EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4109518/2018

Held in Glasgow on 7 November 2018 (Preliminary Hearing); and 14 November 2018 (Written Representations)

Employment Judge: Ian McPherson

Mr Brian Gourlay	**Claimant** **In Person**
GMB	**Respondents** **Represented by:** **Mr Andrew Crammond** **Barrister**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that:-

(1) Having heard counsel for the respondents, and the claimant in person, on the respondents' opposed application for Strike Out of the claim, which failing a Deposit Order, the Tribunal grants the respondents' application, and, in terms of **Rule 37(1)(a) of the Employment Tribunals Rules of Procedure 2013**, strikes out the whole of the claim, on the basis that there is no *prima facie* case, on the basis of the claim as pled, of any unlawful disability discrimination by the respondents against the claimant, and so the claim as pled has no reasonable prospect of success.

(2) Further, the Tribunal also grants the respondents' application, in terms of **Rule 37(1)(a) of the Employment Tribunals Rules of Procedure 2013**, and strikes out the whole of the claim, on the basis that it is scandalous and vexatious, ***res judicata*** and so an abuse of process

insofar as it seeks to re-litigate matters raised in the claimant's previous claim against the respondents, under case no. **S/4108638/2015**, itself struck out by the Tribunal by Judgment dated 4, and issued on 6, May 2016 , and yet further the claim is also time-barred in respect of all and any acts taking place prior to 27 January 2018.

(3) Finally, having struck out the whole of the claim, the Tribunal finds it unnecessary to make a Deposit Order, in terms of **Rule 39 of the Employment Tribunals Rules of Procedure 2013**, which it would have made in the amount of **£1,000** had it not struck out the whole of the claim.

REASONS

Introduction

1. This case called again before me on the morning of Wednesday, 7 November 2018, for a public Preliminary Hearing, previously intimated to both parties by the Tribunal by Notice of Preliminary Hearing dated 18 September 2018, to determine, as a preliminary issue, the respondents' application for Strike Out of the claim, failing which a Deposit Order.

2. One day was allocated for this Preliminary Hearing before me, as an Employment Judge sitting alone. Neither party had requested that it be conducted by a full Tribunal.

3. This Preliminary Hearing followed upon the case having previously called before me, on 5 September 2018, for a Case Management Preliminary Hearing, held in private, where my written Note and Orders, dated 11 September 2018, was issued to both parties under cover of a letter from the Tribunal dated 17 September 2018.

4. Specifically, Order (9) in that written Note stated that this Preliminary Hearing was assigned:

" to address the respondents' application to the Tribunal to consider Strike Out of the claim, under ***Rule 37 of the Employment Tribunals Rules of Procedure 2013,*** *on the basis that the claim, as pled, has no reasonable prospects of success, there being no prima facie case of discrimination made out against the respondents, it is scandalous and vexatious,* ***res judicata****, and time-barred, which failing to seek a Deposit Order against the claimant, under* ***Rule 39,*** *on the basis that the respondents contend that the claim, as pled, has little reasonable prospects of success."*

Claim and Response

5. Following ACAS early conciliation between 26 April and 26 May 2018, the claimant, acting on his own behalf, presented his ET1 claim form to the Tribunal, on 24 June 2018, and it was accepted by the Tribunal, and served on the respondents by Notice of Claim issued by the Tribunal on 3 July 2018.

6. It is a complaint against the respondents, as a trade union, under **Section 57 of the Equality Act 2010**, alleging 3 types of discriminatory conduct related to disability, being discrimination arising from disability, harassment, and victimisation, contrary to **Sections 15, 26 and 27.**

7. On 27 July 2018, an ET3 response was filed on behalf of the respondents, defending the claim, through their representative, Ms Hayley Johnson, solicitor with Thompsons, Glasgow. That response was accepted by the Tribunal on 7 August 2018 and a copy sent to the claimant and ACAS.

8. The response's primary position was that the claim contained no arguable claim that falls within the Employment Tribunal's jurisdiction, and that it should not proceed through the sift, but be dismissed, which failing, it should be relisted for a one day Preliminary Hearing to enable the preliminary issues set out in the ET3 response, at paragraphs 7 to 11, to be considered.

9. At Initial Consideration, on 8 August 2018, and as set out in the Tribunal's letter of that date to both parties, I took the view that, rather than issue any Notice / Order, under **Rule 27 of the Employment Tribunals Rules of**

Procedure 2013, that the claim be dismissed in full, or in part, on the basis of no jurisdiction, or no reasonable prospects of success, and so call upon the claimant to make written representations to the Tribunal, matters would more effectively be dealt with, in the first instance, at the already assigned all-party Case Management Preliminary Hearing, where I could consider matters with the benefit of both parties' completed PH Agendas, and oral submissions.

Procedure post that Case Management Preliminary Hearing

10. At that Case Management Preliminary Hearing, on 5 September 2018, the claimant appeared in person, and Mr Paul Deans, solicitor with Thompsons, Glasgow, appeared for the respondents. I made a number of Orders for compliance by both parties, some related to assigning this Preliminary Hearing, and others related to other aspects of the case, namely clarification and quantification of the claimant's preferred remedy from the Tribunal, in the event of success, and the disputed issues of his disability status, and the respondents' state of knowledge of his disability.

11. It will suffice, for present purposes, to note that those Orders have all been complied with, and the claimant has clarified and provided quantification of his preferred remedy from the Tribunal, in the event of success, being financial compensation of **£67,918.38**, plus top band ***Vento*** damages of **£25,700 to £42,900**, for injury to feelings, as well as a request for the Tribunal to make various recommendations in terms of **Section 124 of the Equality Act 2010**.

12. At that Hearing, on 5 September 2018, the claimant, who tendered a Bundle of Productions, advised me that, in light of Ms Johnson's completed PH Agenda for the respondents, listing complaints that she submitted were alleged in the claimant's detailed, 23-page PH Agenda, but not pled in his ET1, he reserved the right to amend his claim.

13. He further stated that a "***cease and desist***" letter dated 1 February 2018 that he had received from the GMB's solicitor was ***"the catalyst that prompted me to go down the judicial route again with the GMB."*** In May 2016, I had

struck out an earlier 2015 complaint that the claimant had brought against these respondents in case no: **S/4108638/2015,** by my Judgment dated 4, and issued on 6, May 2016. The respondents attached a copy of that previous Judgment to their ET3 response in the present claim.

14. On 12 September 2018, the claimant submitted an application to amend his current ET1, by including an additional 38 pages as part of his ET1 paper apart. Further, on 13 September 2018, Ms Johnson, solicitor for the respondents, wrote to the Tribunal, advising that the respondents accepted that the claimant is a disabled person, by virtue of his MS.

15. The claimant's application to amend the ET1 was opposed by objections intimated by Ms Johnson, on 18 September 2018. With reference to the factors set out in **Selkent Bus Co Ltd v Moore [1996] ICR 836** and other relevant authorities, Ms Johnson's objections were set out relating to (1) the nature of the amendment ; (2) applicability of time limits and extension ; (3) timing and manner of the application ; (4) merits of the claim; and (5) the Tribunal's overriding objective.

16. On 19 September 2018, the claimant submitted a 9 page set of further and better particulars specification of the appropriate recommendations he sought from the Tribunal in the event of success with his claim. Further, on 3 October 2018, the claimant intimated his Schedule of Loss, along with a synopsis of the respondents' actions and alleged inactions and, thereafter on 11 October 2018, he then submitted an application to Strike Out the respondents' ET3 response.

17. The respondents' solicitor, Ms Johnson, had, on 15 October 2018, confirmed that the respondents accepted that they were aware of the claimant's disability at the times of the matters currently pled in his claim form, and, on the same date, Ms Johnson intimated the respondents' objections to the claimant's application of 11 October 2018 to Strike Out the respondents' ET3 response.

18. On 16 October 2018, Ms Johnson intimated the respondents' reply to the claimant's Schedule of Loss. She made a number of detailed comments, and

advised that, while not ordered to do so by the Tribunal, she did not propose to lodge a counter Schedule at that stage. Further, on 28 October 2018, the claimant supplied further and better particulars replying to the respondents' additional information, and, on 29 October 2018, he provided a statement of his means and assets, with vouching documents, regarding his ability to pay a Deposit Order, if made by the Tribunal.

Preliminary Hearing before this Tribunal

19. When this Preliminary Hearing started, at around 10.15am, the claimant was in attendance, unrepresented and unaccompanied. He produced a 29-page typewritten submission, with an executive summary (at pages 3 to 6), parties' arguments, and separate appendices with statutory provisions, legal authorities, excerpts from ***Harvey*** on Striking Out at paras [632] to [653], and excerpts from ***Harvey*** on Deposit Orders at para [591].

20. The fuller ***Harvey*** excerpts, being **Section T** (Striking Out), at paras [629] to [654], and **Section R** (Deposit Orders), at paras [586] to [593/624], had been printed in December 2015, and, although legible, were of poor quality for reading. He also produced hard copy judgments of the 6 further legal authorities cited by him in his list of authorities intimated on 5 November 2018, which I detail later on in these Reasons, he having seen the respondents' list of 12 case law authorities, intimated with their counsel's skeleton argument, on 31 October 2018.

21. Mr Andrew Crammond, barrister, from Trinity Chambers, Newcastle upon Tyne, appeared for the respondents, instructed by Mr Deans, solicitor with Thompsons, Glasgow, who was accompanied, in an observing capacity only, by a colleague, Ms Goodwin. Mr Deans has now been placed on record as the respondents' representative in these Tribunal proceedings, Ms Johnson having moved to another firm of solicitors.

22. Mr Deans produced for the Tribunal a large A4 lever arch file, with a Respondents' Bundle for use at this Hearing, comprising some 20 documents, across 264 pages. In addition, the Tribunal was provided with

hard copy judgments of the 12 legal authorities cited by the respondents' counsel in his list of authorities, which I reproduce later on in these Reasons.

23. Within the respondents' Bundle, I was provided with copies of the pleadings (ET1 and ET3); correspondence between the parties and the Tribunal and Tribunal Orders; chronological documents relating to the Tribunal's 2016 Judgment in the claimant's 2015 claim against the respondents, with email correspondence between the claimant and GMB on 10 July 2016, 19 December 2017, and the "***cease and desist***" letter of 1 February 2018; and finally 3 other documents, being the claimant's statement of means dated 29 October 2018, counsel's written skeleton, and the respondents' list of authorities.

24. My purpose, in ordering the respondent's solicitor to prepare and intimate a skeleton argument was so that the claimant had, as an unrepresented, party litigant, fair notice of the respondents' arguments prior to the start of this Preliminary Hearing.

25. It seemed to me, in making that Order, which I did, at the Case Management Preliminary Hearing on 5 September 2018, as per my Orders (10) and (11), that it was appropriate to do so, having regard to the Tribunal's overriding objective, under **Rule 2 of the Employment Tribunal Rules of Procedure 2013,** to deal with the case fairly and justly, including ensuring, so far as practicable, that the parties were on an equal footing.

Claimant's application to amend the ET1 not considered at this Hearing

26. On 12 September 2018, the claimant intimated to the Tribunal, with a copy sent to Ms Johnson as the respondents' representative, his application to amend the ET1 claim form in this case. Thereafter, by e-mail to the Tribunal, on 18 September 2018, copied to the claimant, Ms Johnson, the respondents' representative, objected to the claimant's application to amend his claim.

27. Further, on 27 September 2018, having noted parties' correspondence of 12 and 18 September 2018, both parties were asked to confirm, by 4 October 2018, whether they wished the opposed application to amend the ET1 to be

heard at this Preliminary Hearing, on 7 November 2018, or dealt with by way of written representations, at a different date.

28. Then, on 2 October 2018, Ms Johnson advised that her preference was that the claimant's application to amend should be dealt with in writing in advance of this Preliminary Hearing using written submissions. As the respondents had raised their preliminary issues first, she submitted that they ought to be determined in advance of the amendment application.

29. By his response, on 1 October 2018, the claimant requested that his amendment application should be addressed at this Preliminary Hearing, and that, by proposing written submissions, he was concerned that the respondents were endeavouring to take unfair advantage of him as a party litigant.

30. While I can see how the claimant might take that view, I was satisfied that, as the matter of the opposed amendment application had not been addressed in advance of this Hearing, it was appropriate case management to deal with the Strike Out application before the Tribunal, meaning, in essence, that the claimant's application to amend his claim should not be determined until after this Preliminary Hearing considered whether his claim should be struck out, under **Rule 37.**

31. I took the view, in exercise of my general case management powers, that the opposed amendment application should, if the case was not struck out, be considered as part of case management going forward in the event the claimant's claim was able to proceed, as a struck-out claim cannot be amended. As such, this Preliminary Hearing proceeded based on the claim as pled, with consideration to be given to the claimant's opposed amendment application only if his claim was allowed to proceed.

32. Having regard to the Tribunal's overriding objective, under **Rule 2**, to deal with the case fairly and justly, including avoiding delay and saving expense, and taking account of the fact that the case was listed for this Preliminary

Hearing, I felt it was not appropriate to consider the claimant's opposed application to amend at this stage.

33. Further, I did not consider it appropriate, nor was I asked by either party, to postpone this listed Preliminary Hearing, nor broaden its scope, to address the claimant's opposed application to amend the ET1 claim form, as well as the respondents' opposed application for Strike Out, which failing Deposit Order.

List of Authorities for the Respondents

34. Along with the written skeleton argument for the respondents, produced by their counsel, Mr Crammond, there was a 3-page list of authorities, sent to the Tribunal by Mr Dean, intimated on 31 October 2018, and copied to the claimant, as follows: -

Statute

Equality Act 2010

Rules

Employment Tribunal Rules of Procedure 2013 [SI 2013 No.1237, as amended]

Case law

1. **Tayside Public Transport Co Ltd (t/a Traven Dundee v Reilly [2012] IRLR 755; [2012] CSIH 46**, per Lord Justice Clerk (Gill).

2. **Ezsias v North Glamorgan NHS Trust [2007] IRLR 603; [2007] EWCA Civ.330,** per Maurice Kay LJ.

3. **Anyanwu and anor v South Bank Student's Union and anor [2001] IRLR 305; [2001] UKHL 14 ; [2001] ICR 391**, per Lord Hope of Craighead.

4. **Chandhok v Tirkey [2015] IRLR 195 ; [2015] ICR 527**, per Langstaff J.

5. **Ahir v British Airways plc [2017] EWCA Civ 1392**, per Underhill LJ.

6. **Uzegheson v London Borough of Haringey [2015] ICR 1285**, per Langstaff J(P).

7. **Van Rensburg v Royal Borough of Kingston upon Thames [2007] UKEAT/0096/07** , per Elias J(P).

8. **Basildon and Thurrock NHS Foundation Trust v Weerasinghe [2015] UKEAT/0397/14,** now reported at **[2016] ICR 305**, per Langstaff J (P).

9. **Kelso v Department for Work and Pensions [2015]UKEATS/0009/15/SM** , per Lady Stacey.

10. **Pnaiser v NHS England [2016] IRLR 170** , per Simler J.

11. **Holmes v Greater Glasgow Health Board [2012] UKEATS/0045/11/BI**, per Lady Smith.

12. **Henderson v Henderson (1843) 3 Hare 100,** at 115, per Vice-Chancellor, Sir James Wigram.

Further Case Law Authorities relied upon by the Claimant

35. Having considered the respondents' list of authorities, by e-mail sent to the Tribunal on 5 November 2018, and copied to Mr Dean, the claimant produced his own list of six further case law authorities, as follows: -

1. **Luton Borough Council v Mr M Haque: [2018] UKEAT/0180/17/JOJ,** now reported at **[2018] ICR 1388,** particularly at paragraph 31 (HHJ Ellenbogen QC).

2. **Hendricks v Commissioner of Police of the Metropolis [2002] EWCA Civ 1686, [2003] ICR 530, [2003] IRLR 96,** particularly at paragraph 48, per Mummery LJ.

3. **Bennett v London Borough Of Southwark [2002] EWCA Civ 223, [2002] IRLR 407, [2002] ICR 881,** particularly at paragraph 32, per Sedley LJ. **[** Although the claimant's citation included **[2006] ICR 655,** as per the Bailli print accessed, that later citation is **Hart v English Heritage**, where **Bennett** was cited.]

4. **Balls v. Downham Market High School & College [2011] IRLR 217,** particularly at paragraphs 6 and 7, per Lady Smith.

5. **Wright v Nipponkoa Insurance Europe Ltd [2014] UKEAT/0113/14,** particularly at paragraph 75, per HHJ Eady QC

6. **Miss A Romanowska v Aspirations Care Ltd [2014] UKEAT/0015/14/SM**, particularly at paragraph 21, per Langstaff J(P).

Case Law Authorities cited by the Tribunal

36. In the course of this Preliminary Hearing, having heard submissions from counsel for the respondents, and before hearing from the claimant in person, I referred to, and I had the clerk provide copies to me, the claimant, and Mr Crammond, of pages 590 to 597 (Chapter 11, Case Management), and pages

1054 to 1057(Chapter 12, Costs and Penalties), from the **IDS Handbook on Employment Tribunal Practice and Procedure.**

37. I did so because they dealt with relevant case law authorities on "***scandalous, vexatious and no reasonable prospect of success***", at **[11.118],** and "***vexatious conduct***", at [20.55], being pages identified by me in the case list where commentary could be found on **ET Marler v Robertson [1974] ICR 72 (NIRC),** and **Attorney General v Barker [2000] 1 FLR 759 (QBD).**

38. These cases being well-known, familiar authorities, known to me from judicial experience, and regularly cited before the Tribunal in Strike Out applications, I wanted to hear from both parties about the application of relevant legal principles set forth in these authorities to the facts and circumstances of the present case, particularly as the respondents'' skeleton argument, intimated on 31 October 2018, at paragraphs 63 to 65, submitted ***that "the claim is scandalous and / or vexatious in all of the circumstances",*** but it made no cross-reference to any case law being relied upon by the respondents in that regard.

Claimant's Statement of Means and Assets

39. Included within the respondents' Bundle of Documents produced to the Tribunal at this Preliminary Hearing was a copy, at pages 243 to 246 inclusive, of the claimant's e-mail to the Tribunal, dated 29 October 2018, together with the vouching documentation then produced by him as evidence of his whole means and assets.

40. In submitting his statement of means and assets, in compliance with Order (13) made by me, at the Case Management Preliminary Hearing on 5 September 2018, the claimant had confirmed, in the covering letter to the Tribunal, that he had provided details and vouching of his income and expenditure, and capital assets and savings.

41. For the respondent, Mr Crammond stated that his clients were happy to accept the claimant's statement of means and assets as his evidence, and that he had no need to test the information provided by the claimant by cross-examination of the claimant in evidence at this Preliminary Hearing.

42. The claimant confirmed he did not intend to give any evidence in person on these matters, and that he was content for the Tribunal to proceed on the basis of the written information and vouching produced by him to the Tribunal. In those circumstances, I then stated to both parties that, there being no further information required by the Tribunal, there was no need for any oral evidence from the claimant on his whole means and assets.

Procedure at this Preliminary Hearing

43. As the claimant, and Mr Crammond, counsel for the respondent, both confirmed to me that no evidence was to be led at this Preliminary Hearing in regard to the respondent's opposed application for Strike Out of the claim, which failing a Deposit Order, I stated that the Tribunal would proceed to hear from Mr Crammond first, in terms of his skeleton argument, previously intimated to the Tribunal, and copied to the claimant, following which I would then hear from the claimant in reply.

44. I wish to record here that I am obliged to both Mr Crammond and the claimant for their respective written and oral submissions to me at this Preliminary Hearing. I have found them both to be helpful in reviewing and addressing the competing submissions made to me at this Preliminary Hearing.

45. Mr Crammond's oral submissions were, quite understandably, based very much upon his written outline skeleton argument, although some further matters were added orally, and I have noted these additional matters raised by counsel for the respondents later on in these Reasons.

46. The claimant's submissions to me at this Preliminary Hearing were likewise an oral delivery of many of the main points in his written submission, although some further matters were added orally, in reply to Mr Crammond's oral

submissions to me, and I have noted these additional matters raised by the claimant later on in these Reasons.

Submissions for the Respondents

47. It is appropriate, at this stage, to note the full terms of Mr Crammond's skeleton argument for the respondents, which was as follows: -

Introduction

1. This skeleton argument is prepared on behalf of the Respondent for the purpose of the Preliminary Hearing listed on 7 November 2018.

2. Annexed hereto, as Ordered by the Employment Tribunal, is a list of authorities. Where it appears no or no reliable web address or link to a case is available, a copy of the judgment has been provided to assist the Claimant.

3. The Claimant has made an application to amend his claim and an application to strike out the Respondent's response. Those issues are not part of the remit of the presently listed PH. Accordingly, this skeleton argument shall deal only with those matters which are the subject of the PH: namely, the application for strike out of the Claimant's claim; alternatively, that a deposit order is made against the Claimant.

4. Further oral submissions are reserved for the hearing, as necessary.

Issues for the PH

5. The issues for determination at the PH are those identified within correspondence from the Employment Tribunal dated 18 September 2018 and the PH Note of EJ McPherson following a preliminary hearing held on 5 September 2018.

6. In short, the issues for determination are:

a. The Respondent's application to strike out the Claimant's claim under *rule 37 of the Employment Tribunal Rules of Procedure* ("the 2013 Rules") on the basis that:

   i. There is no prima facie case, on the basis of the claim as pled, of discrimination made out and the claim has no reasonable prospects of success;
   ii. It is scandalous and vexatious;
   iii. Res judicata; and/or
   iv. The claim is time barred.

b. Alternatively, the Respondent's application for a deposit order against the Claimant pursuant to *rule 39 of the 2013 Rules* on the basis that the claim has little reasonable prospects of success.

Background

7. The following is a short summary of the background to this matter. It is not intended to rehearse the entire background to the matter.

8. The claim presently before the Employment Tribunal (case number 4109518/2018) was presented by the Claimant to the Employment Tribunal on 24 June 2018.

9. ACAS Early Conciliation was commenced on 26 April 2018 and ended on 26 May 2018.

10. The present claim is made pursuant to *sections 15, 26 and 27 of the Equality Act 2010* ("the 2010 Act") and *sections 57 and 109 of the 2010 Act*. The Claimant presented a Paper Apart to the claim spanning 5 pages, to which the Tribunal is referred.

11. In short, the Claimant refers to claims he made against his previous employer, West Dunbartonshire Council, and the Claimant references historic allegations that the Respondent, as his Union, failed to provide him support and assistance. The Claimant also refers to involvement he had with Thompsons Solicitors and Mr David Martyn of the same,

including a “cease and desist” letter (dated 1 February 2018) that was sent to the Claimant.

12. At paragraph 29 of the Paper Apart, under the heading “This Claim,” the Claimant asserts that:

> “Among other things, of which there is demonstrable evidence, of GMB not engaging with the claimant, of misleading the claimant, of providing false and misleading information to and about the claimant to others, of not permitting the claimant access to competent legal advice e.g. when matters of a Costs Warning letter was issue and then the Costs Application was made etc an issue that on 1 February 2018 Mr David Martyn Thompsons Solicitors sent Brian Gourlay a cease and desist letter i.e. sent on behalf of GMB.”

13. The Respondent hereby refers to the terms of the cease and desist letter dated 1 February 2018 in full for its content.

14. At paragraph 30 of the Paper Apart, the Claimant purports to outline claims pursuant to *section 15, 26 and 27 of the 2010 Act*. Further submissions shall be made as to the same below.

15. The claim is defended by the Respondent. An ET3 Response was duly presented by the Respondent. The Tribunal is referred to the same in full for its content.

16. Thereafter, the claim has been case managed, including by way of a preliminary hearing (where Orders setting down the present hearing were made) on 5 September 2018.

17. As the Tribunal is aware, this is not the first claim which the Claimant has brought against the Respondent. The Claimant previously brought a claim with case number S/4108638/2015 against the Respondent. This previous claim was presented to the Tribunal on 25 June 2015. The basis of the claim was that the Claimant considered that he had

been discriminated against contrary to *section 15 of 2010 Act* and pursuant to *section 57 of the 2010 Act*.

18. In relation to the previous claim, a hearing took place on 26 February 2016 to consider an application for strike out, alternatively, a deposit order.

19. By Order of EJ McPherson, the previous claim was struck out on the basis that the claim had no reasonable prospects of success. Alternatively, albeit the Tribunal did not consider it necessary to make a deposit order, the Tribunal found that it would have done so and in the sum of £1,000.

20. The Tribunal is referred to the Judgment of the Tribunal in full for this previous claim.

21. It is also of note, as is apparent from the Claimant's own pleadings, that the Claimant has brought claims against his previous employer.

Submissions

Summary

22. As above, the Respondent asserts that the claim ought to be struck out (pursuant *to Rule 37 of the 2013 Rules*) on one more of the following bases:

    i. There is no prima facie case, on the basis of the claim as pled, of discrimination made out and the claim has no reasonable prospects of success;
    ii. It is scandalous and vexatious;
    iii. Res judicata; and/or
    iv. The claim is time barred.

23. Alternatively, the Claimant ought to be required to pay a deposit order in the sum of £1,000 (pursuant to *rule 39 of the 2013 Rules)* as a condition of his being able to pursue the claim on the basis that the claim has little reasonable prospects of success.

24. The Respondent invites the Tribunal to strike out the claim (alternatively, a deposit order is made against the Claimant) on one or more of the below-mentioned bases, whether taken individually or cumulatively.

Relevant law: strike out, deposit orders and 2010 Act

The 2013 Rules

25. *Rule 37 of the 2013 Rules* states that:

> "At any stage of proceedings, either on its own initiative of on the application of a party, a 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 prospects of success…"

26. The term "no reasonable prospects of success" imposes a lower standard than the previously used terms under previous rules of "frivolous." So, a claim which is frivolous will have no reasonable prospects of success, but a claim which has no reasonable prospects of success may not be frivolous.

27. The Tribunal ought to exercise its power to strike out on this ground in rare circumstances (see *Tayside Public Transport Co td (t/a Travel Dundee) v Reilly [2012] IRLR 755*). Moreover, cases ought not, as a general principle, be struck out on this ground when the central facts are in dispute (see *North Glamorgan NHS Trust v Ezsias [2007] IRLR 603*; and the Tayside case (*ibid*) and further considerations apply in discrimination claims, but the same can be struck out in the very clearest of circumstances (see *Anyanwu v South Bank Students' Union [2001] IRLR 305*).

28. In *Chandhok v Tirkey [2015] IRLR 195*, Langstaff J indicated that strike out of discrimination claims would be rare, but may occur, for example,

where there is a time bar to jurisdiction, where there is no more than merely an assertion of a difference of treatment and a difference of a protected characteristic, or where claims have been brought so repetitively concerning the same essential circumstances that the same would be an abuse.

29. However, Tribunals ought not to be deterred from striking out claims on the basis of no reasonable prospects of success, even where a dispute of fact is involved:

"…if they are satisfied that there is indeed no reasonable prospect of the facts necessary to liability being established, and also provided they are keenly aware of the danger of reaching a conclusion in circumstances where the full evidence has not been heard and explored, perhaps particularly in the discrimination context"

(see *Ahir v British Airways plc [2017] EWCA Civ 1392* at paragraph 16, per Underhill J).

30. Further, at paragraph 24, his Lordship continued:

"…[I]n a case of this kind, where there is on the face of it a straightforward and well documented explanation for what occurred, a case cannot be allowed to proceed on the basis of a mere assertion that that explanation is not the true explanation without the claimant being able to advance some basis, even if not yet provable, for that being so. The employment judge cannot be criticised for deciding the application to strike out on the basis of the actual case being advanced."

31. In deciding whether the Claimant's claim has a reasonable prospect of success, the Tribunal ought to take the Claimant's case at its highest as set out in the claim form, unless contradicted by plainly inconsistent

documents (see *Uzegheson v London Borough of Haringey UKEAT/0312/14* at paragraph 21, per Langstaff J).

32. *Rule 39 of the 2013 Rules* states that:

"(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 prospects 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.

…"

33. When a Tribunal is considering a deposit order, it is not restricted to a consideration of the legal issues. The Tribunal is entitled to have regard to the likelihood of the party being able to establish the facts essential to the case and to reach a provisional view about the credibility of the assertions being put forward (see *Van Rensburg v Royal Borough of Kingston upon Thames UKEAT/0095/07*).

34. *Rule 2 of the 2013 Rules* sets out the overriding objective.

The 2010 Act

35. *Section 15 of the 2010 Act* sets out the definition of discrimination arising in consequence of disability. The section requires that the Claimant has been treated unfavourably, because of something arising in consequence of disability and the Respondent cannot show that the

treatment of the Claimant is a proportionate means of achieving a legitimate aim.

36. *Basildon and Thurrock NHS Foundation Trust v Weerasingh UKEAT/0397/14 (19 May 2015, unreported)* confirms that causation in a *section 15 of the 2010 Act* claim is a two stage test: identify the something and that the something arises in consequence of the Claimant's disability.

37. Further, the Respondent refers to *Kelso v Department for Work and Pensions UKEATS/0009/15/SM* in which Judge Stacey QC stated that:

> "In my opinion the case pled by the claimant under s 15 , which includes the admission made at the hearing, has no reasonable prospects of success. I agree with the EJ that the disability which the claimant claims to suffer is part of the background of the case. It is not on these pleadings possible to construe the unfavourable act of dismissal as "treatment [which] is because of something arising in consequence of the disabled person's disability. It is necessary to construe the section by considering the words used in it. Thus there must be treatment, in this case dismissal; then there must be something arising from disability, in this case the claim for benefits. Final and vitally the treatment must be "because" of the "something." The claimant has agreed in her pleadings that she was dismissed because her employer thought she had been dishonest. That dishonesty us not something arising from disability."

38. Further, in *Pnaiser v NHS England [2016] IRLR 170*, the EAT provided guidance on the application of *section 15 of the 2010 Act*. The EAT confirmed that the "something" that causes the unfavourable treatment must have at least a significant (or more than trivial) influence on the unfavourable treatment and so amount to an effective reason for or cause of it. The Tribunal must determine whether the reason / cause is "something arising in consequence of B's disability."

39. *Section 26 of the 2010 Act* sets out the definition of harassment. In order for any such claim to succeed, there requires to be unwanted conduct, which is related to the protected characteristics (in this case, disability) and which has the necessary purpose or effect as described and on the basis as set out within *section 26 of the 2010 Act*.

40. *Section 27 of the 2010 Act* sets out the definition of victimisation. In order for any such claim to succeed, there requires to be a detriment suffered, which was because of a protected act or the Respondent's belief that the claimant had done or may do a protected act.

41. *Section 57 of the 2010 Act* sets out the basis upon which trade organisations can be liable under the 2010 Act.

No prima facie case

42. The Tribunal ought to consider the claim on the basis of the Claimant as presently pleaded.

43. The Claimant has made an application to amend dated 12 September 2018. The Respondent objects to the amendment application and has set out its objections within its email to the Tribunal dated 18 September 2018.

44. Within the same email, the Respondent outlines its assertion that the strike out and deposit applications ought to be dealt with before any application to amend is determined by Tribunal. The Tribunal is hereby referred to those objections in full and reiterates that the strike out and deposit order application ought to be determined first as, among other reasons set out therein, if there is no claim in existence, there is nothing to amend.

45. Moreover, this approach would be in-keeping with the approach adopted by the Tribunal on the previous case against the Respondent

where a similar matter arose and the application to strike out and for deposit order were considered prior to any application to amend.

46. Any and all further submissions on the issue of the Claimant's application to amend are reserved in full.

47. Accordingly, the Tribunal must consider the strike out and deposit order application on the basis of the claim as pled, which consists of the ET1 and Paper Apart.

48. The Respondent asserts that, on any interpretation, the claim does not disclose a *prima facie* case of discrimination against the Respondent and has no reasonable prospects of success. The same ought to be struck out as a result.

49. The Respondent avers the following in support:

a. The ET1 and Paper Apart are difficult to decipher and it is difficult to discern from them exactly what the acts or omissions of discrimination complained of are. Without such clarity, no reasonable Tribunal could conclude discrimination;

b. Even taking the Claimant's ET1 and Paper Apart at their highest, there is nothing with either the ET1 or the Paper Apart which could be said to support any of the bases for discrimination pleaded by the Claimant. There is no or no reasonable attempt by the Claimant to explain the link between his disability and the alleged acts or omissions complained of and/or that the Claimant was put to any disadvantage contrary to the 2010 Act. Put simply, the Claimant does not state or allege with any or any proper particularity the necessary causal links required for any of his discrimination claims;

c. There are no facts pleaded which could in any way reasonably support a connection or link between any of the acts or omissions referred to and his disability. Put another way, the Claimant has pleaded no basis for a finding that any of the acts or omissions complained of were because of something arising in consequence of disability (*section 15 of the 2010 Act*), related to disability (*section 26 of the 2010 Act*) and/or because of a protected act or that the Respondent believed the Claimant had done or may do a protected act (*section 27 of the 2010 Act*). Accordingly, in the absence of such pleaded facts, no reasonable Tribunal could conclude that there were facts from which discrimination could be proven (*section 136 of the 2010 Act*). Without such facts, there is simply no basis for the claim in discrimination, whichever the legal basis pursued, to have reasonable prospects of success;

d. The Respondent sets out facts within the Response, including at paragraphs 26 – 33 of the Response, explaining the basis and lead up to the Respondent instructing Thompsons Solicitors to send a cease and desist letter. The Claimant either does not, nor can he reasonably, challenge those assertions;

e. Where there are no facts upon which the Claimant can rely (having not pleaded the same), the policy issues around striking out discrimination claims does not exist – there can be no dispute of fact requiring resolution at trial where there are no facts pleaded to support the claims in the first place. Moreover, this application can and should succeed without an extensive study of the documents or as to the credibility of witnesses;

f. There is far from an obvious or plain connection between the alleged acts or omissions complained of and the Claimant's disability and/or the alleged protected acts, whether temporally, factually or otherwise.

The absence of any or any proper and reasonable connection being pleaded by the Claimant is revealing and fatal to the Claimant's claims;

g. The above state of the pleadings of the Claimant must also be seen in context. The Claimant is not a litigant in person without knowledge of how Employment Tribunal procedure works. The Claimant is an individual who has brought various Employment Tribunal claims, including against this Respondent. Moreover, importantly, the Claimant has already had his previous claim against the Respondent struck out on, among other bases, the basis that: "…the claimant fails to connect what he describes as a lack of support from the respondent with his disability or any thing connected to it" (see paragraph 131 of the Tribunal's judgment striking out the previous claim). The Claimant is therefore well aware of the importance of a properly pleaded case and yet has failed again to connect what he describes as acts or omissions of discrimination with his disability or anything connected to it (or even the asserted protected acts);

h. On the facts of this case, on any scenario or interpretation, there is no conceivable link at all which can or could be made between the Claimant's disability and/or pleaded protected acts;

i. Any action which was or was not taken by his previous employer – and in relation to which the Claimant alleges the Respondent ought to have provided him with assistance – are actions taken by his previous employer, not the Respondent. The decisions made by the Respondent are decisions made by a separate organisation to that of the Claimant's previous employer. It is inconceivable that any actions of the previous employer (especially insofar as the same were the subject of an unsuccessful employment tribunal claim by the Claimant) can be used to create a causal connection between the Claimant's disability and the acts or omissions now complained of against the Respondent;

j. At its height, the Claimant makes mere assertions without any factual or other basis to support the same. The cease and desist letter properly and adequately explains the reasons for the cease and desist letter being provided – including the repeated complaints and correspondence by the Claimant to the Respondent (including turning up unannounced at the Respondent's premises), over a substantial period of time and well after his employment with the Council came to an end. It is inconceivable that any Tribunal would consider that the same, on any basis, amounted to an act of discrimination or victimisation and/or the Claimant has and pleads no facts which could counter the legitimate and lawful reasons provided the Respondent for the provision of the cease and desist letter to the Claimant.

50. In the circumstances, the threshold for strike out is well surpassed. Applying the above-mentioned law, this is a case which the Tribunal can and should strike out at this stage of proceedings. Insofar as strike out of claims only occurs in an exceptional case, this is an exceptional case in which strike out is plainly a course open to the Tribunal and one which the Tribunal should take.

51. Moreover, it is within the overriding objective, dealing with cases justly and proportionately (including as to expenses and Tribunal time), that the claim is struck out at this stage and that the discretion to strike out the claim ought to be exercised.

Time bar

28/51A As above, the important dates for time bar purposes are understood to be follows:

a. ACAS Early Conciliation was commenced on 26 April 2018 (Day A);
b. ACAS Early Conciliation ended on 26 May 2018 (Day B); and

c. Claim presented by the Claimant to the Employment Tribunal on 24 June 2018.

52. The limitation period for bringing claims of discrimination pursuant to the 2010 Act is 3 months (see *section 123 of the 2010 Act*).

53. Providing the most favourable interpretation to the Claimant of the extension of time provisions, any and all acts pre-dating 27 January 2018 are out of time.

54. There can be no reasonable prospects of the Claimant proving that there is conduct extending over a period of time and/or a continuing discriminatory state of affairs.

55. The Claimant fails to explain why it would be just and equitable for him to receive an extension of time in relation to any such other acts. For the avoidance of doubt, the Respondent avers that it is not just and equitable to extend time.

56. Accordingly, any and all acts or omissions taking place prior to 27 January 2018 are out of time and the Tribunal has no jurisdiction to hear them.

Res judicata / abuse of process

57. As above, the Claimant has previously brought a claim before the employment tribunal. The Claimant is seeking to relitigate the same.

58. The Claimant ought to be prevented from being able to continue with his claim on the basis that the Tribunal does not have jurisdiction to hear the claim, it amounts to an abuse of process, the Claimant is estopped from doing so and/or the principles of *res judicata* applies.

59. With respect to *res judicata* / estoppel, the Tribunal is referred to the EAT decision in *Holmes v Greater Glasgow Health Board (UKEATS/0045/11/BI)*, which summarises the principles with respect to *res judicata* and the relevant legal principles. The present claim is based upon the same or materially similar facts, which formed the

basis of the previously concluded and struck out claim against the Respondent. The claim is against the same Respondent by the same Claimant and was determined by the previous Tribunal of competent authority. The subject matter of the two claims is plainly the same in substantial and material respects and the Claimant is effectively seeking to re-litigate the same issue / one which could and should have reasonably been dealt with had it been considered a live issue by the Claimant.

60. Accordingly, the present claim is an abuse of process, is prevented by the principle of *res judicata* and is one which has no reasonable prospects of success and/or is vexatious and scandalous.

61. Further or alternatively, the Claimant ought to have brought any and all claims for failure to provide assistance and support at the same time (see *Henderson v Henderson (1843) 3 Hare 100*).

62. In all of the circumstances, there is no good reason for the claim not to be struck out and it is within the overriding for the claim to be struck out.

Scandalous and vexatious

63. The Respondent repeats all of the above in support.

64. The Respondent asserts that the claim is one which is scandalous and/or vexatious in all of the circumstances.

65. Accordingly, the claim ought to be struck out on this basis.

Deposit order

66. In the alternative to strike out, and in the event that the Tribunal does not strike out the claims, the Respondent asserts that the Claimant's claims have little reasonable prospects of success.

67. The Respondent repeats the above in support.

68. Moreover, the Respondent asserts that requiring the Claimant to pay a deposit order, where there are little reasonable prospects of success,

is in accordance with the overriding objective. The Claimant ought to be required – before putting the Respondent and the Tribunal to the time and expense of defending this claim – to pay a deposit as a condition of pursuing his claim. Requiring the Claimant to pay a deposit would require the Claimant to show a degree of conviction the allegations he is pursuing.

69. Having seen the statement of means provided by the Claimant, the Respondent seeks the full deposit order of £1,000. It is submitted that this is both affordable and a reasonable sum to set by means of a deposit being required to be paid by the Claimant as a condition of being permitted to pursue his claim. In any event, the Respondent reserves further submissions on the Claimant's ability to pay a deposit.

Conclusion

70. The Tribunal is invited to strike out the Claimant's claims.

71. Alternatively, the Tribunal is invited to make a deposit order against the Claimant.

72. Further oral submissions are reserved for the hearing.

48. I have reproduced counsel's skeleton in full as it was drafted. In the course of the Preliminary Hearing, it was agreed that his reference, in paragraph 37, to "***Judge Stacey QC***", who gave the EAT's judgment in **Kelso**, should have stated "***Lady Stacey***", the Court of Session judge, rather than HHJ Mary Stacey QC, and that the first paragraph, under ***"Time bar",*** numbered "***28"***, should be renumbered as ***"51A***".

49. Mr Crammond spoke to the terms of his written skeleton between around 10.20am, and 11.20am, when his oral submissions concluded, subject to his right to reply to the claimant's submissions, and any further submissions to be made in development of his skeleton on scandalous and vexatious proceedings, after he and the claimant had had the opportunity to consider the further case law authorities which I had identified, under reference to the

IDS Handbook, as detailed above earlier in these Reasons. I allowed an adjournment for that purpose, so that, as per **Rule 2**, parties were on an equal footing to address me on these additional authorities which I had cited.

50. Contrary to the claimant's assertions that the respondents had acted vexatiously, or unreasonably, towards the claimant, Mr Crammond also stated that his clients disputed that assertion, and in all the circumstances, he stated the present claim is "***ripe for Strike Out***." He described the Strike Out threshold as ***"well surpassed"***, and that this case is an ***"exceptional case***", where Strike Out is in accordance with the Tribunal's overriding objective.

51. While he referred me to **Henderson v Henderson**, Mr Crammond recognised that that is an English authority, and so not binding upon me, but he nonetheless commended it to me as persuasive, and good guidance on what constitutes an ***"abuse of process",*** and he further stated that it is "***right and just, appropriate and proportionate"***, for me to Strike Out the present claim on the basis of ***res judicata***.

Reply by the Claimant

52. Following an adjournment from around 11.30am, to allow the clerk to copy, and distribute the copied extracts from the **IDS Handbook**, and time for both parties to consider matters, it then being around 12.20pm, and Mr Crammond having concluded is oral submissions, before the adjournment, I invited the claimant to reply.

53. He did so, referring to his own written submissions, as emailed to the Tribunal that morning, at 05:22am, enclosing a 29-page typewritten document, and stating that, having had an opportunity during the adjournment to read the **IDS** extracts, he was ready to address the Tribunal in opposition to Mr Crammond's submissions seeking Strike Out, which failing Deposit Order.

54. As recorded earlier in these Reasons, the claimant opened by confirming his statement of means and assets, and counsel for the respondents confirmed

that he was happy that document was taken as read, and no oral evidence was required from the claimant. The claimant further confirmed that there had been no material change in his circumstances since that statement of means had been intimated to the Tribunal, and copied to the respondents' solicitor, on 29 October 2018.

55. When it came to speaking to his written submissions, where the claimant told me that he would have written more, if he had had more time, I clarified to the claimant that he did not need to read it *verbatim,* but it would suffice for him to highlight the main points of his objections, and refer me to case law, where appropriate. I re-assured him, and Mr Crammond, that I would read both parties' written submissions most carefully when writing up this Judgment and coming to my decision.

56. A copy of the claimant's written submission is held on casefile, so I do not reproduce it here *verbatim*, but I note and record that I have taken all that he has written, and all that he has said in oral submissions, into account in coming to this my judicial determination of this opposed application.

57. That said, meantime, it will suffice to reproduce here the full terms of his Executive Summary, complete with footnotes, at pages 3 to 6 of his written submissions, but subject to a redaction that I have made, under **Rule 50**, at his paragraph 3a below, as follows: -

EXECUTIVE SUMMARY

1. The parties are made up, in this instance, of
    a. **claimant Brian Gourlay** a member of GMB trade union
        i. contrary to respondent's skeleton at 49(g) which states *"… The Claimant .. not a litigant in person without knowledge of how Employment Tribunal procedure works. … individual .. brought various ET claims, … "…fails to connect what he describes as a lack of support from the respondent with his disability or anything connected to it" (see para 131 of*

Tribunal's judgment striking out the previous claim). The Claimant is therefore well aware of the importance of a properly pleaded case … has failed again to connect what he describes as acts or omissions of discrimination with his disability or anything connected to it (or even the asserted protected acts) ;"

ii. the truth is the clamant is a party litigant whom has had to struggle continually to ingather information, to get to the truth, and whom has **HAD TO LEARN** of, among other things *whilst disabled*, ET proceedings i.e. whilst having to pay significantly for advice and assistance which he has been entitled to **BUT denied.**

iii. The claimant is, in essence, a tired, weary and disabled party litigant whom has received no assistance of measurable value but rather has been side-lined, deceived, lied to and 'sent to Coventry' by his trade union. Why?

b. All the while **respondent GMB** is a campaigning trade union focused on protecting GMB members in their workplaces … GMB has almost 639,000 members … [1]

i. **respondent's legal representatives** are Thompsons Personal Injury & Accident Solicitors Scotland - *always act for the underdog - the accident victim or worker*. [2]

---

[1] GMB, available at http://www.gmb.org.uk/about/about-gmb - is a campaigning trade union **focused on protecting GMB members** in their workplaces …

- GMB has **almost 639,000 members …**
- Every day of the year GMB offers **protection** at work and **solves problems** for GMB members. GMB **provide back up**, **representation** and **advice** on every issue related to members life at work. Backing up the reps are **full time GMB Organisers**. GMB employ **a team of experts** on a range of issues including **legal specialists**, **health and safety experts**, **pension specialists**, human resource management staff and experts on terms and conditions. In fact, if you need advice and support about anything to do with work **GMB can help you**. GMB's fundamental approach is that together we can achieve more than we can do on our own.

[2] Thompsons Solicitors and Solicitor Advocates available at https://www.thompsons-scotland.co.uk/accident-lawyers accessed Tuesday, 06 November 2018 - is an award-winning firm of solicitors and accident lawyers with a passion for justice.

2. At all material times the claimant has been a fully paid up GMB member.
3. At all material times the claimant has suffered from Multiple Sclerosis *(diagnosed at Glasgow's Southern General Hospital September 1996).*

a. The claimant does take various medications to assist manage MS and other illnesses. Medications include:

[**Redacted by the Judge**, in terms of **Rule 50 of the Employment Tribunals Rules of Procedure 2013**, on the grounds of privacy, as this Judgment will be published online.]

4. The claimant was, at all material times, a GMB trade union representative.
    a. GMB FTO Tony Dowling did state to the claimant the claimant was not a GMB representative. Why? Because the claimant did not undertake a GMB course.
    b. However, the claimant **did advise** Mr Dowling that GMB had been notified in writing that he (the claimant) was absent with Multiple Sclerosis at time of training. Note: the training was on conducting risk assessment. What caused Mr Dowling to make that statement is not yet known.

5. The claimant having submitted his ET1 on limited knowledge of facts the respondents then laid their foundation stone with an ET3 of deception and untruths.

6. To date: GMB have **knowingly** caused false and misleading information to be presented to Employment Judge McPherson.

a. Respondents then representative, Ms Hayley Johnson, presented an ET3 and PHA which disputed the claimant's disability status of medical condition Multiple Sclerosis.

7. As procedure progressed **the ET3 and PHA has disputed the claimant's disability status**.
Conversely, at 14 January 2016 09:14 from the respondents (GMB FTO Ude Adigwe) to Nuala Quinn-Ross, administration assistant at West Dunbartonshire Council an email **stated**, "Please find attached fit notes from Mr Gourlay that we may refer to in his case.

   i. *"You are fully aware of Mr Gourlay's medical condition, which is compounded by the stress that your disciplinary process has put him under. You are legally required to make adjustments to ensure Mr Gourlay is not disadvantaged in this process as a result of his medical condition.*

Please note we therefore expect his Appeal to be recorded, we deem this to be a reasonable adjustment. We have serious concerns that you have failed to make reasonable adjustments to properly support Mr Gourlay in the past. As a result, we are reminding you of your legal obligations under the equality legislation. Please ensure full compliance with them."

b. ***Please find attached fit notes from Mr Gourlay.*** The claimant has requested to be provided these 'attached fit notes from Mr Deans at Fri 07/09/2018 12:20, "Would you please oblige me and have someone forward me the 20 pages referred to in the PDF titled, '12 - 20160120 - NQR to Ude - legally required to make adjustments to ensure Mr Gourlay is not disadvantaged'. Thanks."
c. The claimant received no acknowledgment or response.
d. In essence: the knowledge/information re MS i.e. that the claimant had been instructed to provide to the respondent's representative, by Employment Judge McPherson at PH on 05 September 2018, was **already in the possession of GMB**.

8. **The ET3 and PHA disputed the claimant's disability status.** Conversely, in written submission 25 August 2016 i.e. at day 6 (of 6) at *Appeal against dismissal without notice*, process initiation commencing 08 October 2015 and concluding on 25 August 2016, Mr Ude Adigwe did state in writing and spoke to that document that, among other things,
    a. *"He also explained that, as a sufferer of **Multiple Sclerosis**, he would require certain adjustments to the new working environment to alleviate the impact of the move on his condition. These adjustments included minor changes to his seating area, a display screen equipment assessment as his condition affects his eyesight, and for his work documents, a storage area that didn't require him to squat down."*
    b. *"Unfortunately, Mr Gourlay's managers failed to give due weight to his professional opinion; they failed to act upon his legitimate and well-founded concerns in regard of his **Multiple Sclerosis**; and they abjectly and routinely failed to act in accordance with West Dunbartonshire Council policies and procedures."*
    c. *"He is 53 years old, he suffers from **Multiple Sclerosis**, a lifelong, potentially (sic) degenerative condition, and he has been dismissed on a charge of gross misconduct. He is virtually unemployable whilst those that ignored his pleadings, failed to follow procedure and obstructed due process are free to carry on as before."*

9. The claimant did previously provide written evidence of Multiple Sclerosis to the head of employment law at Thompsons Mr David Martyn before submission of Gourlay -v- GMB case 4109518/2018.

10. The claimant respectfully states that he is up against legal representatives Thompsons whom advise on their website, among other things, *"We never represent insurers or big business: **we always act for the underdog** – the accident victim or worker. Nor do we limit ourselves to dealing with the law as it is - we actively campaign to make the law better, seeking reforms that will help workers, accident victims and their families."*

a. The claimant respectfully proposes that Thompsons very evidently **do not always act for the underdog** but conversely represent demonstrable liars.
b. On that respectfully stated **FACT** the claimant propose that he is the underdog.

11. The respondent has made application to strikeout the claimant ET1 failing that deposit order for £1,000 and at paragraph 69 state, *"the Respondent reserves further submissions on the Claimant's ability to pay a deposit"*.

12. The claimant does object to strikeout and failing that to pay any deposit.

13. The claimant respectfully proposes the respondent arguments are flawed, are factually inaccurate and are in themselves vexatious. Further, the content of the skeleton contains aspects that demonstrate a persistent state of discriminatory affairs have pervaded from GMB, to David Martyn's authorised and ***clearly pled claim*** *re* the "cease & desist" letter to the skeleton at 49(j), *including turning up unannounced at the Respondent's premises*.

14. The claimant respectfully proposes what kind of operation are GMB Scotland running when a disabled member whom has not been receiving meaningful responses, if at all, and is desperately seeking assistance – and states so, does when attending GMB Offices have that then described as '*turning up unannounced at the Respondent's premises'.*
    a. Exactly where in GMB Rule book or on any sign or instruction are GMB members not permitted to attend GMB offices?
    b. Aka harassment i.e. the creation of an intimidating atmosphere and environment for the claimant.

15. The claimant states that he has not been scandalous and/or vexatious.

58. As is the claimant's writing style, as can be seen from the above, his narrative was set forth across his Executive Summary, and 5 separate appendices, each with its own comments, footnotes, and quotations, sometimes with colour highlighting points of explanation, or emphasis, marked up by the claimant. While I have no doubt that the claimant has spent considerable time and effort in producing such submissions, their format does not assist easy-reading.

59. He repeatedly emphasised his view that the respondents' ET3 was "***deception and untruths***", and that the GMB had "***knowingly caused false and misleading information"*** to be presented to the Tribunal, and that their arguments are "***flawed, are factually inaccurate and are in themselves vexatious***"

60. I had to remind him, on more than one occasion, that we were not dealing, at this Preliminary Hearing with his application for Strike Out of the respondents' ET3 response, but their application for Strike Out of his claim, and he should address me on his grounds of opposition to that application by them against him.

61. The claimant stated that he believed his claim had prospects, that he was neither scandalous or vexatious, and that he objected to paying any Deposit Order, and given his means, he further submitted that £1,000 was a significant amount in the overall scheme of things.

62. He accepted that he had turned up at the GMB offices, in January 2018, but he denied that it had been unannounced, and he complained to me that the GMB had given what had happened an ***"implied connotation***", leading to issue of the "***cease and desist***" letter from Thompsons on 1 February 2018.

63. Further, the claimant started that he did not understand the respondents' skeleton argument about time-bar, and "***days A and B***", at paragraph 51A of Mr Crammond's submissions, because, as far as the claimant was concerned, he had submitted his ET1 claim form in time, and he added that

he did not agree with the respondents' skeleton, at paragraph 54, about a continuing act, and he wished to refer to **Hendricks**.

64. The claimant then stated that there was a "***continuing discriminatory state of affairs***", where the GMB were creating an intimidating atmosphere for him by not engaging with him. He described the respondents' defences as "***a sham"***, and I had, again, to remind him to focus on what was relevant and necessary for this Preliminary Hearing.

65. He accepted, as a matter of admission, that he had received the ***"cease and desist"*** letter, and that his complaint about that letter had been accepted by me, as "***clearly pled***", at the Case Management Preliminary Hearing, and that there had been a "***common theme***" by the respondents to provide misleading information to the Tribunal.

66. The claimant described his ET1 as "***true and accurate***", and he said reading it was "***fine"***, although, commenting on Mr Crammond's difficulty in deciphering it, the claimant did accept that maybe, it was his writing style, but he did not know.

67. Further, the claimant stated that his ET1, being true and accurate, stood in contrast to the ET3 response. He submitted that the respondents are "***lying"***, and that "***perjury in action***" would be the result if the case is not struck out, and it goes to a full Hearing, as, on the evidence produced by the GMB, he stated there was a "***high likelihood of GMB witnesses perjuring themselves, and telling untruths, or they would have to, in essence, dob others in."***

68. When the claimant then referred to "***demonstrable lies***" by the respondents, I had to remind him, yet again, that this Preliminary Hearing was not a hearing into his application for Strike Out of the ET3, but to address the respondents' application for Strike Out of his claim, and he should focus his oral submissions to me on that matter.

69. In reply, the claimant stated that he did not understand the respondents' argument that ***res judicata*** applies, and that he was "***pleading a case based on 1st February 2018***", i.e. the date of the "***cease and desist"*** letter.

70. He described that as ***"an entirely new element***" of his case, and that what is in his ET1 is "***background information***", but "***the essence of my claim is the "cease and desist" letter",*** and, as he had said at the Case Management Preliminary Hearing before me, that was "***the catalyst***" for this present claim against the respondents.

71. Next, the claimant disputed that his claim is scandalous or vexatious, either in bringing it, or in conducting the case, and he added that, to that allegation by the respondents, there was "***an all-embracing denial***" by him. He submitted that the Strike Out should be refused, and, if refused, he sought to have the Tribunal deal with his proposed amendment, opposed by the respondents, and his application for Strike Out of the ET3, also opposed by the respondents.

72. Until that time, the claimant stated that further procedure to list this case for any substantive Hearing on its merits was not appropriate, as given his **Rule 6** complaint to the GMB under their rule-book, he wanted to expand upon that at paragraph 24 of his ET1 claim form. Rather than a ***"red or yellow card***", for Strike Out, which failing Deposit Order, the claimant stated that he sought a "***green light"*** to proceed with his claim.

73. Proceedings adjourned for lunch break between just after 1.05pm, and just after 2.00pm. On resuming his oral submissions, the claimant stated that, with reference to the authorities listed in his Appendix 3, at paragraph 65, he had now ruled out relying on **Hague**, but he continued to rely on his cited passages from **Hendricks, Bennett, Balls** and **Wright**, and he asserted that there was a continuing discriminatory state of affairs, he disputed that he had been scandalous or misused the legal process to vilify others or anyone, and he emphasised that it was important that I, as the Judge, take account of the "***whole picture."***

74. The claimant further stated that, in the cited passage from **Romanowska**, at paragraph 21, I should substitute "***GMB***" for "**employer**", that I should look at the whole of paragraph 30 in **Tayside v Reilly,** and, as regards paragraph 20, in **Chandhok v Tirkey,** all 3 cases having been cited by the respondents, he submitted that his claim is not an abuse, and he objected to that description being used by counsel for the respondents.

75. Thereafter, the claimant added that "***my claim is 1st February***", and he stated it was "***not repetitive, but unique in its own context***". When I asked him to clarify what he meant by that comment, the claimant then stated that "***the only act I'm relying on is the 1st February 2018 letter and using Hendricks to allow supporting background."***

76. Further, the claimant then clarified what was his highlighting, and commentary, in paragraph 76 of his written submission, about the **Ahir** judgment, cited by the respondents, and that his green highlighted commentary was on the respondents' ET3 response.

77. Likewise, at his paragraph 77, commenting on the **Uzegheson** judgment, cited by the respondents, the claimant stated that his green commentary was not for this Preliminary Hearing, as he recognised now that this was not a hearing into his Strike Out application against the respondents' ET3.

78. Next, the claimant invited me to disregard that part of his text, at his paragraph 80, about the **Kelso** judgment, cited by the respondents, stating that the passage reading ***"a."… to ensure your former employer…GMB Regional Secretary"*** was duplicated there, it having appeared originally at his paragraph 79c.

79. Turning them to his footnote (1) on page 3 of his written submission, part of paragraph 1 of his Executive Summary, the claimant advised me that "it ***is too early for the burden of proof to even be contemplated"***, as referred to in the respondents' skeleton argument at paragraph 49c referring to **Section 136 of the Equality Act 2010.**

80. The claimant added that he did not accept counsel's submission, at paragraph 49c, he disputed it, and if his claim is not struck out, then he will seek an amendment, and reversal of the burden of proof, and Strike Out of the ET3 response.

81. Turning to his Appendices 4 and 5, the claimant explained that they are a copy and paste from ***Harvey***, and he referred me to his yellow highlighted passages, before turning his attention to the **IDS Handbook** excerpted pages cited by me.

82. The claimant, commenting on **Marler**, and **Barker**, stated that he is pursuing this case "***with the expectation of success***", and he denied that it is vexatious, explaining that that is his view, "***more so, as more information comes to light"*** from the respondents' replies to his Subject Access requests, and minutes of his West Dunbartonshire Council ("***WDC***") appeal against dismissal, heard between 18 February and 25 August 2016.

83. Specifically, the claimant advised me that his solicitor in his other ongoing Tribunal litigation against West Dunbartonshire Council , Ms Dalziel, had only received these minutes last Friday from Mr Ettles, the Council's solicitor. He was critical that the GMB were meant to obtain these minutes on his behalf, but had not done so.

84. As it was not clear to me what minutes the claimant was alluding to, I enquired of the claimant, whether these were the usual, local authority, anodyne minutes, in very brief format, or some transcript of proceedings at his internal appeal before WDC. The claimant advised that these minutes were not anodyne, but more substantial, but the GMB had not got those minutes for him.

85. Referring then to the **Barker** judgment, the claimant stated that his case does not mirror the image set by Lord Bingham, and that he was simply seeking assistance from the GMB as his trade union, as he was trying to process his ill health retiral and pension from the Council, through GMB, as denied him

by WDC, but he insisted that the GMB had failed to act on his behalf by making representations for him.

86. The claimant then referred me to page 1054 of the **IDS Handbook**, at paragraph [20.53] about ***"Litigants in person***." The way the Tribunal clerk had copied the excerpts, as 2 pages per one A4 sheet, the next page, page 1055, included the paragraph [20.55] that I had referenced as it discusses **Marler** and **Barker**.

87. Instead, the claimant referred me to the narrative about to **AQ Ltd v Holden [2012] IRLR 648,** holding that a Tribunal cannot, and should not, judge a litigant in person by the same standards as a professional representative, and that a claimant simply being "***misguided***" is not sufficient to establish vexatious conduct. He further stated that he had been continually endeavouring to get the GMB to provide him with advice and support.

88. Further, the clamant explained to me, a pension and ill-health retirement are employment law matters that the GMB had failed to address, and he stated further that he has "***demonstrable evidence***" that the HR Manager at WDC stopped his ill-health retiral, and the GMB had done nothing with that knowledge.

89. While Mr Crammond, counsel for the respondents, had referred to ***"mere assertions"*** by the claimant, the claimant stated that the "***cease and desist***" letter was clearly pled, it is not an assertion, but it is an agreed fact that there was that letter from Thompsons on behalf of the GMB, and that is ***"clearly pled"*** is shown at paragraph 41 of my PH Note, at page 117 of the respondents' Bundle.

90. He stated that he had read that paragraph 41 as me making a finding that the "***cease and desist***" letter was clearly pled. I pause here to note and record that while the claimant sees that as a finding, I do not – at the Case Management PH, I made no findings in fact, I merely recorded parties' submissions, as no evidence was led, and made case management orders about future procedure in this case.

Reply for the Respondents

91. The claimant's oral submissions having concluded, at around 2.50pm, I then invited Mr Crammond, counsel for the respondents, to advise whether or not he wished to say anything further by way of a response. In reply, he stated that he had already addressed matters in his earlier submissions, which he adopted, and he acknowledged the excerpts from the **IDS Handbook** helpfully provided by the Tribunal.

92. Further, in developing his written submission about scandalous and vexatious conduct, Mr Crammond stated that that can be argued in respect of both the bringing and conduct of a claim, and referring to the **IDS Handbook**, at page 591, paragraph [11.118], he referred to the commentary there about **Bennett, Marler** and **Barker**, and submitted that the **Barker** case was the situation here, where the claimant had brought a case against the GMB with "***no discernible basis***."

93. Under reference to page 1055, at paragraph [20.55], counsel added that the Court of Appeal judgment, in **Scott v Russell [2013] EWCA Civ. 1432**, approved Lord Bingham's definition of "***vexatious***" in **Barker** and the claimant's bringing and conduct of this claim falls within those definitions of vexatious conduct.

94. Further, added Mr Crammond, the claimant's submissions at this Preliminary Hearing might be described as "***intemperate at best***", against the respondents, and their representatives, and the claimant at this Hearing says his ET1 is "***all about the "cease and desist" letter*** ", when any reasonable person, reading his ET1, would be forgiven for thinking it was only about that matter, as the ET1 "***spins out well beyond the "cease and desist" letter."*** All of this is ***"inconvenient to the respondents"*** submitted Mr Crammond.

95. Counsel for the respondents then added that the claimant had had the Case Management PH, and this point about the "***cease and desist"*** letter being all the case was about was not clarified then, and now, there was further procedure , including a Schedule of Loss from the claimant, which seeks to

recover legal expenses and costs incurred, but counsel submitted the claimant cannot have a realistic expectation that his complaint about the "***cease and desist"*** letter could assist him in recovering over £60,000 plus injury to feelings from the GMB.

96. Further, added Mr Crammond, he did not see how the claimant's Schedule of Loss in this case assisted the claimant in pursuing ill-health retirement, and / or a pension, through the GMB, and he added that "***that much must be obvious to any person, let alone this claimant who has experience of litigating in the Employment Tribunal."***

Further Submissions requested by the Tribunal

97. It then being just before 3.00pm, and Mr Crammond's reply having concluded, I raised a further matter with both parties.

98. On the matter of ***res judicata***, raised by the respondents, I stated that I was aware, from previous judicial experience in another case several years ago, of a judgment from the UK Supreme Court, which I identified as **Virgin Atlantic Airways v Zodiac Seats UK Ltd [2014] 1 AC 160,** which had been cited more recently in an unreported EAT Judgment by His Honour Judge Hand QC in **Mrs. C Ochieng v Stantonbury Campus [2016] UKEAT/0304/15/ RN.**

99. Further, on the matter of dealing with party litigants**,** as referred to by the claimant in citing from **AQ Ltd v Holden,** I stated that I was aware of a more recent Supreme Court judgment on that matter, from Lord Sumption, in **Barton v Wright Hassall LLP [2018] UKSC 12.**

100. I allowed both parties to submit written representation, within 7 days, with any additional written submissions either party wished to make to comment on the **Ochieng** EAT Judgment, and the cases referred to therein, and the clerk's letter to both parties, sent later that afternoon, advised them that I would thereafter consider their further written submissions, and take them into account in my private deliberations, when writing up this Judgment.

Reserved Judgment

101. This Preliminary Hearing concluded at 3.05pm, when I reserved Judgment, to follow, in writing, with Reasons, in due course.

102. After the close of this Preliminary Hearing, on the late afternoon of 7 November 2018, the claimant wrote to the Tribunal office commenting that , "***while pragmatically outwith ET Glasgow control***", excessive noise from an adjacent building site did present "***a somewhat unfavourable environment",*** but while "***very distracting***" and "***notably inconvenient at times",*** he was not complaining that the noise had been of any detriment to him, ***"just an unhelpful and unavoidable issue outwith control of Glasgow ET",*** and no response was expected from the Tribunal.

103. Nonetheless, on instructions from me, the Tribunal clerk wrote to the claimant, with copy to Mr Deans for the respondents, stating that the claimant's comments had been noted, and that I was satisfied that, by appropriate pause, and clarification, during the Preliminary Hearing, I had noted both parties' oral submissions

Parties' Further Written Representations

104. Thereafter, on 14 November 2018, both parties duly submitted their further written representations. The Tribunal acknowledged receipt of them, on 16 November 2018, and advised both parties that I would consider them when writing up this Judgment, which I hoped to have completed within around the next 4 weeks.

105. A copy of both parties' further written representations is held on casefile, so I do not reproduce them here *verbatim*, but I note and record that I have taken them both into account in coming to this my final decision.

Claimant's Further Written Representations

106. That said, meantime, it will suffice to note that the claimant provided his additional written submissions and comment on the EAT judgment cited by

me, being **Ochieng v Stantonbury Campus** (at his pages 2 to 4) ; **Johnson v Gore Wood** (page 5); **Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd** (pages 6 to 8); **Attorney General v Barker** (pages 9 and 10) ; and **Matuszowicz v Kingston Upon Hull City Council** (page 11). His covering letter to the Tribunal was accompanied by a typewritten, 10 page set of his substantive comments on the cited case law authorities

107. As with his principal written submissions, and as is the claimant's writing style, his comments on each of the cited cases came with their own footnotes, and quotations, sometimes with colour highlighting points of explanation, or emphasis, marked up by the claimant. Of particular note, and so I feel it appropriate to quote here *verbatim*, are the terms of his paragraphs 20 to 24 of his comments on **Ochieng**, as follows:-

> "20. The claimant respectfully states he does not believe he has repeated factual narrative repeated in the earlier claim 638. Some factual input is relevant, it is respectfully proposed, to the victimisation claim i.e. that relates to the previous claim and in regard discrimination over time. The, to the claimant, evident overlap between estoppel and relying on a previous claim and quoting that same claim is where the claimant appreciates he is getting out his depth. Especially e.g. when lies are **knowingly told** in evidence or in ET3 etc.
>
> 21. If the claimant's claim is struck out in full or in part he believes he shall be able to perhaps proceed with any relevant materials. The claimant accepts that GMB have put a lot of work into their strike-out application. The claimant respectfully proposes that having read the Barker case that Barker and Gourlay are poles apart i.e. opposite ends of the 'spectrum' and that the claimant was not and is not vexatious. That nothing of his cease and desist claim had been pled previously. The claimant was not repeating allegation i.e. cease and desist was new. The cease and desist was not out

of time. The claimant had no prior knowledge of the cease and desist letter whereby he could have raised that matter in claim 638. The claim had not been withdrawn. The claimant **alleges collusion has occurred** and that should be taken into account in regard estoppel.

22. With reference to Ochieng i.e. referring to Virgin the claimant does respectfully state he has not been abusive and has not made duplicate claims unless referral to establish an ongoing act.

23.(v) what has been known as issue estoppel prevents "the raising in subsequent proceedings of points which (i) were not raised in the earlier proceedings or (ii) were raised unsuccessfully" but with an exception of "special circumstances where this would cause injustice"; but where the point "was not raised, the bar will usually be absolute if it could with reasonable diligence and should in all the circumstances have been raised" (see paragraph 22).

24. The claimant respectfully proposes his case meets the criteria for "special circumstances" especially when **collusion is alleged and demonstrable lies have been told in ET3**. The claimant accepts that Employment Judge McPherson has directed to focus on the response to the strikeout but as collusion is alleged the claimant respectfully proposes that the, *'knowingly providing false and misleading information to an Employment Judge'* is sufficiently serious that, respectfully, it does merit that cognisance be taken of events."

108. The claimant relies upon ***"special circumstances***" as he alleges that there has been "***collusion as alleged and demonstrable lies have been said in ET3".*** These are serious allegations to make against the respondents, and their professional legal advisers, and I note that the claimant repeats that allegation at paragraph 32 of his comments on **Virgin Atlantic** : "The claimant comments and proposes/alleges that collusion has taken place in Gourlay -

v- GMB e.g. Ms Johnson did **factually identify that GMB have, in essence, lied."**

109. Further, at paragraph 25, the claimant advises that he has submitted a "***new claim***". This follows upon his paragraph 10, referring to obtaining a fresh ACAS EC certificate on 13 November 2018. If and when the claimant raises a fresh claim against these respondents, then that new claim will go through the standard process of acceptance, notice of claim, ET3 response, and then Initial Consideration, and any further procedure that might be appropriate. That new claim is not a matter for me in this Judgment, although, for reasons of judicial continuity, it is likely to be allocated to me by the Tribunal administration for case management.

110. Next, I refer to the claimant's narrative, at his paragraphs 40 and 41 where he comments about **Attorney General v Barker**. Again, given the terms of his comments, I consider it appropriate to quote here *verbatim*, as follows:-

> "40. 'Without any reasonable ground': the claimant respectfully proposes he has had reasonable grounds to complain about the actions and inactions etc of both WDC and GMB i.e. as demonstrated by the inactions of GMB to, respectfully proposed, **correct a wrong**.
>
> 41. The claimant has been, in essence, using terminology of then then GMB FTO Mick Conroy that the claimant has been shafted by WDC. The claimant does at Wednesday, 14 November 2018 respectfully propose that GMB have shafted the claimant too."

111. I pause here to note and record that the claimant's repeated use of the word "***shafted"*** is full of emotion, and while such inflammatory and vulgar language may be common in informal speech, its use in a formal response to this Tribunal and his reply to legal arguments is inappropriate.

112. It does no credit to the claimant, who otherwise has generally shown himself to be an articulate and well-educated person in drafting his written submissions for the Tribunal.

113. What is clear is that, despite the passage of time, the claimant remains seriously aggrieved at the acts and omissions, as he sees them, of both WDC as his former employer, and GMB as his trade union.

114. I regard his use of the word "***shafted"*** to be both unfortunate and misguided, and perhaps used in the heat of the moment if used once, but its repetition suggests to me a deliberate use of that word, which can be considered as evidencing malice and ill-will on his part towards both the GMB, and WDC.

Respondents' Supplementary Skeleton Argument

115. The respondents' written submissions, with supplementary skeleton argument, were also intimated on 14 November 2018. As per paragraph 3 of Mr Crammond's supplementary skeleton, the contents of this skeleton argument are to be read in conjunction with the previously provided written and oral submissions made on behalf of the respondents for the purposes of and at the Preliminary Hearing held on 7 November 2018.

116. For present purposes, I refer to, and reproduce here, *verbatim,* the terms of his paragraphs 5 to 12, as follows:-

> "5. Firstly, the above-mentioned cases are primarily relevant to the issues arising in relation to the arguments as to *res judicata* (including the *Henderson v Henderson* argument) and abuse of process.
>
> 6. Secondly, by way of general proposition, the abovementioned authorities support and bolster the assertions already made on behalf of the Respondent insofar as they pertain to the issues of *res judicata* and abuse of process. Indeed, the authorities (including of the Supreme Court in *Virgin Atlantic*) most certainly bolster the *Henderson v Henderson* argument pursued by the Respondent.
>
> 7. The Tribunal will have regard to the entirety of both the EAT and Supreme Court decision. Within those authorities there is also

useful reference to other authorities, such as *Johnson v Gore Wood [2000] UKHL 65*, to which the Tribunal will have regard.

8. As to the *Ochieng* authority, the Tribunal is referred, in particular to:

   a. paragraph 10: this is a good summary of the principles, and with reference to the abovementioned authorities, in relation *res judicata* (and abuse of process, including the *Henderson v Henderson* principles, albeit, as recognised at the hearing, they arise in the context of English case law, but remain ether binding and/or, at the very least, persuasive to the Tribunal. Within the judgment, in summary, it is stated that the following principles emerge:

      i. the argument that *Henderson v Henderson* is not about *res judicata* estoppel at all but about abuse of process, to which different considerations apply, is misconceived;

      ii. *res judicata* and abuse of process are "juridically very different" because the former is a matter of substantive law and the latter is a matter of procedure but "they share the common underlying purpose of limiting abusive and duplicative litigation;"

      iii. the bar to re-litigation or further litigation will be absolute when an attempt is made to raise points in subsequent proceedings "which had to be and were decided [in the earlier proceedings] in order to establish the existence or non existence of a cause of action;"

      iv. re-litigation or further litigation will also be barred when an attempt is made to raise points in subsequent proceedings which are "essential to the existence or non existence of a cause of action" even where those points were not decided in

the earlier proceedings based on the same cause of action because they had not been raised then "if they could with reasonable diligence and should in all the circumstances have been raised;"

v. what has been known as issue estoppel prevents "the raising in subsequent proceedings of points which (i) were not raised in the earlier proceedings or (ii) were raised unsuccessfully" but with an exception of "special circumstances where this would cause injustice;" but where the point "was not raised, the bar will usually be absolute if it could with reasonable diligence and should in the all the circumstances have been raised."

b. paragraph 13: which is a reminder of the terms of *rule 37 of the 2013 Rules*, which includes reference to *rule 37(1)(a)* and *rule 37(1)(b)*, the latter being the ground of strike out where the manner in which proceedings have been conducted has been scandalous, unreasonable or vexatious. Both limbs of the *rule 37 of the 2013 Rules* test have relevance and application in the present application and, it is submitted, that a claim which is found to be an abuse of process and/or barred by reason of *res judicata* can also lead to it being struck out as being a claim which has no reasonable prospects of success as well as it being scandalous and/or vexatious.

9. As to the *Virgin Atlantic* authority, the Tribunal is referred to paragraphs 17 – 26 in particular for the Supreme Court's summary of the law of *res judicata* and the legal principles applicable. The principles are well summarised by the EAT in the above case. However, the Tribunal is referred to the same in full in the Supreme Court judgment.

10 Accordingly, the Respondent asserts that the above authorities support (and indeed strengthen) its position on its application to strike out the Claimant's claim.

11. Where and insofar as the Claimant's ET1 and Paper Apart seek to make claims regarding issues which have already been the subject of the previous strike out decision and/or are matters which could with reasonable diligence have been brought as part of the previous claim (and there is simply no good reason any such claim which could have been brought at the time of the earlier claim was not so brought) which the Claimant made against the Respondent, the same amount to an abuse of process and/or ought to be prevented from proceeding as a result of the *res judicata* principles.

12. The underlying policy issues which are enunciated within these decisions are apparent in the present case, especially where the recent claim is brought some years after the previous claim and it having been struck out by the Employment Tribunal. The Respondent is entitled to finality of litigation in relation to such matters and there is no good reason to suggest otherwise. Where such matters were or could have been brought in the previous claim, and insofar as they are even pursued by the Claimant as claims in the present action (noting that the Claimant appears to now accept at the hearing on 7 November 2018 that the only act of discrimination relied upon is the sending of the cease and desist letter dated 1 February 2018), such claims ought be struck out as a result of the above."

Issue for determination by the Tribunal

117. Despite the claimant's attempts, in submissions, to run arguments about why the respondents' ET3 response should be struck out by the Tribunal, the only live issue for determination at this Preliminary Hearing was the preliminary

issue of the respondents' application for Strike Out of the claim, failing which a Deposit Order.

Relevant Law

118. Mr Crammond's written skeleton argument, as reproduced above at paragraph 37 of these Reasons, includes reference to the relevant statutory provisions to be found in the **Equality Act 2010**, specifically **Sections 15, 26, 27, 57, 109 and 136**, and 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.

119. **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.

120. 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.

121. In **Abertawe Bro Morgannwg University Health Board v Ferguson UKEAT/0044/13,** 24 April 2013, **[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.

122. 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.

123. 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.

124. 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.

125. 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.

126. 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.

127. 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."***

128. Although not cited to me by either party at this Preliminary Hearing, although I did refer to it in my 2016 Judgment striking out the claimant's 2015 claim against the GMB, I am aware that in a now reported EAT judgment by Mrs. Justice Simler DBE, the President of the Employment Appeal Tribunal, in **Morgan v Royal Mencap Society [2016] IRLR 428**, she helpfully analyses the principles laid down in the case law, and their application, at paragraphs 13 and 14 of her judgment, where, at paragraph 14, she states that the power to strike out a case can properly be exercised without hearing evidence.

129. Again, while not cited to me, by either party, although I also referred to it in my 2016 Judgment, I am aware that 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."

130. So too have I considered **Dolby**, as I did in my 2016 Judgment, 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."

131. 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, which I again referred to it in my 2016 Judgment, 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."***

132. 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.

133. 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***."

134. 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.

135. 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.

136. 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.

137. **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.

138. 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.

139. 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**.**

140. 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.

141. 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.

142. 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)."

143. 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."***

144. 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.

145. 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.

146. In the present case, the claimants' complaints in the ET1 claim form are registered by the Tribunal under only one administrative jurisdictional code, for disability discrimination, being ***"DDA***", so this is not a case where I need

to concern myself with any other, and separate, head 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.

147. Finally, although I was not referred to it by either party, 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.

148. **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.***"

149. 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."

150. For the purposes of this Judgment, I do not need to address the differing approaches identified by Lady Smith in ***Simpson***, and Mrs Justice Simler in ***Hemdan***. I suspect, however, that it will only be a matter of time before another Employment Judge somewhere else, in another case, will have to wrestle with the competing views of these two learned EAT Judges, and decide what is the correct approach under the current 2013 Rules.

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

Discussion and Disposal

152. Having now carefully considered parties` submissions, written and oral, along with their further written representations, 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 his own representations opposing the respondent's written application for Strike Out, which failing Deposit Order.

153. **Rule 37** entitles an Employment Tribunal to strike out a claim in certain defined circumstances, (a) to (e). Here, the respondents' submissions focus their application for Strike Out of the claim under **Rule 37(1) (a)** on the basis that the claim has no reasonable prospect of success, or it is scandalous or vexatious, the latter being also a separate head under **Rule 37(1)(b)** along with unreasonable conduct.

154. 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 one of those cases where it is appropriate to Strike Out the whole of the claim without the case proceeding to be determined on its merits at a Final Hearing.

155. I do so because despite the claimant's submission that I should not Strike Out but allow the case to go forward to a Final Hearing, I am satisfied that the legal arguments submitted by Mr Crammond, counsel for the respondents, are well-founded.

156. As Mr Crammond stated, at paragraph 22 of his skeleton argument for the respondents, the claim ought to be struck out on one or more of the four separate bases he set forth, whether taken individually, or cumulatively. I accept that argument, and the legal arguments he sets forth in his written submissions, as leading to Strike Out of the entire claim under **Rule 37**.

157. Further, I regard as well-founded his arguments that, on any interpretation, the claim as pled in the ET1 does not disclose a *prima facie* case of discrimination against the respondents, and the various factors relied upon by him, at his **paragraph 49(a) to (j),** explain why that is so, and why the claim ought to be struck out by this Tribunal.

158. Put simply, the claimant fails to connect what he describes as the alleged acts and omissions of the GMB complained of with his disability or anything connected to it. There are no facts pleaded which could, in any way, reasonably support a causal connection or link between any of the acts or omissions referred to and the claimant's disability.

159. Further, it seems to me to be in the interests of justice, and consistent with Tribunal's overriding objective, that this case is brought to an end, and brought to an end now, and that is why I have decided to grant the respondents' application and strike out the whole claim.

160. I consider that there is significant merit in Mr Crammond's paragraph 49(g), where he says the claimant's pleadings need to be seen in context, and that this claimant is not a litigant in person without knowledge of how Employment Tribunal procedure works.

161. From his past experience, in several cases over the last 4 years, he perhaps better than most, unrepresented, party litigants, ought to know the importance of a properly pleaded case, giving fair notice, and adequate specification of his case, and about the essentials of his case being in the ET1, per **Chandhok v Tirkey**.

162. Further, and again a point well made by Mr Crammond, at his paragraph 49(i), any action which was not taken by WDC, as his former employer, and in relation to which the claimant alleges the GMB ought to have provided him with assistance, are not actions or omissions of these respondents, for WDC is an entirely separate body from the respondents.

163. Also, while in the course of this Preliminary Hearing the claimant's case appeared to narrow to the "***cease and desist letter***", notwithstanding his position was confused, he did not indicate any intention to withdraw his amendment application.

164. While it is a matter of fact that the "***cease and desist***" letter, issued on 1 February 2018, is an act complained of timeously, and so not time-barred, the terms of that letter from Thompsons explain why they have taken that action

on behalf of their clients at the GMB. There is no reasonable prospect of the claimant convincing a Tribunal that the issue of that letter was an act of discrimination by the respondents.

165. I reject as wholly fanciful the claimant's arguments that there has been a course of conduct by the GMB extending over a period of time, and / or a continuing discriminatory state of affairs. That is, in my view, a disingenuous attempt by the claimant to try and avoid the respondents' arguments about **res judicata**, and abuse of process, given my 2016 Judgment striking out his previous claim against the GMB.

166. In my reserved consideration of this case, in private deliberation, I have also given myself a self-direction on the Scottish law regarding **res judicata**. In particular, I have considered the helpful summary provided in the judgment of the Inner House of the Court of Session (Extra Division) in **Durkin v HSBC Bank plc [2016] CSIH 93**, where the Opinion of the Court, delivered by Lord Malcom, at paragraphs [9] to [11], considered the law as to **res judicata**, described it as well-settled and summarised it as follows:

"**The Law as to *Res Judicata***

[9] The main question for decision is whether the sheriff and the sheriff principal were correct to uphold the bank's plea of *res judicata*. The applicable law is well settled, and can be summarised as follows. The plea, which is found in most developed legal systems, is rooted in the public policy against repeated litigation between the same parties "on substantially the same basis" – Lord President Cooper in *Grahame* v *Secretary of State for Scotland* 1951 SC 368 at 387. In the same passage it is stressed that the court should not concentrate on the specific terms of the conclusions or the pleas in law, but look to "the essence and reality of the matter" and simply inquire – "What was litigated and what was decided?". The court is not concerned with whether the first decision was right or wrong. In *Grahame* the plea failed because the two actions dealt with "essentially separate and distinct subjects of assessment" – Lord Russell at 392. *Phosphate Sewage Co* v *Molleson* (1879) 6 R (HL) 113 makes it clear that simply putting forward new facts to support a claim for relief previously refused will not overcome the plea – Lord Hatherley at 119.

[10] In *Short's Trustee* v *Chung* 1999 SC 471 the first action was one of reduction of two dispositions brought by a trustee in sequestration based on gratuitous alienations under section 34(4) of the Bankruptcy (Scotland) Act 1985. Given the meaning of certain provisions in the Land Registration

(Scotland) Act 1979, it was discovered that the grant of the reductions had not altered the title to the lands, so in a second action restoration of the properties to the previously infeft proprietor was sought. A plea of *res judicata* failed. The court asked "the fundamental question", namely, are there common features which lead to the conclusion that the second action would entail "unacceptable repetition of litigation?" The court rejected the submission that the same issue was being litigated. It derived little assistance from concepts such as a comparison of the *medium concludendi* of each action, but preferred the "more useful" test adumbrated in *Grahame* – see at 477H. The "nature of the (second) action" was different from the first. A "new matter" was being litigated.

[11] In *Primary Health Care Centres (Broadford) Ltd* v *Ravangave* 2009 SLT 673 Lord Hodge observed that a plea of *res judicata* depends upon a prior determination by a court of competent jurisdiction pronounced *in foro contentioso*; that the subject matter and *media concludendi* are the same; and that (other than in respect of decrees *in rem*) the parties are the same, or representative of the same parties, or with the same interest. The modern tendency is to focus on the essence of the matter rather than technical form. At paragraph 32 his Lordship noted the clear authority that, since there is only one cause of action, all grounds of pleading that a single act amounts to a delict (or breach of contract) must be raised in the same action. Thus, for example, one cannot seek damages for personal injury at common law, and then, if that is unsuccessful, bring an action based upon breach of statutory duty. It will not avail a pursuer to raise a new action pleading different facts in support of what is, in essence, the same issue; which in both of the actions at the instance of Primary Health Care Centres was – are the defenders liable in terms of the lease? This was said in the context of the pursuers having been prevented from advancing an alternative basis for the claim in the first action, a justification also put forward in the present case by Mr Durkin. Absent *res noviter ad notitiam*, a different factual basis will not stop a plea of *res judicata* if the legal claim has not changed. In both actions the same legal claim was being litigated, therefore Lord Hodge upheld the plea of *res judicata*."

167. I accept, as well-founded, Mr Crammond's supplementary skeleton argument, of 14 November 2018, at paragraphs 6 to 10 in particular, that the Supreme Court's judgment in **Virgin Atlantic**, and the EAT judgment in **Ochieng**, bolster the respondents' arguments in relation to ***res judicata***, and abuse of process, and support, and indeed strengthen, the respondent's application to Strike Out the claim.

168. It is contrary to the legal principle of finality of litigation to allow him now, some 2 years later, to seek to run a new claim based on many matters that were the subject of his struck out 2015 claim. That is particularly so, in my view, when

he did not seek to apply for a reconsideration of that Judgment, nor to appeal it on a point of law to the EAT.

169. It is in these circumstances, allied to his conduct of this Preliminary Hearing, that I am also satisfied that it is appropriate to uphold the respondents' further argument that this claim should also be struck out as scandalous or vexatious.

170. In these circumstances, I do not, strictly speaking, need to go on and consider Mr Crammond's alternative argument seeking a Deposit Order against the claimant. However, having heard from both parties fully on that opposed application by the respondents, I consider it only right and proper that I make some further comments.

171. **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.

172. 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.

173. 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**.**

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

175. At this Preliminary Hearing, I did not make specific enquiries of the claimant, as regards his ability to pay, if I decided to order him to do so, because he had complied with the case management order that I made on 5 September 2018, and he had, on 29 October 2018, provided a statement of means and assets, with vouching documents, and nothing further was requested by the respondents' representative, nor required by me as the presiding Employment Judge.

176. Having struck out the entire claim, I have found it unnecessary to make a Deposit Order, in terms of **Rule 39 of the Employment Tribunals Rules of Procedure 2013**, which I would have made had I not struck out the whole of the claim.

177. In that event, of course, I would have required to further consider the appropriate amount for a Deposit Order, having regard to the claimant's whole means, and taking his ability to pay into account, I would have required to decide what specific amount that I could be satisfied that he could afford to pay in that regard.

178. Had I required to do so, I note and record here that, having regard to the claimant's statement of his whole means, I would have decided that a sum of £1,000, as sought by Mr Crammond, on behalf of the respondents, would have been an appropriate amount to set as a condition of the claimant being permitted to take part in these Tribunal proceedings relating to the specific allegations set forth in his ET1 claim form.

179. In his statement of means, dated 29 October 2018, together with vouching documents, none of which was challenged by Mr Crammond, the claimant provided a detailed account of his income and expenditure, and also his capital assets and savings.

180. As this Judgment will be published online, and so as to keep the claimant's, and his wife's , financial affairs strictly confidential, and not be publicly available I have not recorded the detail here, but, without disclosing the actual sums involved, which have in any event been disclosed to the Tribunal,

and copied to Mr Dean as solicitor for the respondent, it is I think sufficient to record here that the claimant, no longer in employment of West Dunbartonshire Council, is no longer in receipt of a salary, but he is in receipt of State benefits from the DWP, and also a pension from the Local Government Pension Scheme.

181. According to his statement of means, the joint expenditure of the household, comprising himself and his wife, exceeds his income. On the matter of capital assets, however, the claimant is not, by comparison to many a claimant who appears before the Tribunal, a man of limited means, who is unemployed, on State benefits, following termination of employment, and with little, if any, by way of capital assets.

182. Whilst his available cash is modest, the claimant appears to be a man of some significant capital means, and with capital assets, including 3 properties, jointly owned with his wife and / or sister, with vehicles, and electronics, electrical & mechanical equipment, I consider that a sum of **£1,000**, against the value of his whole means and assets, as declared to the Tribunal, is a fair and reasonable sum which, if he wished to continue with his claim, had I not struck it out, would not impose a significant financial barrier preventing him from continuing with this claim, if he still chose to do so, when the amount of deposit involved is modest when compared to his whole means and assets.

Further Procedure

183. Given my decision to strike out the whole of this claim, there is no further procedure to be determined by the Tribunal.

184. In particular, the claimant's proposed application to amend the ET1 claim form, as intimated by him on 12 September 2018, is no longer an issue for the Tribunal. As the claim has now been struck out, it is not possible to amend a claim that has been struck out.

185. Further, and because of this decision, no further action will be taken on the claimant's application of 11 October 2018 to Strike Out the respondents' ET3 response.

Closing Remarks

186. It is clear that the claimant feels strongly about this case and, as like many other unrepresented, party litigants, he may well have persuaded himself of the justice of his cause, and he may indeed sincerely believe in his cause.

187. However, I have had to assess his claim before this Tribunal against these respondents, the GMB, based on my independent and objective judicial scrutiny of his ET1 claim form, taking what he says there, at its highest.

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

189. Further, I consider it appropriate, in relation to the claimant's reference to himself as 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."

190. 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".*

191. In the present case, I have taken into account that the claimant is representing himself, but that factor does not in any way allow him any special indulgences where the Tribunal decides, as I have done, that it is appropriate to grant the respondents' application for Strike Out.

192. As I am satisfied that this claim has no reasonable prospects of success against the GMB, I have struck it out in its entirety, for the various reasons detailed above.

Employment Judge: Ian McPherson

Date of Judgement: 20 December 2018

Entered in Register,

Copied to Parties: 21 December 2018