EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4122886/2018

Held in Glasgow on 9 April 2019 (Preliminary Hearing in chambers)

Employment Judge: Ian McPherson

Mr Brian Gourlay	**Claimant** **Written Representations** **per Mr Tony McGrade** **Solicitor**
GMB	**Respondents** **Written Representations** **per Mr Paul Deans** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that: -

(1) Having considered parties' solicitor's written representations, on the respondents' opposed application for Strike Out of the claim, in terms of **Rule 37(1)(a) of the Employment Tribunals Rules of Procedure 2013**, the Tribunal **refuses** the respondents' application for Strike Out, it not being satisfied that it is in the interests of justice to strike out the claim, without hearing evidence, when the respondents have not satisfied the Tribunal that the claim has no reasonable prospects of success.

(2) Having so decided, the Tribunal **orders** that the claimant's complaint of unlawful disability discrimination against him by the respondents, being victimisation contrary to **Section 27 of the Equality Act 2010**,

shall now be listed for a Final Hearing before a full Tribunal in due course, and **instructs** the clerk to the Tribunal to issue to both parties' representatives, along with this Judgment, date listing stencils for the proposed listing period of **August, September and October 2019.**

(3) Further, having considered parties' solicitor's written representations, on the respondents' alternative opposed application for a Deposit Order against the claimant, in terms of **Rule 39 of the Employment Tribunals Rules of Procedure 2013**, on the basis that the claim has little reasonable prospects of success, the Tribunal considers that argument by the respondents is well-founded, on the basis of the claim as currently pled by the claimant.

(4) Accordingly, the Tribunal **grants** the respondents' application for a Deposit Order, and having regard to the available information about the claimant's means to pay such an Order, the Tribunal **orders** that the claimant shall, **within 21 days of the date of issue of that Order**, issued along with this Judgment, pay to HMCTS Finance Centre, Bristol, a deposit of **SEVEN HUNDRED AND FIFTY POUNDS (£750.00)** as a condition of him being allowed to continue to advance that victimisation allegation against the respondents, all as per the Deposit Order issued under separate cover.

REASONS

Introduction

1. This case called again before me on the morning of Tuesday, 9 April 2019, for a Preliminary Hearing, previously intimated to both parties by the Tribunal by Notice of Preliminary Hearing dated 13 February 2019, to determine, as a preliminary issue, the respondents' application for Strike Out of the claim, failing which a Deposit Order. 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.

2. While, on 1 February 2019, I had ordered the Preliminary Hearing to be held in chambers, and thus in private, and the Notice of Preliminary Hearing issued to both parties stated "***for information , parties are not required to attend***", that Notice stated, wrongly, that the Preliminary Hearing would be conducted in public, as is ordinarily the case for a Strike Out application, as per **Rules 53 and 56.**

3. For the avoidance of any doubt, this Hearing was not conducted in public, because it was conducted, on the papers only, in my own private chambers, and not in a publicly accessible Hearing room.

4. This Preliminary Hearing followed upon the case having previously called before me, on 1 February 2019, for a Case Management Preliminary Hearing, held in private, where my written Note and Orders, dated 6 February 2019, was issued to both parties under cover of a letter from the Tribunal dated 6 February 2019.

5. Specifically, Order (7) in that written Note stated that this Preliminary Hearing was assigned:

> *" to address the respondents' opposed 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 in the claimant's ET1 claim form, has no reasonable prospects of success, which failing to seek a Deposit Order of £1,000 against the claimant, under* ***Rule 39,*** *on the basis that the respondents contend that the claim, as so pled, has little reasonable prospects of success."*

Claim and Response

6. Following ACAS early conciliation on 13 November 2018, the claimant, acting on his own behalf, presented his ET1 claim form to the Tribunal, on 14 November 2018, and it was accepted by the Tribunal, and served on the respondents by Notice of Claim issued by the Tribunal on 21 November 2018.

7. It was 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.**

8. On 19 December 2018, an ET3 response was filed on behalf of the respondents, defending the claim, through their legal representative, Mr Paul Deans, solicitor with Thompsons, Glasgow. That response was accepted by the Tribunal on 3 January 2019 and a copy sent to the claimant and ACAS. At that stage, the claimant was an unrepresented, party litigant, acting on his own behalf.

9. The ET3 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 to be considered.

10. On 9 January 2019, I refused the respondents' request for a one-day Preliminary Hearing, and the Tribunal's letter of that date to both parties advised them that the case required some discussion at the forthcoming Case Management Preliminary Hearing, scheduled for 1 February 2019, before any Preliminary Hearing on Strike Out / Deposit Order, as sought by the respondents, could be considered.

11. Further, I so ordered because the claimant's application on 3 January 2019 in his claim No.2 against these respondents (case no: **4109518/2018**) had sought reconsideration of a Judgment issued by me on 21 December 2018 in that earlier claim, as also permission to amend this No.3 claim.

12. By way of explanation, I note and record that I refer here to claims Nos 2 and 3, because this is the claimant's third claim against these respondents. He previously brought, what I now refer to as claim No.1, with case number **4108638/2015,** which claim I struck out on 6 May 2016 on the basis that that claim had no reasonable prospects of success.

Procedure post Case Management Preliminary Hearing

13. At that Case Management Preliminary Hearing, on 1 February 2019, the claimant appeared in person, as an unrepresented, party litigant, 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 this case, which, whilst administratively linked to the claimant's earlier claim (No.2) against these respondents was not combined with this claim No.3.

14. It should also be noted and recorded, at this point, that at that same Hearing, on 1 February 2019, the claimant withdrew certain parts of his claim, in terms of **Rule 51 of the Employment Tribunals Rules of Procedure 2013**, namely complaints alleging unlawful discrimination arising from disability, and harassment on grounds of disability, contrary to **Sections 15 and 26 of the Equality Act 2010**, leaving only his victimisation complaint against the respondents, in terms of **Section 27 of the Equality Act 2010**.

15. The claimant not objecting, I issued a **Rule 52** Judgment dismissing those withdrawn parts of this claim, on the application of Mr Deans. That Judgment, dated 6 February 2019, was entered in the register and copied to parties on that date.

16. By way of setting in place a specific procedure, and timetable, to be followed by both parties, so that I might be able to consider their previously exchanged written submissions at this Preliminary Hearing, in chambers, and without the need for parties to attend a public Hearing, I ordered the respondents' solicitor, Mr Deans, to intimate his outline written skeleton argument, and list of authorities, within the following 3 weeks, i.e. by Friday, 22 February 2019.

17. Further, I allowed the claimant a period of no more than 3 weeks following receipt of Mr Deans' submissions, to provide his own written comments / objections to the respondents' applications for Strike Out / Deposit Order, and provide a statement of his means and assets, so that the Tribunal had available some information, as required by **Rule 39(2),** to assess his ability to pay if I decided to make a Deposit Order.

18. At that Preliminary Hearing, on 1 February 2019, I also encouraged the claimant, as an unrepresented, party litigant, to seek out independent and objective advice, and, post that Hearing, his solicitor, Ms Morag Dalziel, at McGrade + Co, Glasgow, who represents him in ongoing Tribunal proceedings against his former employer, a local authority, was instructed on his behalf, and she came on record as the claimant's legal representative on 19 February 2019.

Respondents' Application, and Claimant's Objections

19. Mr Deans' outline written skeleton argument, and list of authorities, for the respondents, having been intimated timeously to the Tribunal, with copy to Ms Dalziel for the claimant, on 22 February 2019, her reply for the claimant, with his objections to the respondents' applications for Strike Out / Deposit Order, and with his statement of his means and assets, were due to be received by Friday, 15 March 2019.

20. In the event, on account of Ms Dalziel's absence due to illness, her colleague, Mr Tony McGrade, principal of McGrade + Co, applied to the Tribunal, with copy to Mr Deans, on 12 March 2019, seeking an additional 21 days to comply, i.e. until Friday, 5 April 2019, so the case could still be considered by me in chambers at this Preliminary Hearing on Tuesday, 9 April 2019.

21. **Rule 92** intimation having been given to Mr Deans, by email on 13 March 2019, he confirmed, on the respondents' behalf, that in light of the circumstances, he did not object to Mr McGrade's application for an extension of time as it did not impact on this Preliminary Hearing proceeding as scheduled on 9 April 2019. On my instructions, on 18 March 2019, a reply was sent by the Tribunal clerk to both solicitors advising that I had granted the requested extension of time to 5 April 2019.

22. Unfortunately, on 2 April 2019, on account of Ms Dalziel's continued absence due to illness, her colleague, Mr McGrade, made a fresh application to the Tribunal, with copy to Mr Deans, seeking a further extension of time to 11 April 2019, given Ms Dalziel had been absent since 6 March 2019, and it now appeared she would not be fit to return to work for some time, and,

further, the claimant's father had died, and the claimant was involved in making funeral arrangements, and there were a number of matters raised requiring further investigation and consideration.

23. On my instructions, on 3 April 2019, the clerk to the Tribunal emailed both solicitors stating that, while I was sympathetic to the unfortunate circumstances, as set forth by Mr McGrade, I was not minded to grant a further 7 day extension as to do so would mean the listed chambers Hearing on 9 April 2019 requiring to be vacated and relisted for a later date, but, if the respondents' solicitor had no objection to the further extension sought, I would be prepared to postpone and relist for another date.

24. **Rule 92** intimation having again been given to Mr Deans, by email later on 3 April 2019, from a Lynne Shanks, at Thompsons, on behalf of Mr Deans, while sympathetic to the claimant's solicitor's position, she objected to the application for a further extension, as there had already been a 21 day extension, to which they had not objected, but this further request for extension would impact on the date of the in chambers Hearing, and the inevitable outcome of the requested extension would be delay to the listed Hearing.

25. Given the respondents' solicitor had objected to the claimant's further extension application from Mr McGrade, I gave careful consideration to the application and objection, in terms of the interests of justice, and my duty to ensure a fair and just disposal of the case, and I granted a further extension of time, but not for the full 7 days sought, but an extension to no later than 12 noon on Monday, 8 April 2019, but this was a final extension, as it was important that the listed chambers Hearing on 9 April 2019 proceed as scheduled, so as to avoid any further delay.

26. As explained by the Tribunal in an email from the clerk, issued on my instructions, on 4 April 2019, I took the view that the combination of unfortunate circumstances impacting on both the claimant's solicitor, Ms Dalziel, and the claimant himself, were exceptional, and justified the further short extension of time, as the interests of justice require the Tribunal to

ensure that the claimant's position is set forth before the Judge, in time for him to consider it at the listed chambers Hearing.

27. Ms Dalziel was provided with Mr Deans' outline skeleton argument for the respondents as far back as 22 February 2019, and notwithstanding the unexpected and unfortunate issues affecting her non-availability, on account of ill-health, I took the view that the claimant's solicitors had had more than a reasonable period of time to consider, and reply. That is why I granted a further, short extension of time, to no later than 12 noon, on Monday, 8 April 2019, but without requiring to cancel the listed chambers Hearing.

28. Mr McGrade complied with that extended timetable, mid-morning on 8 April 2019, by email to the Tribunal, copied to Mr Deans for the respondents, and the claimant's outline written skeleton argument, with his comments / objections to the respondents' applications for Strike Out / Deposit Order, as also the claimant's statement of means and assets, were to hand in time for the extended date for compliance.

29. I wish to place on record my sincere thanks to Mr McGrade for ensuring that his client's position in opposition was set forth fully for the Tribunal's consideration, and I record further that I found both his reply for the claimant, and Mr Dean's outline written skeleton argument for the respondents, of immense help to me in understanding parties' competing arguments at this in chambers Preliminary Hearing.

Respondents' Application for Strike Out / Deposit Order

30. In his email of 22 February 2019, Mr Deans attached his outline written skeleton argument for the respondents, running to 50 numbered paragraphs, over 10 (unnumbered) typewritten pages, together with his typewritten, 2-page list of authorities, 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 Travel Dundee v Reilly [2012] IRLR 755; [2012] CSIH 46**

2. **Ezsias v North Glamorgan NHS Trust [2007] IRLR 603; [2007] EWCA Civ.330**

3. **Anyanwu and anor v South Bank Student's Union and anor [2001] IRLR 305; [2001] UKHL 14; [2001] ICR 391**

4. **Uzegheson v London Borough of Haringey [2015] ICR 1285**

5. **Greater Manchester Police v Bailey [2017] EWCA Civ. 425**

6. **Ahir v British Airways plc [2017] EWCA Civ 1392**

7. **A-G v Barker [2000] 1 FLR 759**

8. **Van Rensburg v Royal Borough of Kingston upon Thames [2007] UKEAT/0096/07**.

31. Rather than try and sub-edit his work, and provide my own executive summary, it is appropriate, at this stage, to note the full terms of Mr Deans' written outline skeleton argument for the respondents, *verbatim*, which was as follows:

Introduction

1. This skeleton argument is prepared on behalf of the Respondent for the purpose of the in chambers Preliminary Hearing scheduled to be held on 1 April 2019.

2. Annexed hereto, as Ordered by the Employment Tribunal, is a list of authorities. Where it appears that 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. This skeleton argument is submitted in support of the Respondent's application that the Claimant's claim as plead should be struck out; alternatively, that a deposit order is made against the Claimant.

Issues for determination

4. 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 victimisation and the claim has no reasonable prospects of success; and
      ii. It is scandalous and / or vexatious and / or an abuse of process;
      iii. Any act or omission relied upon which occurred before 14 August 2018 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

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

6. The claim presently before the Employment Tribunal is one of victimisation, made pursuant to **section 27 of the Equality Act 2010**.

7. The Claimant submitted an ET1 Paper Apart running to some 50 plus pages. At page 41 of the Paper Apart, the Claimant asserts his Claims in Law. At page 44, under the heading of Victimisation, the Claimant sets out the grounds for his claim of victimisation.

8. At paragraph 87, the Claimant asserts that he has been victimised in breach of section 27(2)(a) -(d) of the Equality Act 2010.

9. At paragraph 89, the Claimant identifies the act of victimisation as:
"The particular act of victimisation is as follows: The Claimant sent a Rule 6 complaint to GMB in the 24 September 2018 at 16.35 email. There has been an omission in that the claimant has not received an acknowledgment or response."

10. At paragraph 90, the Claimant identifies the protected act:

"by not acknowledging or responding to the 24 September 2018 at 16.35 email was done because the claimant had carried out a protected act under s.27(2)(b) of the EqA. The protected act was the act of having previously taken a claim against GMB i.e. claim 4108638/2015 Gourlay v GMB submitted 25 June 2015. Claim 4108638/2015 Gourlay v GMB was struck out with judgment dated 06 May 2016."

11. 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.

12. The Respondent refers to paragraphs 19-26 of the ET3 paper apart which sets out the reasons why there was no response to the Claimant's email. In short, the Claimant has made numerous complaints about his dismissal by West Dunbartonshire Council (WDC) and his perception of his treatment by the Respondent and the lack of support he believes he has suffered. The Respondent has dealt with voluminous communications from the Claimant and has spent significant amounts of time and resources responding to his enquiries. The Respondent made clear, by way of a "cease and desist" letter dated 1 February 2018, that the Respondent would not respond to any further contact from the Claimant in relation to these matters which the Respondent considered closed.

13. The Claimant was therefore well aware, from February 2018, that he would not receive any response to any communications he sent to the Respondent regarding his employment with WDC or any perceived lack of support from GMB in that regard.

14. The Respondent accepts the Claimant's contention that he did a protected act by taking an Employment Tribunal claim 4108638/2015 against the Respondent. This claim was lodged on 25 June 2015 and struck out on 6 May 2016.

15. The Claimant identifies, as the alleged detriment, the Respondent's failure to acknowledge or respond to his email of 24 September 2018. The Claimant has not explained in what way the non-response constitutes a detriment. The Respondent does not accept that the Claimant suffered detriment by the Respondent's failure to respond to this email.

16. In the event the Tribunal accepts that the Claimant has identified a *prima facie* detriment, the Respondent contends that the Claimant was not subjected to that detriment because he had done a protected act.

Relevant law: strike out, deposit orders and 2010 Act

The 2013 Rules

17. ***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…"

18. 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***).

19. 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).

20. However, the Tribunal be guided by the comments made by Underhill LJ:

> "it is trite law that the burden of proof is not shifted simply by showing that the claimant has suffered a detriment and […] has done a protected act" (see ***Greater Manchester Police v Bailey [2017] EWCA Civ 425*** at paragraph 29).

21. The Tribunal will also be aware of Underhill LJ's observation that:

> "…[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." (see ***Ahir v British Airways plc [2017] EWCA Civ 1392*** at paragraph 24)

22. With regard the definition of vexatious proceedings, we would refer the Tribunal to the words of Lord Bingham:

> "The hallmark of a vexatious proceeding is in my judgment that it has little or no basis in law (or at least no discernible basis); that whatever the intention of the proceeding may be, its effect is to subject the defendant to inconvenience, harassment and expense out of all proportion to any gain likely to accrue to the claimant; and that it involves an abuse of the process of the court, meaning by that a use of the court process for a purpose or in a way which is significantly different from the ordinary and proper use of the court process." (see ***A-G v Barker [2000] 1 FLR 759*** at paragraph 19)

23. ***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.

…"

24. 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***).

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

The 2010 Act

26. ***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.

27. ***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

28. The Tribunal ought to consider the claim on the basis of the Claimant as presently pled.

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

30. The Respondent avers the following in support:

a. Taking the ET1 at its highest, there is nothing which supports the contention of victimisation. There is no, or no reasonable attempt by the Claimant to link the bringing of a claim in June 2015 and the Respondent's failure to respond to one email submitted in September 2018. The Claimant has not advanced any causative link between the protected act and the alleged detriment.

b. Taken at its highest, the Claimant makes mere assertions without any factual or other basis to support the same. The cease and desist letter of 1 February 2018 properly and adequately explains the reasons for the letter being provided and it makes it abundantly clear that the Respondent will not respond to any further communications regarding matters the Respondent considers closed. This is a straightforward and well documented explanation for what occurred.

c. The Respondent sets out facts within the Response, including at paragraphs 19 – 26 of the Response, explaining why the Respondent has not responded. The Claimant either does not, nor can he reasonably, challenge those assertions;

d. There is far from an obvious or plain connection between the protected act and the alleged detriment, whether temporally, factually or otherwise. The detriment complained of is too remote from the alleged detriment. The absence of any or any proper and reasonable connection being pled by the Claimant is revealing and fatal to his claim.

e. In between the lodging of claim 4108638/2015 in June 2015, and the lodging of the present claim, the Respondent has replied to numerous communications received from the Claimant. Against this background, the Claimant would be expected to provide a reasonable explanation

as to why he considers that this one non-response is because of the protected act. He makes no explanation.

f. In line with the position made clear in the cease and desist letter, the Respondent remains willing to provide assistance to the Claimant as it would provide to any trade union member. By separate correspondences the Claimant has sought assistance with a pension issue. The Respondent has acknowledged these correspondences and has written to the Claimant on 17 August 2018, 4 October 2018, and 15 January 2019 offering assistance. The Respondent is currently in the process of reviewing the Claimant's query with its pension specialist in London, and preparing a response.

g. The Claimant has pled no factual basis for a finding that the alleged detriment occurred because he did a protected act. Accordingly, in the absence of such pled facts, no reasonable Tribunal could conclude that there were facts from which discrimination could be proven (***section 136 of the 2010 Act***).

h. The Claimant's pleadings must 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 in recent years, including against this Respondent. He is well aware of the importance of a properly pled case yet has failed to provide any causal link between a claim he lodged in June 2015, which was struck out on 6 May 2016, and the Respondent's failure to respond to one email in September 2018.

31. In the circumstances, the threshold for strike out is well surpassed. Applying the above-mentioned law, this is a case in 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.

32. 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.

Scandalous, Vexatious, Abuse of Process

33. As the Tribunal is aware, this is not the first claim which the Claimant has brought against the Respondent.

34. The Claimant brought a claim with case number 4108638/2015 against the Respondent. This claim was struck out on 6 May 2016 on the basis that the claim had no reasonable prospects of success.

35. The Claimant brought a claim with case number 4109518/2018 against the Respondent. This claim was struck out on 21 December 2018 on the basis that the claim stood no reasonable prospect of success, it was scandalous and vexatious, res judicata and an abuse of process.

36. In the present case, the Claimant has submitted an ET1 running to some 50 pages. Much of the subject matter of that document appears to have been previously pled in the two struck out cases noted above. The Claimant appears unable to accept the previous decisions handed down by the Tribunal and he appears determined to continue to lodge tribunal claims against the Respondent ad infinitum.

37. As was found by the Tribunal in striking out the Claimant's most recent claim against the Respondent (paragraph 114, 4109518/2018), the Claimant bears malice and ill will towards the Respondent. It is the Respondent's position that the Claimant, in submitting further claims, demonstrates this malice and ill will. The Claimant is acting scandalously and/or vexatiously and or it is an

abuse of process to put the Respondent to the inconvenience, harassment and expense out of all proportion to any gain likely to accrue to him.

38. The Respondent's "cease and desist" letter properly and adequately explains the reasons for the letter being provided and it makes it abundantly clear that the Respondent will not respond to any further communications regarding matters the Respondent considers closed. The Claimant is acting scandalously and or vexatiously and or it is an abuse of process for the Claimant to lodge a claim for this omission, as he was well aware that this correspondence would not be responded to, and of the Respondent's reasons for this.

39. The Claimant cannot reasonably believe that the failure to respond in September 2018 is because of the protected act he carried out in June 2015. Nor can he have any objectively reasonable or realistic expectation that any failure to respond could result in him being awarded an injury to feelings award within mid-band Vento as sought. The Claimant is acting scandalously and/or vexatiously and or it is an abuse of process for the Claimant to pursue a claim on this basis.

40. In support of the Respondent's position that the Claimant is acting scandalously, vexatiously and/or in a way that constitutes an abuse of process, the Respondent highlights the Claimant's verbal indication, during the preliminary hearing held on 1 February 2019, that he intends to lodge yet another claim against the Respondent.

41. The Claimant's decision to continually lodge tribunal claims against the Respondent, claims which the Tribunal continues to strike out at the preliminary hearing stage demonstrates an abuse of process.

Time Bar

42. The important date for time bar purposes are as follows:
    a. ACAS early conciliation commenced on 13 November 2018
    b. ACAS early conciliation ended on 13 November 2018
    c. Claim presented to Tribunal 14 November 2018.

43. The limitation period for bringing claims of discrimination pursuant to the 2010 Act is 3 months (s.123). Insofar as the Claimant seeks to rely on any acts or omissions pre-dating 14 August 2018, such acts or omissions are out of time. 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. 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 acts. For the avoidance of doubt, the Respondent avers that it is not just and equitable to extend time.

44. 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.

Deposit order

45. 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.

46. The Respondent repeats the above in support.

47. 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.

48. 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.

Conclusion

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

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

Claimant's Objections, and Statement of Means & Assets

32. Mr McGrade's response to the respondents' skeleton argument, intimated by him to the Tribunal and Mr Deans, by email on 8 April 2019, along with his one-page typewritten list of authorities for the claimant, was set forth out over 29 paragraphs, extending over 11 typewritten pages.

33. It also attached the claimant's statement of means and assets, as also a copy of the Thompsons "***cease and desist***" letter of 1 February 2018 from David Martyn, partner at Thompsons, to the claimant, upon which the respondents rely. A full copy of the text of that letter is set forth as an Appendix to this Judgment, at the end of these Reasons, as Mr McGrade's written submissions (at paragraphs 16, 17 and 18) refer to only three paragraphs of a two-page letter and, as Mr McGrade observes, at his paragraph 13, despite the very clear terms of the "***cease and desist***" letter, the respondents did not in fact conduct themselves in the manner that that letter indicated they would do.

34. Included within Mr McGrade's attachments were the claimant's statement of means and assets in a letter (with 5 appendices) from the claimant dated 3 April 2019, together with the vouching documentation then produced by him as evidence of his whole means and assets.

35. In submitting his statement of means and assets, in compliance with Order (12) made by me, at the Case Management Preliminary Hearing on 1 February 2019, 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.

36. As this Hearing was in chambers, there was obviously no evidence from the claimant, to speak to the information provided in his schedule, which I took at face value, there being no indication from the respondents' solicitor, Mr Deans, prior to the start of this in chambers Hearing, that the respondents sought to challenge any of the detailed information provided by the claimant.

37. Indeed, I pause to note and record that, generally speaking, the statement of means and assets was consistent with an earlier statement of means and assets provided by the claimant at the Strike Out / Deposit Order Preliminary Hearing held before me, in public, in his claim No.2, case no: **4109518/2018**, held on 7 November 2018, and as referred to in my Judgment and Reasons issued on 21 December 2018.

38. Rather than try and sub-edit his work, and provide my own executive summary, it is appropriate, at this stage, to note the full terms of Mr McGrade's response to the written outline skeleton argument for the respondents, which response, *verbatim*, was as follows:

Issues for determination

1. It is accepted that the issues for determination are as set out in the Respondent's skeleton argument, namely:

    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 victimisation and the claim has no reasonable prospects of success; and

ii. It is scandalous and / or vexatious and / or an abuse of process;

iii. Any act or omission relied upon which occurred before 14 August 2018 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.

Statutory provisions

2. **Section 27 of the Equality Act** sets out the test to be applied in determining a claim of victimisation: -

(1) A person (A) victimises another person (B) if A subjects B to a detriment because—

(a) B does a protected act, or

(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act—

(a) bringing proceedings under this Act;

(b) giving evidence or information in connection with proceedings under this Act;

(c) doing any other thing for the purposes of or in connection with this Act;

(d) making an allegation (whether or not express) that A or another person has contravened this Act.

(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

(4) This section applies only where the person subjected to a detriment is an individual.

(5) The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule.

3. A number of important principles emerge from the case law which are likely to be relevant to this case.

a. Despite the difference in wording between section 27 of the Equality Act 2010 introducing the requirement to show that the victimisation was because of the protected act, this is not intended to impose a different test and therefore the authorities decided under the previous legislation will still be relevant. (Lord Justice Underhill in **Chief Constable of Greater Manchester Police v Bailey [2017] EWCA Civ 425**, para 12).

b. It is not necessary to demonstrate that discriminator was consciously motivated by the fact that the person had done the protected act. (Lord Nicholls in **Nagarajan v London Regional Transport 1999 IRLR 572**, para 14ff).

c. It is not appropriate to apply a “but for” test when determining whether a victimisation claim has been established. (Lord Justice Underhill in **Chief Constable of Greater Manchester Police v Bailey [2017] EWCA Civ 425**, para 36).

d. The tribunal should consider whether carrying out a protected act had a significant influence in relation to the detriment. (Lord Nicholls in **Nagarajan v London Regional Transport 1999 IRLR 572**, para 19).

e. An employer who take steps to protect itself in relation to discrimination proceedings is unlikely to have carried out an act of victimisation. (Lord Nicholls in Chief **Constable of West Yorkshire Police v Khan [2001] IRLR 830**, para 31).

4. **Rule 37 of the Employment Tribunals Rules of Procedure 2013** makes provision for striking out. It provides as follows: -

(1) At any stage of the proceedings, either on its own initiative or 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 prospect of success;

(b) that the manner in which the proceedings have been conducted by or on behalf of the Claimant or the Respondent (as the case may be) has been scandalous, unreasonable or vexatious;

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

(d) that it has not been actively pursued;

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

(2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.

5. A number of comments can be made on this provision.

a. The power to strike out a claim on the ground that it has no reasonable prospect of success should only be exercised in rare circumstances ***(Tayside Public Transport Co Ltd (t/a Travel Dundee) v Reilly [2012] IRLR 755,*** at para 30).

b. Claims should in general terms not be struck out on this ground when the central facts are in dispute **(*Ezsias v North Glamorgan NHS Trust [2007] IRLR 603).***

6. **Rule 39 of the Employment Tribunals Rules of Procedure 2013** makes provision for deposit orders. It provides as follows: -

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

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

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

(4) If the paying party fails to pay the deposit by the date specified the specific allegation or argument to which the deposit order relates shall be struck out. Where a response is struck out, the consequences shall be as if no response had been presented, as set out in rule 21.

(5) If the Tribunal at any stage following the making of a deposit order decides the specific allegation or argument against the paying party for substantially the reasons given in the deposit order—

(a) the paying party shall be treated as having acted unreasonably in pursuing that specific allegation or argument for the purpose of rule 76, unless the contrary is shown; and

(b) the deposit shall be paid to the other party (or, if there is more than one, to such other party or parties as the Tribunal orders),

otherwise the deposit shall be refunded.

(6) If a deposit has been paid to a party under paragraph (5)(b) and a costs or preparation time order has been made against the paying party in favour of the party who received the deposit, the amount of the deposit shall count towards the settlement of that order.

Commentary

7. There is very little dispute regarding the circumstances of this case. I therefore do not propose to outline the background to the case. It is conceded by the Respondent that the Claimant carried out a protected act (cf para 14 of the skeleton argument). There is therefore no issue as to whether the Claimant enjoys protection against victimisation in accordance with *(section)* 27 of the Equality Act 2010.

8. The Respondent has disputed whether the Claimant has suffered a detriment. It states (at para 15) “The Respondent does not accept that the Claimant suffered a detriment by the Respondent’s failure to respond to this email.”

9. I would submit that the tribunal should have no hesitation in holding that the refusal to respond to the email constitutes a detriment. Having submitted the email, it cannot be argued that the Claimant was completely indifferent as to whether it should be answered. The very fact that he submitted a claim for victimisation is an indication that he regarded the refusal to respond to his email as adverse treatment. I would also submit that on any objective

assessment, the failure to respond must be regarded as unfavourable treatment.

10. What is in dispute is whether the particular circumstances of this case disclose a prima facie case of victimisation. What the Respondent seeks to rely upon in particular is the cease and desist letter dated 1 February 2018 that was issued to the Claimant. It is not disputed that this letter was issued to the Claimant.

11. The Respondent seeks to argue that, having issued the cease and desist letter, this explains the refusal of the Respondent to have any further contact with the Claimant, and in particular the refusal to respond to the rule 6 complaint.

12. It cannot be disputed that the cease and desist letter forms part of the factual matrix to this case and has to be considered in the context of the strike out request. However, it must also be viewed against all the circumstances of this case. Those circumstances include the following factors.

13. The Claimant's position is that despite the very clear terms of the cease and desist letter, which for ease of reference is attached to this document, the Respondent did not in fact conduct itself in the manner that it indicated it would do so.

14. Paragraph 32f the skeleton argument sets out the Respondent's position as follows: –

    a. **In line with** (my emphasis) the position made clear in the cease and desist letter, the Respondent remains willing to provide assistance to the Claimant as it would provide to any trade union member. By separate correspondences the Claimant has sought assistance with a pension issue. The Respondent has acknowledged these correspondences and has written to the Claimant on 17 August 2018, 4 October 2018, and 15 January 2019 offering assistance. The

> Respondent is currently in the process of reviewing the Claimant's query with its pension specialist in London, and preparing a response.

15. The foregoing paragraph deserves some comment. Firstly, it indicates that in line with the cease and desist letter "the Respondent remains willing to provide assistance to the Claimant as it would provide to any trade union member." I do not consider this is a legitimate interpretation of the terms of the attached letter. At no point in the letter does the Respondent state that it is willing to offer the Claimant assistance on any issues.

16. It may be argued that it is implied in the letter that assistance will be offered in other issues. Some support for this position can be found in the words "the purpose of this letter is to inform you that our client, the GMB, has no further comment to make about **these matters** (my emphasis).

17. However, the letter goes on to state that: -

> "The GMB do not therefore propose to respond to any further contact they have from you in relation to your employment with the council and the lack of support you say was provided by them during this period."

This suggests all contact regarding the Claimant's employment with West Dunbartonshire Council will cease.

18. Perhaps the most categoric statement of the Respondent's position appears later in the letter, where it states as follows; -

> "The purpose of this letter is to request that your actions, including but not limited to: turning up at the GMB's offices without an appointment, repeatedly emailing or otherwise contacting GMB officials and employees, including but not limited to: Gary Smith, Brian Johnson, Tony Dowling, Ude Adigwe, Tom Roache and Janice Flynn stop immediately."

19. It is the Claimant's position that the pension issue which the Respondent has indicated it is currently dealing with relates to the Claimant's employment with West Dunbartonshire Council. Any attempt to draw a distinction between pension and other issues is therefore completely misplaced. While I accept that the skeleton argument lodged by the Respondent does not specifically concede that the pension issue with which currently dealing relates to pension accrued during the Claimant's employment with West Dunbartonshire Council, the Claimant is clear that it is. If it transpires that there is a dispute regarding this issue, I would respectfully submit that this issue should properly be resolved at a hearing, rather than on the papers. In my submission, this gives further support to the Claimant's position that this case should not be determined on the papers.

20. I would also submit that the decision by the Respondent to deal with the pension issue is completely inconsistent with the terms of the cease and desist letter. While I do not dispute that it is open to the Respondent to choose to deal with some issues and not others, it inevitably gives rise to the question as to why the Respondent was willing to deal with pension issue, but not the complaint made by the Claimant. At this stage, can it be concluded that the decision to refuse to deal with a complaint regarding the Claimant's treatment, against a background in which the Respondent was dealing with other issues, was not influenced a significant degree, consciously or unconsciously, by the earlier discrimination proceedings? I would respectfully submit that this is not an issue that can easily be resolved on the papers and is one which requires oral evidence to enable a proper determination to be made.

21. Had the Respondent issued the letter of 1 February 2018 and thereafter refused to deal with any issues relating to the Claimant's employment with West Dunbartonshire Council, I accept that it could well be argued that this provides a cogent, albeit I would suggest not necessarily conclusive, explanation for not replying to the rule 6 complaint. However, that is not the case. The Respondent continues to deal with some issues arising from the Claimant's employment, namely the issue of pension and not others, namely

the rule 6 complaint. I would submit that the Respondent is seeking to draw a distinction where none exists. It is also appropriate to point out that the Respondent's own narration of events indicates the unanswered Rule 6 complaint was submitted shortly within one week of the Respondent corresponding with the Claimant regarding the pension issue. On the Respondent's version of events, the Respondent continued to correspond with the Claimant for a period of five months, while the Rule 6 complaint remained unanswered.

22. I do of course accept that there may be a very good explanation as to why, having issued the cease and desist letter, the Respondent chose to deal with the pension issue, but ignored the rule six complaint. However, given the terms of the cease and desist letter, it is not clear why this distinction was drawn, nor does the skeleton argument provide an alternative basis for this distinction.

23. Perhaps the best statement of the law in relation to strike out any Scottish context can be found at paragraph 30 of **Tayside**. While this dealt with the 2004 Rules of Procedure, I would submit there is no clear difference between the 2004 and 2013 rules. The opinion of Lord Justice clerk was as follows: -

> "Counsel are agreed that the power conferred by rule 18(7)(b) may be exercised only in rare circumstances. It has been described as draconian (Balls v Downham Market High School and College [2011] IRLR 217, at paragraph 4 (EAT)). In almost every case the decision in an unfair dismissal claim is fact-sensitive. Therefore, where the central facts are in dispute, a claim should be struck out only in the most exceptional circumstances. Where there is a serious dispute on the crucial facts, it is not for the tribunal to conduct an impromptu trial of the facts (ED & F Man Liquid Products Ltd v Patel [2003] 24 LS Gaz R 37, Potter LJ at paragraph 10). There may be cases where it is instantly demonstrable that the central facts in the claim are untrue; for example, where the alleged facts are conclusively disproved by the productions (ED & F Man Liquid Products Ltd v Patel, supra; Ezsias v

> North Glamorgan NHS Trust, supra). But in the normal case where there is a 'crucial core of disputed facts,' it is an error of law for the tribunal to pre-empt the determination of a full hearing by striking out (Ezsias v North Glamorgan NHS Trust, supra, Maurice Kay LJ, at paragraph 29)."

24. I would respectfully submit that, given the circumstances outlined above, and in particular the terms of the letter upon which the Respondent seeks to rely and subsequent actions, this claim does not fall within the "rare circumstances" identified in **Tayside** where strike out is appropriate.

25. The Respondent has referred to the passage at paragraph 29 of **Bailey** that it is not sufficient for the Claimant to prove he has suffered a detriment and that he has a protected characteristic or has done a protected act. I do not dispute this. It relies on this passage to suggest that there is no causative link between the protected act and the detriment. However, it has to be recognised that the Claimant was until very recently a litigant in person. He instructed solicitors in relation to this matter only after the issue of strike out arose. The Respondent has not chosen to seek further and better particulars as to why the Claimant considers the detriment arose because of the protected act. The Claimant has clearly not yet had the opportunity to give evidence. In these circumstances, I would submit the tribunal should be extremely wary of coming to any clear conclusion on the absence of any link between the detriment and the protected act.

26. The Respondent seeks to rely on the fact that various other claims submitted by the Claimant have been struck out. It is not disputed that various other claims have been struck out. However, each claim must be considered on its own facts. The fact that other claims have been struck out provides no answer to the question as to whether this particular claim should be struck out.

27. The respondent has also raised an issue of time bar. I would submit there is no time bar issues present in this case. The claimant complains of his failure by the respondent to acknowledge or respond to his email of 24 September

2013. [sic: this is an obvious typographical error for 2018.] As the respondent concedes (at para 42) he commenced early conciliation on 13 November 2018 and presented the claim on 14 November 2018. This was well within the three-month time period.

28. The test to be applied in determining whether a deposit order should be made is whether the claim "has little reasonable prospects of success." Many of the same arguments apply to the issue of a deposit order as apply to the request for strike out. The Respondent relies primarily on the cease and desist letter. However, as outlined above, the subsequent actions of the Respondent are not consistent with the terms of the letter.

29. I have attached to this skeleton argument a schedule of means provided by the Claimant. If a decision is made to issue a deposit order, I would ask that any deposit order is restricted to take account of the financial circumstances of the Claimant. I would submit that any deposit order should not be issued for a figure in excess of £500.

Further Case Law Authorities for the Claimant

39. Mr McGrade's list of authorities, intimated on 8 April 2019, was as follows:

1. **Chief Constable of Greater Manchester Police v Bailey [2017] EWCA Civ 425**
2. **Nagarajan v London Regional Transport [1999] IRLR 572**
3. **Chief Constable of West Yorkshire Police v Khan [2001] IRLR 830**
4. **Tayside Public Transport Co Ltd (t/a Travel Dundee) v Reilly [2012] IRLR 755**
5. **Ezsias v North Glamorgan NHS Trust [2007] IRLR 603**

40. Clearly, items Nos 1, 4 and 5, were already included in the respondents' list, intimated by Mr Deans on 22 February 2019. Somewhat surprisingly,

especially as my Strike Out Judgment in claim No2, issued on 21 December 2018, had include further case law authorities on Strike Out and Deposit Orders, neither party's representative has made reference to them in their written submissions for this case. I have, however, given myself a self-direction on the relevant law, as detailed later on in these Reasons.

Issue for determination by the Tribunal

41. The only issue for determination at this Preliminary Hearing was the preliminary issue of the respondents' application for Strike Out of the victimisation claim, failing which a Deposit Order.

Relevant Law

42. Both Mr Deans' and Mr McGrade's written submissions, as reproduced above at paragraphs 31 and 38 of these Reasons, includes reference to the relevant statutory provisions to be found in the **Equality Act 2010**, specifically **Sections 27, 57, 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 clearly relevant is **Rule 2,** the Tribunal's "***overriding objective",*** to deal with the case fairly and justly.

43. **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.

44. 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.

45. In **Abertawe Bro Morgannwg University Health Board v Ferguson UKEAT/0044/13,** 24 April 2013, **[2014] IRLR 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.

46. 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.

47. 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.

48. 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.

49. 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.

50. 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.

51. 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."***

52. Although not cited to me by either party's solicitor, in their written submissions for this Preliminary Hearing, although I did refer to it in my 2016 Judgment striking out the claimant's 2015 claim against the GMB, and again in my 2018 Judgment striking out his 2018 (No.2) claim, there is also the reported EAT judgment by Mrs. Justice Simler DBE, then President of the Employment Appeal Tribunal, in **Morgan v Royal Mencap Society [2016] IRLR 428**,

where 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.

53. Again, while not cited to me, by either party's solicitor, although I also referred to it in my 2016 and 2018 Judgments, 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."***

54. So too have I considered **Dolby**, as I did in my 2016 and 2018 Judgments, 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."

55. 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 in my 2016 and 2018 Judgments, 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."***

56. 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.

57. 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***."

58. 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.

59. 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.

60. 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.

61. **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.

62. 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.

63. 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**.**

64. 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.

65. 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.

66. 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)."***

67. 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."***

68. 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.

69. 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.

70. In the present case, the claimant's complaints in the ET1 claim form were all registered by the Tribunal under only one administrative jurisdictional code, for disability discrimination, being ***"DDA***", but as only the victimisation complaint is now proceeding, 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. The other heads of complaint have been withdrawn by the claimant and dismissed by the Tribunal under **Rule 52.**

71. Finally, although I was not referred to it by either party's solicitor, I am aware, as indeed I highlighted in my 2018 Judgment in claim No.2, 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, then 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.

72. **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."***

73. 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 I reproduced those cited paragraphs, in full, in my 2018 Judgment in claim No.2, I do not do so here again, but I think it is helpful to note her view, at paragraph 13, that : "… ***If there is a core factual conflict it should properly be resolved at a Full Merits Hearing where evidence is heard and tested",*** and, at paragraph 16, that : ***"…. 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…"***

74. So too it is important to highlight what Mrs Justice Simler stated at paragraph 17:

> ***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."

75. For the purposes of this Judgment, I have noted the differing approaches identified by Lady Smith in ***Simpson***, and Mrs Justice Simler in ***Hemdan***. I am content to adopt Mrs Justice Simler's approach as being the correct approach under the current 2013 Rules, and, as such, I have paid specific attention to whether, if a Deposit Order is to be made, what amount it should be for, so as not to constitute a barrier to justice for the claimant.

Discussion and Disposal

76. Having now carefully considered both parties` solicitor's written submissions, along with 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, through his solicitor, Mr McGrade, to make his own representations opposing the respondents' written application for Strike Out, which failing Deposit Order.

77. **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.

78. After most careful consideration of the competing arguments, taking into account the relevant law, as ascertained in the legal authorities referred to earlier in these Reasons, I am not satisfied that this is one of those cases where it is appropriate to Strike Out the claim, which should proceed to be

determined on its merits at a Final Hearing. I am not satisfied that it is in the interests of justice to Strike Out the claim, without hearing evidence, when the respondents have not satisfied me that the claim has **no** reasonable prospects of success.

79. Mr McGrade's written submissions on behalf of the claimant, as set forth earlier at paragraph 38 of these Reasons, have persuaded me that, in the exercise of my judicial discretion, I should not Strike Out the claim, but allow it to go forward to a Final Hearing, where evidence from both parties can be tied and tested. I regard as well-founded Mr McGrade's arguments against a Strike Out.

80. Further, it seems to me to be not in the interests of justice, and thus inconsistent with Tribunal's overriding objective to deal with the case fairly and justly, that this case is brought to an end, and brought to an end now, and that is why I have decided to refuse the respondents' application for Strike Out, and instead decided to list the case for a full merits Hearing in due course.

81. To have struck out the claim now would have been draconian, and a barrier to justice for the claimant, where he and now his solicitor, Mr McGrade, submit that there is an arguable case against these respondents, and the claimant offers to prove that case, with a view to obtaining Judgment against these respondents.

82. While Mr Deans has identified, in his written submissions for the respondents, that there are certain aspects of the claim as pled by the claimant, as an unrepresented, party litigant, which could do with further clarification or specification, those matters are best addressed by a request for Mr McGrade to provide further and better particulars of the claim as regards the detriment suffered, and the causal link between the protected act and alleged detriment.

83. The respondents are entitled to fair notice and proper specification of the victimisation claim being brought against them, and the claimant, through his solicitor, Mr McGrade, should be able to provide that necessary further clarification and specification of the claim. That, in my view, is another reason

why a Strike Out of the claim would be draconian, where further and better particulars can be used to address the pleading deficiencies identified by Mr Deans in the claimant's ET1 claim form.

84. In these circumstances, there being significant disputed facts as between the parties, I take the view that the case should proceed to a Final Hearing. I am satisfied that there being a core factual dispute, the dispute between the parties in this Tribunal is best resolved at a full Merits Hearing where evidence is tried and tested.

85. It is conceded by the respondents, at paragraph 14 of Mr Deans' skeleton argument, that the claimant carried out a protected act, by bringing claim No.1 against the respondents, but at paragraph 15, the respondents dispute that the clamant has suffered a detriment, saying that their failure to respond to his email of 24 September 2018 with his **Rule 6** complaint is not a detriment. Mr McGrade challenges that, at paragraph 9 of his skeleton argument for the claimant, saying that as the claimant has not received an acknowledgement or response from the respondents, that is to be regarded as unfavourable treatment.

86. That is clearly a matter for proof, where the claimant can give his evidence as to why be believes he suffered a detriment, and the respondents can lead whatever evidence they feel is appropriate to resist the claim brought against them, and, in particular, deal with the point raised by Mr McGrade, at paragraph 20 of his skeleton argument for the claimant, as to why the respondents were willing to deal with the claimant's pension issue, but not his **Rule 6** complaint, and whether that refusal to deal with that complaint was influenced to any significant degree, consciously or unconsciously, by the earlier discrimination proceedings brought by the claimant in his 2015 claim No.1?

87. I agree with Mr McGrade that this is not an issue that can be resolved on the papers and it is one which requires oral evidence to enable a proper judicial determination to be made.

88. I also agree with Mr McGrade that no issue of time-bar arises from the victimisation complaint. The claimant's letter was sent to the respondents on 24 September 2018, and his ET1 was presented on 14 November 2018, and thus within 3 months of the act complained of by the claimant. It does not appear to be disputed that the respondents received the claimant's letter, with his **Rule 6** complaint, but they did not acknowledge it, or substantively reply to it.

89. While the respondents submit that this claim is scandalous, vexatious, or an abuse of process, I am not satisfied that that is so. In his skeleton argument for the respondents, at paragraph 36, Mr Deans refers to how the claimant "***appears determined to continue to lodge tribunal claims against the Respondent ad infinitum***." As this is a third claim, I rather think Mr Deans is over-egging the pudding by his observation, and the same point can be made as regards his paragraph 41, where he refers to the claimant's "***decision to continually lodge tribunal claims",*** and how this ***"demonstrates an abuse of process."***

90. This claim No.3 is different to the two earlier claims, and it has to be dealt with on its own individual facts and circumstances. To my mind, the claimant lodging claim No.3, while I had reserved decision in claim No.2, shows persistence on his part, in pursuing what he clearly sees, even now, as a proper claim against the respondents, but the fact he has done so does not, of itself, show that he is motivated by malice or ill-will towards the respondents.

91. While the ET1 paper apart in this claim still runs to some 50 pages, much of what is there emanates from a much broader original claim against the respondents which, as a result of his withdrawal of parts of the claim, is now a much narrower complaint of victimisation only.

92. In the interests of clarity, and good housekeeping of the pleadings, I consider that Mr McGrade might wish to consider providing a revised paper apart, to replace the original, and addressing only the outstanding victimisation complaint, and removing all earlier averments that are irrelevant to that

insisted upon head of complaint. He might find it convenient to do this at the same time as intimating any further and better particulars of the victimisation complaint, as referred to earlier in these Reasons.

93. There are many factors to be taken into account, and, as such, a factual enquiry being for another day, at a Final Hearing to be fixed sometime in **August, September or October 2019**, I am of the view that this case is best addressed by both parties leading evidence, and a full Tribunal coming to a determination, with the benefit of evidence led by both parties, tried and tested through cross-examination in the usual way, any necessary clarifications of that evidence by the Tribunal, and both parties' representatives then making closing submissions to the Tribunal on the basis of the evidence as led, and their submissions on the factual and legal issues arising in this claim.

94. However, in light of some of the points raised by Mr Deans, in his written submissions for the respondents, as set forth at paragraph 31 of these Reasons, I have decided that there is scope for making a Deposit Order against the claimant on the basis that the claim, as currently pled, has little reasonable prospects of success. In particular, I consider that the claim as pled is weak because it does not fully clarify, or specify, the causative link between the protected act and the alleged detriment, and the latter also requires clearer and fuller specification of what the claimant says constitutes the detriment.

95. In coming to my determination on the matter of whether or not to grant any Deposit Order in this case, I have done so after carefully considering both solicitors' written submissions, and also reading again the ET1 claim form, and the ET3 response, as also parties' correspondence with the Tribunal, as held on the casefile.

96. While I have decided not to Strike Out the claim, as having no reasonable prospects of success, I am satisfied that the claim, as currently pled, has little reasonable prospects of success, and that it is accordingly appropriate to make a Deposit Order.

97. At this Preliminary Hearing, which was held in chambers, as the claimant was not required to attend, I did not need to make specific enquiries of the claimant, as regards his ability to pay, if I decided to order him to do so, because he already had complied with the case management order that I made on 1 February 2019, and he had, on 8 April 2019, through his solicitor, provided his 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.

98. That being so, I have required to consider the appropriate amount for a Deposit Order, having regard to the claimant's whole means, and taking his ability to pay into account, and so I have required to decide what specific amount that I can be satisfied that the claimant could afford to pay in that regard.

99. I note and record here that, having regard to the claimant's statement of his whole means, I have decided that the full amount of £1,000, as sought by Mr Deans on behalf of the respondents, would not 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 allegation of victimisation set forth in his ET1 claim form.

100. In his skeleton argument, at paragraph 48, Mr Deans submitted that £1,000 was both affordable and reasonable. In my view, £1,000 is too high, and the £500 maximum suggested by the claimant's solicitor, Mr McGrade, is too low. I have decided the sum of **£750** is appropriate and proportionate in all the circumstances.

101. In his statement of means and assets, together with vouching documents, none of which was challenged by the respondents' solicitor, the claimant has provided a detailed account of his income and expenditure, and also his capital assets and savings.

102. As this Judgment will be published online, and so as to keep the claimant's and his family's financial affairs 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 respondents, it is I think sufficient to record here that the claimant, no longer in local government employment is no longer in receipt of a salary, but he is in receipt of State benefits from the DWP, through ESSA and DLA, and also a pension from the Local Government Pension Scheme.

103. 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.

104. Whilst his available cash is modest, comprising **£836.96** in his bank account, the claimant appears to be a man of some significant capital means, and with capital assets, including two properties, jointly owned with his wife and / or sister, I consider that a sum of **£750**, against the value of his whole means and assets, as declared to the Tribunal, is a fair and reasonable sum which, if he wishes to continue with his claim, as I have not struck it out, will 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.

105. A deposit of £750 appears affordable from his cash to hand, and, if not, looking at the joint expenditure, including **£3,000** per annum for holidays, and an unplanned reserve of **£2,000**, this amount of deposit could presumably be met by reprioritising how the household budget is spent, and so without the need to realise capital assets into cash.

Further Procedure

106. Given my decision not to Strike Out the claim, there is now further procedure to be determined by the Tribunal.

107. Accordingly, I have allowed the claim and response to be listed for a Final Hearing for full disposal, including remedy if appropriate, on dates to be hereinafter assigned by the Tribunal, in the proposed listing period of **August, September and October 2019,** further to receipt of completed date listing stencils from parties' representatives, those stencils being issued by the clerk to the Tribunal, along with this Judgment.

108. Further, having granted the respondents' application for a Deposit Order to be made against the claimant, in terms of **Rule 39**, on the basis that the claim has little reasonable prospect of success, I have made a Deposit Order against the claimant in the amount of **£750.00** for payment to HM Courts & Tribunals, within 21 days of issue of the separate Deposit Order signed by me, and issued by the clerk to the Tribunal, along with this Judgment.

109. In respect of the Final Hearing to follow, and for the efficient and effective conduct of that Final Hearing, in exercise of the general powers to manage proceedings, as conferred by **Rule 29 of the Employment Tribunal Rules of Procedure 2013**, I have also signed a separate set of standard Case Management Orders, as issued by the clerk to the Tribunal, along with this Judgment. Parties' representatives should ensure full and timeous compliance with these further Case Management Orders.

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

111. Dependent upon subject matter, and any objection / comment by the other party's representative, any such case management application may

be dealt with on paper by me as the allocated Employment Judge, or a Preliminary Hearing fixed, either in person, or by telephone conference call, as might be most appropriate.

Employment Judge: Ian McPherson
Date of Judgement: 30 April 2019

Entered in Register,
Copied to Parties: 02 May 2019

APPENDIX: This is the full text of the Cease and desist letter of 01/02/2018 from Thompsons to the claimant

Dear Mr Gourlay

Cease and desist letter

No further action to be taken

Your employment with West Dunbartonshire Council (the "Council") ended in September 2015. You requested legal assistance from the GMB in relation to claims which you had against the Council relating to your dismissal, and prior to that, about how the Council treated you as a disabled employee.

Your requests for legal assistance were considered in line with the GMB's usual process; these requests were declined because the GMB were advised that your claims had no reasonable prospect of succeeding.

Since then, we are aware that you have contacted the GMB repeatedly to make numerous complaints about your treatment by them and the lack of support you say they have given you.

The GMB has spent a significant amount of time and resources responding to your enquiries; despite this you remain dissatisfied and are still repeatedly contacting the GMB, its officials and employees about this.

Whilst we appreciate you remain dissatisfied with the responses you have received from the GMB, the purpose of this letter is to inform you that our client, the GMB, has no further comment to make about these matters.

It is not sustainable for them to spend any further time or resources responding to your enquiries, over 2 years after you have left your employment with the Council.

The GMB do not therefore propose to respond to any further contact they have from you in relation to your employment with the Council and the lack of support you say was provided by them during this period.

Please therefore cease and desist from contacting the GMB about these matters**.**

If you do not do so, the GMB will have no option but to take advice from us about the other remedies open to them to resolve this matter.

Cease and desist from harassing GMB officials and employees

You will also appreciate that it is important that the GMB, as an employer, takes all reasonable steps it can to protect its officers and employees from being harassed in the workplace.

We understand that in addition to repeated persistent and lengthy e-mails directed towards GMB officials and employees, last month you turned up unannounced at GMB premises.

The purpose of this letter is to request that your actions, including but not limited to: turning up at the GMB's offices without an appointment, repeatedly e-mailing or otherwise contacting GMB officials and employees, including but not limited to: Gary Smith, Brian Johnstone, Tony Dowling, Ude Adigwe, Tim Roache and Janice Flynn stop immediately.

If your actions do not stop and you continue to persistently contact and/or otherwise harass the GMB, any of its officials or employees, the GMB shall pursue any legal remedies available to it to protect its officials and employees from harassment.

These remedies may include but are not limited to: contacting the police to obtain criminal sanctions against you and/or suing you civilly for damages that have been incurred as a result of your actions.
This letter acts as a warning to discontinue this unwanted conduct. No further action will be taken against you at this stage; we trust this will not be necessary and that you will now cease and desist from contacting our client immediately.

Yours faithfully

DAVID MARTYN
PARTNER
THOMPSONS