a substantially for the same

reasons as I have identified and if the Respondent is successful thereafter in any application for costs.

Employment Judge Heap

Date: 21st February 2020

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE

Notes

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

Employment Tribunals Rules of Procedure 2013

1. The Tribunal has made an order (a "deposit order") requiring a party to pay a deposit as a condition of being permitted to continue to advance the allegations or arguments specified in the order.

2. If that party persists in advancing that complaint or response, a Tribunal may make an award of costs or preparation time against that party. That party could then lose their deposit.

What happens if you do not pay the deposit?

3. If the deposit is not paid the complaint or response to which the order relates will be struck out on the date specified in the order.

When to pay the deposit?

4. The party against whom the deposit order has been made must pay the deposit by the date specified in the order.

5. If the deposit is not paid within that time, the complaint or response to which the order relates will be struck out.

What happens to the deposit?

6. If the Tribunal later decides the specific allegation or argument against the party which paid the deposit for substantially the reasons given in the deposit order, that party shall be treated as having acted unreasonably, unless the contrary is shown, and the deposit shall be paid to the other party (or, if there is more than one, to such party or parties as the Tribunal orders). If a costs or preparation time order is made against the party which paid the deposit, the deposit will go towards the payment of that order. Otherwise, the deposit will be refunded.

How to pay the deposit?

7. Payment of the deposit must be made by cheque or postal order only, made payable to HMCTS. Payments CANNOT be made in cash.

8. Payment should be accompanied by the tear-off slip below or should identify the Case Number and the name of the party paying the deposit.

9. Payment must be made to the address on the tear-off slip below.

10. An acknowledgment of payment will not be issued, unless requested.

Enquiries

11. Enquiries relating to the case should be made to the Tribunal office dealing with the case.

12. Enquiries relating to the deposit should be referred to the address on the tear-off slip below or by telephone on 0117 976 3096. The PHR Administration Team will only discuss the deposit with the party that has been ordered to pay the deposit. If you are not the party that has been ordered to pay the deposit you will need to contact the Tribunal office dealing with the case.

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DEPOSIT ORDER

To: **HMCTS Finance Centre**
The Law Library
Law Courts
Small Street
Bristol
BS1 1DA

Case Number _____

Name of party _____

I enclose a cheque/postal order (*delete as appropriate*) for £_____

Please write the Case Number on the back of the cheque or postal order