EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4122596/2018

Held in Glasgow on 8 May 2019 (Preliminary Hearing)

Employment Judge I McPherson

Mr Jagjiwan Singh Jhammat	**Claimant** **In Person**
Newcross Healthcare Solutions Limited	**Respondents** **Represented by:** **Mr Jamie Meechan - Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that: -

(1) Having heard the claimant in person, and the respondents' solicitor, in Preliminary Hearing, the Tribunal **refuses** the respondents' application for Strike Out of the claim, which failing a Deposit Order, in terms of **Rules 37 and 39 of the Employment Tribunals Rules of Procedure 2013,** and **orders** that the case now be listed for a Final Hearing for full disposal, including remedy, if appropriate, before a full Tribunal on dates to be hereinafter assigned by the Tribunal, following the standard date listing process.

(2) Further, the Tribunal **reserves** for consideration at that Final Hearing, as part of parties' closing submissions to the Tribunal, the matter of any application by either party for an award of expenses, or preparation time, in terms of **Rules 74 to 84**.

REASONS

Introduction

1. This case called again before me on the morning of Wednesday, 8 May 2019, at 10.00am, for a one-day public Preliminary Hearing, previously intimated to both parties by the Tribunal by Notice of Preliminary Hearing (Preliminary Issue) dated 1 March 2019.

2. This Preliminary Hearing was previously ordered by me, at a Case Management Preliminary held, in private, on 26 February 2019, where I ordered, amongst other things, that the respondents' opposed applications seeking Strike Out of the claim, which failing a Deposit Order, be listed, and I made certain case management orders in that regard.

3. My written Note and Orders of the Tribunal, dated 28 February 2019, were issued to both parties, under cover of a letter from the Tribunal dated 28 February 2019.

4. Following further correspondence with both parties, after that Case Management Preliminary Hearing, by further letter from the Tribunal dated 4 May 2019, issued on my instructions, it was confirmed to both parties that this Preliminary Hearing would have an extended remit.

5. Specifically, it was stated that it would also deal with the claimant's application of 20 March 2019 for Costs against the respondents, as opposed by the respondents, as per their skeletal submissions on Strike Out, as intimated to the Tribunal, and copied to the claimant, on 24 April 2019.

Claim and Response

6. Following ACAS early conciliation between 22 October and 1 November 2018, the claimant, acting on his own behalf, presented his ET1 claim form to the Tribunal, on 8 November 2018. The claimant, who complained of victimisation, sought compensation from the respondents, totaling **£19,799**, comprising £3,799 loss of earnings, and £16,000 for injury to feelings.

7. His claim was accepted by the Tribunal, and served on the respondents by Notice of Claim issued by the Tribunal on 20 November 2018. Thereafter, on 18 December 2018, an ET3 response was filed on behalf of the respondents, defending the claim, through their legal representative, Ms Laura Godfrey, solicitor with Ashfords LLP, Exeter.

8. That response was accepted by the Tribunal on 19 December 2018, and a copy sent to the claimant and ACAS. The response's primary position was that the claim was lacking in specification as to the legal basis of the claims being brought, which were interpreted as being victimisation, and whistleblowing detriment.

9. At the Case Management Preliminary Hearing held before me, on 26 February 2019, the Tribunal noted and recorded the claimant's clarification at that Preliminary Hearing that the legal basis on which he relies to support the facts set forth in his ET1 claim form is a complaint of victimisation, contrary to **Sections 27 and 77 of the Equality Act 2010**, and a complaint of detriment in a Working Time Regulations case, contrary to **Sections 45A and 48(1ZA) of the Employment Rights Act 1996**, and that the claimant is not making any whistleblowing detriment complaint against the respondents, in terms of **Sections 43 and 47B of the Employment Rights Act 1996**.

10. Having then heard from the solicitor for the respondents, Mt Jamie Meechan, from MacRoberts LLP, Glasgow, I allowed him a 14 day period to apply to the Tribunal to amend their ET3 response to properly respond to the claimant's clarification that he intends to pursue his **Section 45A** claim, and on 5 March 2019, Laura Godfrey, solicitor at Ashfords LLP, Exeter, intimated an application to amend the ET3 response, and for the claim to be struck out, with copy to the claimant, and to her local agent, Mr Meechan.

11. Thereafter, on 21 March 2019, the claimant emailed the Tribunal, with copy to Ms Godfrey for the respondents, attaching his reply to the respondents' application to amend the response and for the case to be struck out. His five-page, typewritten reply, dated 20 March 2019, clarified that he did not oppose the application to amend the respondents' grounds of resistance, and he

attached a separate 5-page, typewritten document entitled "***Reply to Grounds of Resistance."***

12. Further, in his reply to the respondents' application for Strike Out / Deposit Order, the claimant stated that he opposed that on various stated grounds, to which I will return later on in these Reasons, and he also included in that reply an application that the respondents be directed to pay the costs in relation to this Strike Out Hearing.

13. On 26 March 2019, having considered both parties' recent correspondence, and on my instructions, a letter was sent to both parties by the Tribunal stating that, as there was no objection by the claimant, and it was in the interests of justice to do so, I allowed the respondents' amendment of 5 March 2019 to the ET3 response, and that the claimant's reply of 20 March 2019 would be held on the casefile as additional information from the claimant.

14. Further, that letter from the Tribunal also stated that the respondents' application for Strike Out / Deposit Order would now be held into all aspects of the claim, and that the respondents' outline written skeleton argument (ordered at the Case Management Preliminary Hearing to be intimated by 24 April 2019) should now cover all aspects of the claim, and should also address the claimant's application of 20 March 2019 seeking an award of costs against the respondents, in the event their Strike Out application was unsuccessful.

Applications before this Tribunal

15. On 24 April 2019, Mr Meechan intimated to the Tribunal, with copy sent to the claimant, his 4-page, typewritten skeletal submissions on the respondents' application for Strike Out, Deposit Order, and opposition to any Costs / Expenses against the respondents, as also his list of authorities for the respondents, to all which I will return later on in these Reasons.

16. In the Tribunal's letter of 26 March 2019, the claimant was reminded that his statement of means and assets (also ordered at the Case Management Preliminary Hearing to be intimated by 24 April 2019) should be intimated by the due date, as previously ordered. In the event, it was only on 30 April 2019 that the claimant emailed the Tribunal, with copy to both Ms Godfrey and Mr Meechan for the respondents, with a Bundle of 18 documents, including his statement of means and assets, with some supporting vouching documents, and a list of authorities for the claimant. Again, I will return to these later on in these Reasons.

17. Meantime, I note and record that, although no application was made by the claimant for an extension of time, in the interests of justice, and on my own initiative under **Rule 5 of the Employment Tribunal Rules of Procedure 2013,** I extended the time for compliance, and both parties were so advised by letter from the Tribunal dated 4 May 2019.

18. When the case called before me at this Preliminary Hearing, the claimant was in attendance, unrepresented, and unaccompanied. Mr Meechan again appeared as local agent for the respondents, and at this Hearing he was accompanied by a trainee solicitor, Miss L Anderson.

19. I heard from both parties, who spoke to their previously intimated written submissions, and I record here that I am obliged to both the claimant and Mr Meechan for their respective written submissions, which have been of considerable help to me in understanding their respective positions, and of assistance as, in private deliberation, I have now come to this my decision on the various applications before this Tribunal.

Respondents' Application for Strike Out / Deposit Order

20. Mr Meechan spoke to the terms of his written skeletal submissions intimated on 24 April 2019. It is convenient, at this stage, to note their full terms, which I repeat *verbatim*, as follows: -

T*he Claimant's claim is that restrictions were placed on his available hours because he raised a holiday pay claim against the Respondent. He claims this is victimisation in terms of the Equality Act 2010, and detriment in terms of the Employment Rights Act 1996. The Respondent's position is that these claims have no reasonable prospects of success, failing which little reasonable prospects of success. The restrictions were placed because of an ECS check, received by the Respondent on 2 July 2018 (which is the Employer Checking System referred to in the ET3), which confirmed that the Claimant had the right to work but subject to restrictions. The Respondent has continued to rely on guidance and advice from the Home Office in relation to the Claimant's right to work, and any restrictions placed on his hours have been in response to that and not the Claimant's holiday pay claim.*

The Respondent has therefore applied for both the victimisation claim under sections 27 and 77 EA 2010 and detriment claim under sections 45A and 48(1ZA) ERA 1996 to be struck out, failing which that a deposit order is made.

STRIKE OUT

Rule 37 (contained in Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013):

A tribunal may strike out at any stage of the proceedings, either on its own initiative, or following the application of a party, all or part of a claim or response on the grounds that…it…has no reasonable prospects of success (Rule 37(1)(a)).

***Hasan v Tesco Stores Ltd UKEAT/0098/16** - When considering whether to strike out, a tribunal must:*

1. *Consider whether any of the grounds set out in Rule 37 have been established.*

2. *Then go on to decide whether to exercise its discretion to strike out, given the permissive nature of the rule.*

***Ezsias v North Glamorgan NHS Trust [2007] EWCA Civ 330**, at para 29 - "It would only be in an exceptional case that an application to an Employment Tribunal will be struck out as having no reasonable prospect of success when the central facts are in dispute."*

*The EAT provided guidance in **Mechkarov v Citibank [2016] ICR 1121**, at para 14:*

- *Only in the clearest of cases should a discrimination claim be struck out*
- *Where there are core issues of fact that turn to any extent on oral evidence, they should not be decided without hearing oral evidence*
- *The claimant's case must ordinarily be taken at its highest*
- *If the claimant's case is "conclusively disproved by" or is "totally and inexplicably inconsistent" with undisputed contemporaneous documents, it may be struck out*
- *A tribunal should not conduct an impromptu mini trial of oral evidence to resolve core disputed facts*

Nevertheless, there is authority for discrimination and other claims being struck out.

***Croke v Leeds City Council UKEAT/0512/07/LA** - Mr Croke, a litigant in person, presented discrimination claims against the Council, which applied to have them struck out. After requiring Mr Croke to provide full particulars of his claim, at a PHR an employment judge held that his claims were for victimisation. However, as there was no material from which the necessary causal link between a protected act and the Council's alleged conduct could be identified, the judge struck out the claims as having no reasonable prospect of success. Upholding the employment judge's decision, the EAT held that where, on the available material, the employment judge considered*

that a case was "not, in any ordinary sense of the term, fact-sensitive", it could be struck out without evidence being formally heard.

*In **Ahir v British Airways plc 2017 EWCA Civ 1392**, CA, the Court of Appeal asserted that tribunals should not be deterred from striking out even discrimination claims that involve disputes of fact if they are entirely satisfied that there is no reasonable prospect of the facts necessary to find liability being established. The Court accepted that the test for strike-out on this ground with its reference in rule 37(1)(a) to 'no reasonable prospect of success' was lower than the test in previous versions of the strike out rule, which referred to the claim being frivolous or vexatious or having 'no prospect of success'. In this case, the Court upheld an employment judge's decision to strike out the victimisation and discrimination complaints of an employee who had been dismissed for falsifying his CV. The Court concluded that the employment judge had rightly described the allegations as 'fanciful' and struck out the claims as having no reasonable prospect of success. There was a well-documented and innocent explanation for the appellant's dismissal, and his dishonest conduct was considered in light of his airside clearance. It was held that cases could not be allowed to proceed simply on the basis of assertions.*

Submission - analogies can be drawn with the Ahir case and the present case. It is not surprising that the Respondent restricted the Claimant's hours in response to an ECS check which directed that it do so, given the significant penalties which may arise for non-compliance with the Immigration Rules/Home Office guidance. The Claimant's assertion that in fact the hours were reduced because he brought a holiday pay claim, is speculative, and (particularly given that there is a well-documented and innocent explanation for the restriction) should be struck out.

***Shestak v Royal College of Nursing EAT 0270/08** - held that undisputed documentary evidence — in the form of emails which could not, taken at their highest, support the claimant's interpretation of events — justified a departure*

from the usual approach that discrimination claims should not be struck out at a preliminary stage.

a) Victimisation contrary to sections 27 and 77 EA 2010

The Claimant relies on a disclosure under section 77 EA 2010. The Claimant states in his ET1 that he was subject to detrimental treatment as a result of issuing a holiday pay claim. In his email to the Tribunal of 13 November 2018, he further states that he has asked for disclosure information regarding his holiday pay which is part of his pay and was victimised because of that.

Section 77 EA 2010 states that a disclosure is a relevant pay disclosure for the purposes of a victimisation claim under section 39(3) EA 2010 if made for the purpose of enabling the person who makes it, or the person to whom it is made, to find out whether or to what extent there is a connection between pay and having (or not having) a particular protected characteristic.

The Claimant's position (as set out in his email to the Tribunal dated 20 March 2019) is that it is not necessary for him to have the particular characteristic in order to be protected against victimisation. He argues that to be unlawful, the victimisation must be linked to a protected act. The Respondent accepts this analysis, at least to the extent that a Claimant does not need to have a particular protected characteristic in order to be protected against victimisation in terms of section 27. However, it is submitted for the Respondent that the Claimant does need to identify a protected characteristic in terms of section 77 for there to be a relevant pay disclosure.

It is the Claimant's case that he has made a relevant pay disclosure, and it is this which is the protected act. However, section 77(3) is clear that for a disclosure to be "a relevant pay disclosure" there must be "a connection between pay and having (or not having) a protected characteristic."

At no point during the grievances raised by the Claimant, or the Working Time Regulations claim brought by him and heard at a final hearing, did he make any suggestion that this was linked to a protected characteristic. He did not refer to any protected characteristic in his ET1 (for claim number 4106998/2018, the holiday pay claim, or the present claim). It would therefore be reasonable for the Tribunal, and indeed the Respondent, to conclude that his request for information about the holiday pay was equally not to find out whether there is a connection between pay and having a particular protected characteristic.

As such, it is submitted that the Claimant has not done a protected act as defined in section 77(4) EA 2010, or otherwise. Although the Claimant does not accept this point, this is due to his interpretation of the law rather than a factual dispute that arises between the parties. The Tribunal therefore, considering this part of the case in line with the guidance set out in Mechkarov v Citibank cited above, and taking the Claimant's case at its highest, should be satisfied that there is no reasonable prospect of success of this element of the case.

The Respondent therefore applies to the Tribunal for an order under rule 37 striking out this claim on the basis that it has no reasonable prospect of success.

b) Detriment contrary to sections 45A and 48(1ZA) ERA 1996

The Claimant claims that he was subject to detrimental treatment contrary to section 45A ERA 1996 after issuing a claim in the Employment Tribunal for holiday pay. The detrimental treatment cited by the Claimant is a restriction of hours.

As stated in the Grounds of Resistance attached to the Respondent's ET3, the Respondent, in accordance with its duties to prevent illegal working, carried out a right to work check (using the Home Office's Employer Checking

Service) in respect of the Claimant which stated that the Claimant's hours were to be restricted in accordance with his Tier 4 student visa. The reason for the restriction to the Claimant's hours was very clearly (a) the result of the ECS check from the Home Office, and (b) clarification from the Home Office that the Respondent must restrict the Claimant's hours in accordance with his Tier 4 visa.

The relevant ECS check was issued to the Respondent on 2nd July 2018 (it having been applied for in June 2018 as the previous ECS check expired in June 2018), and the restriction to the Claimant's hours was applied shortly afterwards (having received confirmation from the Home Office that the restriction should be applied). The restriction to the Claimant's hours was clearly not a direct result of the Claimant issuing a holiday pay claim - it was a result of the ECS check and advice from the Home Office. There is a well-documented and innocent explanation for the restriction of hours.

The Respondent therefore applies to the Tribunal for an order under rule 37 striking out the claim on the basis that it has no reasonable prospect of success.

DEPOSIT ORDER

In the event that the Tribunal does not strike out this claim, the Respondent applies for an order under rule 39(1) that the Claimant pay a deposit as a condition of continuing the ERA 1996 and/or EA 2010 claim on the ground that it has little reasonable prospect of success.

Rule 39 (contained in Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013):

If the Tribunal considers that any specific allegation or argument in a claim has little reasonable prospect of success, it may make an order requiring a

party to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.

The test is therefore lower than the test to strike out.

***IDS Employment Law Handbooks**, Volume 5, Chapter 4, Deposit Orders, Procedure for making a deposit order, 11.248 - "while the amount of a deposit order should reflect the party's means, it should also be high enough to stand as a warning that the matter had little reasonable prospects of success."*

***O'Keefe v Cardiff and Vale University Local Health Board (No. 1602248/15)** is referred to in IDS, in which the Tribunal ordered the Claimant to pay £100 for each of the two grounds of his claim – despite the Claimant having no source of income at the time. It is said in IDS that "the Tribunal reasoned that the sum at this level ensured that the order did not effective amount to strike out…but was sufficient high to 'bring home…the limitations of the claim'.*

*The Tribunal should look at all means and assets, and not just income. For example, in **Simpson v Strathclyde Police and another UKEAT/0030/11**, the EAT held that a Tribunal was entitled to take a claimant's student loan into account as part of the claimant's available resources.*

COSTS/EXPENSES

Claimant's email of 20 March 2019 - "respondent has filed the present application for strike out and deposit order which has no merits and in spite of the fact the respondent legally aware about the provisions of law and then also filed such merit less application before the Tribunal resulting in one day hearing and delayed the final hearing in this case, therefore respondent be directed to pay the costs incurred in relation to strike out hearing."

Submission - costs do not "follow the event" in the Tribunal, and are generally viewed as the "exception rather than the rule".

Costs, or expenses in Scotland, means fees, charges, disbursements or expenses incurred by or on behalf of the receiving party (Rule 74(1)).

The Tribunal at the case management hearing directed the Claimant to free legal advice and representation services available in the Glasgow area. The Claimant continues to be unrepresented. The Respondent is therefore not aware of any relevant costs incurred by the Claimant. Costs must be incurred to be recoverable.

***Yerrakalva v Barnsley Metropolitan Borough Council [2011] EWCA Civ 1255** - costs should be limited to those 'reasonably and necessarily incurred'.*

Respondent's costs

The Respondent reserves its position in relation to expenses, subject to the outcome and progress of this preliminary hearing and indeed any final hearing

Respondents' List of Authorities

21. In considering Mr Meechan's written submissions, I have taken into account his list of authorities, as intimated on 24 April 2019. Again, it is convenient, at this stage, to note them as follows: -

1) **Employment Tribunal Rules of Procedure 2013 (SI 2013 No.1237), Schedule 1**
2) **Hasan v Tesco Stores Ltd [2016] UKEAT/0098/16**
3) **Ezsias v North Glamorgan NHS Trust [2007] EWCA Civ 330**
4) **Mechkarov v Citibank NA [2016] UKEAT/0041/16; [2016] ICR 1121**

5) **Croke v Leeds City Council [2008] UKEAT/0512/07**

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

7) **Shestak v Royal College of Nursing & Others [2008] UKEAT/0270/08**

8) **IDS Employment Law Handbooks, Volume 5, Chapter 4, Deposit Orders, Procedure for making a deposit order, paras 11.245 to 250**

9) **Simpson v Strathclyde Police and Another [2012] UKEATS/0030/11**

10) **Barnsley Metropolitan Borough Council v Yerrakalva [2011] EWCA Civ 1255**

Claimant's Opposition to Respondents' Application

22. At this Preliminary Hearing, the claimant spoke to the terms of his written submissions of 20 March 2019, as intimated on 21 March 2019. It is convenient, at this stage, to note their full terms, so far as relevant for present purposes, which I repeat *verbatim*, as follows: -

Response to Application for the Claimant's claim to be struck out

Claimant oppose the respondent application for striking out the claim, on the following grounds:

That the claimant has been subjected to victimisation because he has raised claim for Holiday Pay and challenged the respondent practice of rolled -up-pay which is contrary to objectives of Working Time Regulation. Claimant has prima facia case of victimisation, so if the same is struck out or any deposit orders are made at this stage that will be curtailment of claimants right to raise voice for his legal rights.

Claimant present claim is based upon the fact that his working rights were restricted once he raised the issue of Holiday Pay with the respondent with a motive to put pressure upon the claimant not to continue with his holiday pay claim, which has been admitted by respondent Manager Caroline Armstrong while answering the grievances raised by claimant. She has specifically

stated that as claimant has raised the Holiday Pay claim HR team reviewed all elements on claimant file. If there would have been any issue with the restrictions regarding claimants right to work that should have been brought to notice at the earliest available opportunity, when claimant started work with respondent as claimant immigration status was same at start of employment with respondent and later when the restrictions were imposed , so all the restriction were just with a motive to victimise the claimant, as he raised Holiday Pay claim. The submissions of respondent that claimant case has no reasonable prospect of success is denied, as there are sufficient documentary evidence which can only be produced if proceedings go for full hearing which can prove the claimants claim.

a) Victimisation contrary to section 27 and 77 of Equality Act 2010

It is incorrect assumption of respondent that there is nothing to suggest that claimant has not done a protected act as defined in section 77(4) of EA 2010. According to section 77(4) EA Act 2010 claimant has sought disclosure regarding his and one of the co-employees holiday pay , and holiday pay is part of pay given by any employer to his employees. So claimant has asked respondent for relevant pay disclosure , made a claim before Employment Tribunal to seek the pay disclosure and sought information regarding his holiday pay which is part of pay.

Further going to section 77(5) of EA Act 2010 claimant disclosure regarding his holiday pay also applies wide section 39 (4) (b) & (d) of EA Act 2010 . As section 39 (4) (b) of EA Act 2010 claimant work has been restricted and section 39 (4) (d) of EA Act 2010 respondent subjected claimant to detriment as claimant raised issue regarding holiday pay.

Respondent is trying to create a wrong belief before the Tribunal , stating their need to be connection between pay and having particularly protected characterises. Claimant believes that respondent has not gone through the legislative history of Equality Act 2010 and intention of Parliament to encode Harassment and Victimisation under Equality Act 2010. According to "Equality Act 2010 Code of Practice: Employment Statutory Code of Practice", the legislative intent of section 27 of EQ Act 2010 is elaborated as,

"a worker need not to have particular protected characteristics in order to be protected against victimisation under the Act; to be unlawful, victimisation must be linked to 'protected act'. Making an allegation or doing something related to the Act does not have to involve an explicit reference to the legislation". So for victimisation connection should be between protected act and detrimental treatment, so in the present case detrimental act is restrictions imposed on working conditions of claimant after he did protected act of seeking pay disclosure by way of asking for Holiday Pay for himself and other co-employee. Moreover claimant alleged discrimination in his grievance and all other correspondence to respondent regarding restrictions on allocation of work.

It is incorrect that claimant has not raised the discriminatory conduct of respondent in grievances, even the grievances raised by the claimant and in appeal related to grievances there has been clear mention of the discriminatory conduct of respondent, because of his nationality and particular immigration status.

Respondent has raised various issues like not rising the issues of discrimination before the respondent which can only be proved once claimant gets opportunity to lead his evidence and submits his documents which clearly answers the respondent questions, so deciding anything about the merits of the case without taking into consideration evidence would be injustice to claimant, at this preliminary stage. Moreover claimant has prima facia case of victimisation which needs redressal.

Therefore claimant requests that respondent application under rule 37 for striking out the claim on the basis of no reasonable prospectus of success be dismissed.

b) Detriment contrary to section 45A and 48 (1ZA) of ERA 1996

It is denied that respondent followed the Home Office policy regarding right to work, but they have used the policy to fulfil their motive to victimise claimant for raising holiday pay issue and then claim before Employment Tribunal. The facts are evident that when claimant joined the respondent they conducted full checks and confirmed that claimant has right to work full time without any

restrictions. Claimant was offered work accordingly on full time basis, but after 30/04/2018 when claimant first raised holiday pay issue there was some slowdown in allocation of work as respondent was of the view that claimant will settle down and not do anything, but when 0n 09 May 2018 claimant approached ACAS respondent become alert and finally when on 07/06/2018 submitted the claim. At one stage respondent completely removed the claimant and his wife from the system saying they do not have right to work, this came to claimant knowledge when claimant and his wife online logging system through staff intranet and HFGo App was deactivated on 02/07/2018. Claimant on 02/07/2018 immediately contacted Glasgow Branch Manager Caroline Armstrong who informed that claimant and his wife do not have any right to work, so cannot be continued to work and therefore their accounts are deactivated. By deactivating accounts claimant would not be able to book any shifts neither will have accesses to his pay.

Claimant informed Mrs Caroline that its not correct and submitted all the paper work vide mail dated 03/07/2018 and reminder was also sent on 04/07/2018 and 05/07/2018 as claimant also wants some money from pay and that was only possible if claimant have access to HFGo App. On 05 /07/2018 Mrs Caroline replied stating that all restrictions are removed, but did not gave any reason for putting restriction, neither she give any information about 20 hours restriction. Thereafter claimant was not offered any work till mid-August 2018 and when got offer for a shift for 24 hours from Hamilton Branch on 21 August 2018, they were not able to book the same and informed claimant that, claimant is not allowed to work more that 20 hours a week, therefore cannot be booked for 24 hour shift. Claimant on same day raised grievances and submitted all documentation including Home Office policies to Branch Manager Glasgow office, but nothing helped and later on 17/09/2018, claimant was informed that all restrictions are removed.

Important issue in all these submissions is that, <u>claimant visa conditions are same when claimant joined respondent job till now, but the issue of restriction was raised by respondent as claimant raised holiday pay concern</u>. So claimant has prima facia claim which cannot be struck down at this

preliminary stage without taking into consideration all the evidence and documents.

Victimisation did not stopped even now and respondent are looking for a chance to dismiss the claimant and his wife from the job , so in month of December 2018 respondent submitted wrong declaration to Home Office on behalf of claimant and his wife which resulted in negative right to work check and claimant and his wife was served with a notice of termination on the basis of their right to work , but claimant approached Home Office and submitted documentary evidence that they have right to work , which saved the termination of job of claimant and his wife.

The claim involved the issues which needs to be proved by way of evidence and even at this stage on the basis of submissions claimant has prima facia claim and there is noting contradictory submitted by respondent .

Therefore claimant requests that respondent application under rule 37 for striking out the claim on the basis of no reasonable prospectus of success be dismissed.

Further claimant requests that as the claimant has reasonable prospectus of success and prima facia claim therefore there are no reasons to issue any deposit orders. Even if any deposit orders are issued claimant has no resources to pay even £1 as deposit because of family financial conditions. Claimant has two minor children's and even the wife of claimant has lost her contracted job recently. So , claimant is the only earning member in the family of four persons and even claimant work is also irregular as and when required.

It is further requested that respondent has filed the present application for strike out and deposit order which has no merits and in spite of the fact the respondent legally aware about the provisions of law and then also filed such merit less application before the Tribunal resulting in one day hearing and delayed the final hearing in the case, therefore respondent be directed to pay the costs incurred in relation to strike out hearing.

23. In addressing the Tribunal, the claimant also referred me to documents in his Bundle, intimated on 30 April 2019, including documents 1 to 13, at pages 1 to 30 of his Bundle. I refer to his documents later on in these Reasons. On my instructions, on 4 May 2019, a letter was sent by the Tribunal, to both parties, stating it was not clear why a Bundle had been lodged, when not ordered by the Tribunal, and enquiring whether the claimant was seeking to give evidence at the Preliminary Hearing, rather than simply replying to the respondents' solicitor's skeleton submissions.

24. Further, and for the avoidance of any doubt, the Tribunal's letter of 4 May 2019 stated that this Hearing was not a Final Hearing into the merits of the claim, but a Preliminary Hearing on the respondents' opposed applications for Strike out / Deposit Order, and also now the claimant's opposed Costs application.

25. In his email reply to the Tribunal, on 5 May 2019, the claimant clarified that his documents were submitted: ***"to make the Tribunal aware about the facts and submissions regarding*** **prima facie** ***case by claimant",*** and because "***it's claimant's obligation to defend the strike out application***." Further, he clarified, he was not producing any witness, but he would be "***relying upon the documents and submissions to be made during the hearing, and, in case respondent brings any witness claimant keeps it's right to cross-examination."***

26. Finally, I also note and record that, in Mr Meechan's email of 7 May 2019, replying to the Tribunal's letter of 4 May 2019, he confirmed that the respondents would not lead any oral evidence at this Preliminary Hearing. He did, however, enclose, with copy for the claimant, a "***Strike Out Index***", of 4 documents which he intended to refer to at this Preliminary Hearing, and he provided hard copies for the claimant and Tribunal. I refer to his documents later on in these Reasons.

Claimant's List of Authorities

27. In considering the claimant's written submissions, I have taken into account his list of authorities, as intimated on 30 April 2019, as document 18 in his Bundle, at page 44. Again, it is convenient, at this stage, to note them as follows: -

(1) **Kwele-Siakam v The Co-operative Group Ltd [2017] UKEAT/0039/17**

(2) **Hemdan v Ishmail & Another [2016] UKEAT/0021/16; [2017] ICR 486; [2017] IRLR 228**

(3) **Anyanwu and anor v South Bank Students' Union and anor [2001] UKHL 14; [2001] ICR 391**

(4) **Ezsias v North Glamorgan NHS Trust [2007] EWCA Civ 330**

Claimant's Statement of Means & Assets, and Evidence heard by the Tribunal

28. On this aspect of the applications before the Tribunal, I had before me, and I have taken into account, the claimant's income and expenditure statement, and copy pay slips for him and his wife, Mrs Prabhjot Kaur, as also bank statements, all as intimated on 30 April 2019, as documents 14 to 17 in his Bundle, at pages 32 to 43.

29. It is convenient, at this stage, to note the information there provided to the Tribunal, in particular the "***Income and Expenses Statement by Claimant***", reproduced as page 32 of his Bundle, and reading as follows: -

> ***"Claimant is responsible for a family including three dependents his wife and two minor children aged 13 years and 10 years. Claimant income is not certain every month as he is not on fixed hours contract and sometimes for week remain without job.***

Claimant wife is also enrolled with respondents, but she is not getting much work, moreover she lost her fixed hours job in January 2019 because of her ill-health as she is suffering for Arthritis associated with lung diseases. Although in month of April 2019 she tried another job in private household, but that was also lost as she was not required.

Now the only earning member in the family is the claimant whose average monthly earning ranges between £1000 to 1200, on the other hand family expenses are far more which is putting family in debts. In these circumstances, if Tribunal even award £1 deposit order that cannot be fulfilled. In similar circumstances demanding any deposit order will be denial of justice for the claimant.

Claimant had prima facia case based upon evidence and facts, so there cannot be any presumption, that there are no reasonable prospects of success and therefore no deposit order is required. Even if Tribunal proceed with deposit order the expenses and income details are as under."

30. The claimant then, at page 33 of his Bundle, provided an income and expenses statement covering 1 to 30 April 2019. It is not necessary, as this Judgment will be published online, to detail the full specifics in these Reasons, and to preserve the confidentiality of the family's financial situation, I do not repeat here the full detail provided, but the claimant referred to a total family monthly income of **£1,783.49**, with expenses of **£1,713.76**, and he further stated that there are nil assets or savings held by him and his family. He produced copy of his and his wife's bank statements for April 2019, and his and her pay slips from the respondents for April 2019, at pages 34 to 43 of his Bundle.

31. Further, I note and record that, in Mr Meechan's email of 7 May 2019, replying to the Tribunal's letter of 4 May 2019, the respondents' solicitor confirmed that he wished to cross-examine the claimant on his means, and he estimated around 30 minutes, and accordingly I heard sworn evidence from the claimant on this matter, which I elicited from him by a series of structured and focused questions, reference to the ET1 claim form, and his Bundle, and then cross-examination by Mr Meechan on behalf of the respondents.

Findings in Fact relating to the Claimant's Means and Assets

32. On the basis of the sworn evidence from the claimant heard at this Preliminary Hearing, and the various documents spoken to by him in evidence, as contained within his Bundle, I have found the following essential facts established: -

(1) The claimant, who is employed by the respondents, is aged 44. He is an Indian national, and he has a right to work in the UK, subject to certain immigration restrictions.

(2) He has been employed by the respondents as a Support Worker, and his employment with them, which is continuing, started on 9 January 2018.

(3) His April 2019 payslip from the respondents, copy produced to the Tribunal, shows a monthly income of £984.89. He spoke of his income from the respondents being roughly £1,000 per month, after tax, but variable according to hours worked. He stated he has no other source of income, whether from part-time, casual or self-employed working.

(4) The claimant is married, with 2 dependent children of school age, and he produced an income and expenses statement for the Tribunal, at pages 32 and 33 of his Bundle, with supporting documents at pages 34 to 43.

(5) He holds a Master of Science degree from the University of the West of Scotland, from where he graduated on 4 July 2017, with an MSc in International HR Management. While registered with another employment agency, Black on Black Recruitment, the claimant stated he is not doing any work for them

(6) On the basis of his evidence to the Tribunal, the Tribunal finds that he and his family are currently dependent upon his income as the only income to the family, his wife not currently being employed.

(7) While the claimant stated that his wife is still on the respondents' books, he explained that she has not had any shifts from the respondents since February and March 2019. The claimant further stated that his wife has no other income, and they do not receive any State benefits, e.g. child benefit, and housing benefit, due to their immigration status.

(8) The claimant and his family live together in a private, rented flat, and so he stated that he is not a home owner. Further, the claimant stated that while their monthly expenditure includes a payment for a car, that car (a Vauxhall Crossland, purchased in January 2019 for about £12,000) belongs to his sister, Rita Gupta, who is the registered keeper.

(9) He further explained that he needs the car to go to work, often at unsociable hours, and at places where there is no convenient public transport available. He also explained that his sister purchased the car because his credit history is not good enough for him to get finance.

(10) The claimant spoke of no capital assets or savings held by him or his family, and the copy bank statements produced to the Tribunal vouch that he has very little disposal income in his bank accounts. This month, with only his income from the respondents, the family's expenditure will exceed its income.

(11) While the claimant stated that his wife intends to work again, and she had given the respondents her availability, he advised that she had not yet been offered any shifts, so that she is looking for jobs elsewhere also. She had received a one-off payment from a charity in April 2019, as shown in the bank statements produced, when she had been employer as a carer for an old age pensioner, but he stated that was not regular income.

(12) When challenged, in cross-examination by the respondents' solicitor, about "***non-essential spending***" for a cinema visit and carry out meal, the claimant stated that he does not have money to spend extravagantly, and he disputed that he had any disposable income, and he denied that he had any other savings.

(13) When asked about how he funded his Masters degree, the claimant stated that he did so through parental support, and some of his own savings, but added that he has no savings now.

(14) Further, while still registered with Black and Black Recruitment, the claimant stated that he was not getting work from them, because he is working for the respondents, and so he does not have time for 2 jobs, but he keeps that other agency as a "safety net", but he had only done one shift for them in the last 6 months, as they are looking for available people to work.

33. The claimant's evidence was subject to cross-examination by the respondents' solicitor, but Mr Meechan did not undermine what the claimant had stated in evidence, and vouched in his documents lodged with the Tribunal, and no contrary, documented evidence was put to the claimant that he had any significant capital or savings that he had not disclosed. Accordingly, I was satisfied, on the evidence available at this Preliminary Hearing, that the claimant is currently the sole earner for a family of 4, and that they live in rented accommodation in what can only be described as very modest circumstances, and in dire financial straits, where family income does not currently match necessary outgoings.

Documents referred to by Parties at this Preliminary Hearing

34. As part of their respective oral submissions to me at this Preliminary Hearing, when speaking to their respective written submissions for the Tribunal, each of Mr Meechan for the respondents, and the claimant, referred me to particular documents in their respective Bundles, as well as commenting on documents referred to or relied upon by each other.

35. In Mr Meechan's "***Strike Out Index***", intimated on 7 May 2019, he included 4 documents, being (1) Holiday Pay claim form dated 7 June 2018; (2) ECS Check dated 2 July 2018; (3) Home Office Guidance; and (4) Email Guidance from Home Office dated 2 and 3 September 2018.

36. Document (1) was a copy of the ET1 claim form, presented by the claimant on 7 June 2018, in an earlier claim against the respondents, currently before this Tribunal, under case number **4106998/2018.**

37. Next, document (2) is an Employer Checking Service (ECS) Positive Verification Notice dated 2 July 2018 from UK Visas & Immigration to the respondents' Caroline Armstrong, valid until expiry on 28 December 2018, verifying the claimant's right to work in the UK as an Indian national, and

stating that the claimant has the right to work, subject to the restrictions in section 4 of the notice, namely: "***Work restrictions : Student. A maximum of 20 hrs per week during term time. No Self Employment."*** The name and date of birth given on that notice tally with those given on the claimant's ET1 claim form in this case, presented on 8 November 2018, and the separate holiday pay claim, at document (1), presented on 7 June 2018.

38. Further, document (3), labelled "***Home Office Guidance***", is a 3-page extract from a 23-page Home Office guidance document, version 9.0, published for Home Office staff on 15 January 2019, entitled "***Leave extended by section 3c"***, explaining at pages 17 and 18 of 23 when **Section 3C of the Immigration Act 1971** operates to extend leave.

39. Finally, document (4), labelled "***Email Guidance from Home Office dated 2 and 3 September 2018"*** is in fact an email of 22 August 2018 by the respondents' Sue Hill, Quality Assurance & Audit Manager, to a David Perrin, Home Office, Immigration Enforcement Intelligence, Plymouth, his reply to her of 2 September 2018, and her forwarded email of 3 September 2018 to the respondents' Tracy Kennedy and Anne Baker.

40. Ms Hill's original email was a query about student hours, post course, and Mr Perrin's reply stated: "***I've been advised by my colleagues on the enforcement team that in this case he would be allowed to work full time until a decision is made on his new application."*** Ms Hill's forwarded message to colleagues at the respondents then stated: "***Hi both – I've had a good response from David Perron*** (sic) ***regards the Glasgow case…seems from their view, this person can work as mentioned below…no need to restrict hours while application is in progress."***

41. It is clear to me, from re-reading these documents, in private deliberation after this Preliminary Hearing, that document (3) is internal Home Office staff guidance published 15 January 2019, and thus after the date of the acts complained of by the claimant, and that in document (4), other than an oblique

reference to "***the Glasgow case***", the claimant is not identified as the subject of the query, nor is the ***"he***" in Mr Perrin's response identified by name. As the respondents have produced these documents, the inference is that they refer to the claimant.

42. Turning then to the claimant's documents, in his own Bundle, at pages 1 to 4, he produced different Home Office Guidance, being pages 75 to 77 of 109, excerpted from a Home Office document entitled : "***Tier 4 of the Points Based System – Policy Guidance"***, for all Tier 4 applications made on or after 19 July 2018 and, at page 5, his MSc degree certificate of 4 July 2017 , with CAS statement dated 25 May 2015 from the University of the West of Scotland about his unconditional offer of admission to the postgraduate Diploma / MSc , running from 14 September 2015 to 13 September 2016.

43. The bulk of the claimant's Bundle, however, was emails and letter correspondence between him and the respondents, from 2 May 2018 to 12 October 2018, produced at pages 8 to 31 of his Bundle, relating to holiday pay request and responses, his grievances about right to work restrictions, the grievance outcome of 17 September 2018 from Caroline Armstrong, the respondents' Business Centre Manager, and the subsequent grievance appeal outcome of 12 October 2018 from Mhairi Blyth, Regional Operations Manager - Scotland.

44. As such, it was more a Bundle for a Final Hearing, if the case was to go that far, as at this Preliminary Hearing, it was essentially presented by the claimant in support of his claim having reasonable prospects, as per his email to the Tribunal of 5 May 2019, mentioned above at paragraph 25 earlier in these Reasons.

45. Neither the claimant nor respondents led any evidence about this correspondence, and it was not the subject of any Joint Statement of Agreed Facts that it is even accepted by both parties as a true copy of the correspondence exchanged between them. That said, the respondents'

solicitor, Mr Meechan, did not challenge its authenticity, so I was prepared to take it at face value, in understanding the factual background to the dispute between the parties.

Relevant Law

46. Mr Meechan's list of authorities for the respondents included, at item (1), a full copy of the **Employment Tribunal Rules of Procedure 2013, Schedule 1,** and his skeletal submissions highlighted the relevant provisions of the key Rules, being **Rule 37** on Strike Out, **Rule 39** on Deposit Orders, and **Rule 74** on Costs / Expenses. Clearly, the other Rule that is relevant is **Rule 2,** the Tribunal's "**overriding objective",** to deal with the case fairly and justly. While both parties have cited some case law authorities for my consideration, as per their lists of authorities, detailed earlier in these Reasons, I have given myself a self-direction on the relevant law.

47. **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.

48. 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.

49. In **Abertawe Bro Morgannwg University Health Board v Ferguson UKEAT/0044/13,** 24 April 2013, **[2014] I.R.L.R. 14**, the learned EAT President, Mr Justice Langstaff, at paragraph 33 of the judgment, remarked in the course of giving judgment that, in suitable cases, applications for strike-out may save time, expense and anxiety.

50. 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.

51. 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.

52. 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.

53. 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.

54. 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.

55. 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."***

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

57. Again, while not cited to me, by either party, I am also 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."***

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

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

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

59. I recognise, of course, that the second stage exercise of discretion under **Rule 37(1)** is important, as commented upon by the then EAT Judge, Lady Wise, in **Hasan v Tesco Stores Ltd [2016] UKEAT/0098/16**, an unreported Judgment of 22 June 2016, where at paragraph 19, the learned EAT Judge refers to ***"a fundamental cross-check to avoid the bringing to an end of a claim that may yet have merit."***

60. 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.

61. 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**."

62. 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.

63. 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.

64. 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.

65**.** **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.

66. 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.

67. 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**.**

68. 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.

69. 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.

70. 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)."***

71. 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."***

72. 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.

73. 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 **Employment 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.

74. In the present case, the claimant's complaints in the ET1 claim form are registered by the Tribunal under two administrative jurisdictional codes, one for racial discrimination, being **"*RRD***", under **the Equality Act 2010, Sections 13, 14, 19,26, 27 and 120**, and the other being "***DOD***", the appropriate code for suffering a detriment, etc., under the **Employment Rights Act 1996, Sections 46, 47, 48, 102-103, 105, 108-109 and 111.**

75. As such, this is a case where I need to concern myself with those separate heads of complaint, of victimisation contrary to **Sections 27 and 77, Equality Act 2010**, and detriment contrary to **Sections 45A and 48(1ZA), Employment Rights Act 1996**, 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.

76. Finally, although I was not referred to it by either party, I drew their attention to the judicial guidance from Her Honour Judge Eady QC, in **Tree v South East Coastal Ambulance Service NHS Foundation Trust [2017] UKEAT/0043/17**, referring to Mrs Justice Simler, President of the EAT, in **Hemdan v Ishmail & Another [2017] ICR 486 ; [2017] IRLR 228**, and Judge Eady QC holding that when making a Deposit Order, an Employment Tribunal needs to have a proper basis for doubting the likelihood of a claimant being able to establish the facts essential to make good their claim.

77**.** **Hemdan,** which the claimant cited in his list of authorities**,** 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."***

78. Mrs Justice Simler's judgment from the EAT in **Hemdan**, at paragraphs 10 to 17, addresses the relevant legal principles about Deposit Orders, and I gratefully adopt it as a helpful and informative summary of the relevant law, as follows: -

"10. A deposit order has two consequences. First, a sum of money must be paid by the paying party as a condition of pursuing or defending a claim. Secondly, if the money is paid and the claim pursued, it operates as a warning, rather like a sword of Damocles hanging over the paying party, that costs might be ordered against that paying party (with a presumption in particular circumstances that costs will be ordered) where the allegation is pursued and the party loses. There can accordingly be little doubt in our collective minds that the purpose of a deposit order is to identify at an early stage claims with little prospect of success and to discourage the pursuit of those claims by requiring a sum to be paid and by creating a risk of costs ultimately if the claim fails. That, in our judgment, is legitimate, because claims or defences with little prospect cause costs to be incurred and time to be spent by the opposing party which is unlikely to be necessary. They are likely to cause both wasted time and resource, and unnecessary anxiety. They also occupy the limited time and resource of courts and tribunals that would otherwise be available to other litigants and do so for limited purpose or benefit.

11. The purpose is emphatically not, in our view, and as both parties agree, to make it difficult to access justice or to effect a strike out through the back door. The requirement to consider a party's means in determining the amount of a deposit order is inconsistent with that being the purpose, as Mr Milsom submitted. Likewise, the cap of £1,000 is also inconsistent with any view that the object of a deposit order is to make it difficult for a party to pursue a claim to a Full Hearing and thereby access justice. There are many litigants, albeit not the

majority, who are unlikely to find it difficult to raise £1,000 by way of a deposit order in our collective experience.

12. The approach to making a deposit order is also not in dispute on this appeal save in some small respects. The test for ordering payment of a deposit order by a party is that the party has little reasonable prospect of success in relation to a specific allegation, argument or response, in contrast to the test for a strike out which requires a tribunal to be satisfied that there is no reasonable prospect of success. The test, therefore, is less rigorous in that sense, but nevertheless there must be a proper basis for doubting the likelihood of a party being able to establish facts essential to the claim or the defence. The fact that a tribunal is required to give reasons for reaching such a conclusion serves to emphasise the fact that there must be such a proper basis.

13. The assessment of the likelihood of a party being able to establish facts essential to his or her case is a summary assessment intended to avoid cost and delay. Having regard to the purpose of a deposit order, namely to avoid the opposing party incurring cost, time and anxiety in dealing with a point on its merits that has little reasonable prospect of success, a mini-trial of the facts is to be avoided, just as it is to be avoided on a strike out application, because it defeats the object of the exercise. Where, for example as in this case, the Preliminary Hearing to consider whether deposit orders should be made was listed for three days, we question how consistent that is with the overriding objective. If there is a core factual conflict it should properly be resolved at a Full Merits Hearing where evidence is heard and tested.

14. We also consider that in evaluating the prospects of a particular allegation, tribunals should be alive to the possibility of communication difficulties that might affect or compromise understanding of the

allegation or claim. For example where, as here, a party communicates through an interpreter, there may be misunderstandings based on badly expressed or translated expressions. We say that having regard in particular to the fact that in this case the wording of the three allegations in the claim form, drafted by the Claimant acting in person, was scrutinised by reference to extracts from the several thousand pages of transcript of the earlier criminal trials to which we have referred, where the Claimant was giving evidence through an interpreter. Whilst on a literal reading of the three allegations there were inconsistencies between those allegations and the evidence she gave, minor amendments to the wording of the allegations may well have addressed the inconsistencies without significantly altering their substance. In those circumstances, we would have expected some leeway to have been afforded, and unless there was good reason not to do so, the allegation in slightly amended form should have been considered when assessing the prospects of success.

15. Once a tribunal concludes that a claim or allegation has little reasonable prospect of success, the making of a deposit order is a matter of discretion and does not follow automatically. It is a power to be exercised in accordance with the overriding objective, having regard to all of the circumstances of the particular case. That means that regard should be had for example, to the need for case management and for parties to focus on the real issues in the case. The extent to which costs are likely to be saved, and the case is likely to be allocated a fair share of limited tribunal resources, are also relevant factors. It may also be relevant in a particular case to consider the importance of the case in the context of the wider public interest.

16. If a tribunal decides that a deposit order should be made in exercise of the discretion pursuant to Rule 39, sub-paragraph (2) requires tribunals to make reasonable enquiries into the paying party's ability to pay any deposit ordered and further requires tribunals to have

regard to that information when deciding the amount of the deposit order. Those, accordingly, are mandatory relevant considerations. The fact they are mandatory considerations makes the exercise different to that carried out when deciding whether or not to consider means and ability to pay at the stage of making a cost order. The difference is significant and explained, in our view, by timing. Deposit orders are necessarily made before the claim has been considered on its merits and in most cases at a relatively early stage in proceedings. Such orders have the potential to restrict rights of access to a fair trial. Although a case is assessed as having little prospects of success, it may nevertheless succeed at trial, and the mere fact that a deposit order is considered appropriate or justified does not necessarily or inevitably mean that the party will fail at trial. Accordingly, it is essential that when such an order is deemed appropriate it does not operate to restrict disproportionately the fair trial rights of the paying party or to impair access to justice. That means that a deposit order must both pursue a legitimate aim and demonstrate a reasonable degree of proportionality between the means used and the aim pursued (see, for example, the cases to which we were referred in writing by Mr Milsom, namely Aït-Mouhoub v France [2000] 30 EHRR 382 at paragraph 52 and Weissman and Ors v Romania 63945/2000 (ECtHR)). In the latter case the Court said the following: -

> ***"36. Notwithstanding the margin of appreciation enjoyed by the State in this area, the Court emphasises that a restriction on access to a court is only compatible with Article 6(1) if it pursues a legitimate aim and if there is a reasonable degree of proportionality between the means used and the aim pursued.***
>
> ***37. In particular, bearing in mind the principle that the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective, the Court reiterates that the amount of the fees, assessed in the light of the***

particular circumstances of a given case, including the applicant's ability to pay them and the phase of the proceedings at which that restriction has been imposed, are factors which are material in determining whether or not a person enjoyed his or her right of access to a court or whether, on account of the amount of fees payable, the very essence of the right of access to a court has been impaired …

42. Having regard to the circumstances of the case, and particularly to the fact that this restriction was imposed at an initial stage of the proceedings, the Court considers that it was disproportionate and thus impaired the very essence of the right of access to a court …"

17. An order to pay a deposit must accordingly be one that is capable of being complied with. A party without the means or ability to pay should not therefore be ordered to pay a sum he or she is unlikely to be able to raise. The proportionality exercise must be carried out in relation to a single deposit order or, where such is imposed, a series of deposit orders. If a deposit order is set at a level at which the paying party cannot afford to pay it, the order will operate to impair access to justice. The position, accordingly, is very different to the position that applies where a case has been heard and determined on its merits or struck out because it has no reasonable prospects of success, when the parties have had access to a fair trial and the tribunal is engaged in determining whether costs should be ordered."

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

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

Submissions for the Respondents

81. In his oral submissions to me at this Preliminary Hearing, the respondents' solicitor, Mr Meechan, referred me to his written submissions, which he adopted in full, and took me through, highlighting, as and when appropriate, cited passages from his case law authorities, and referring me also to the documents in the respondents' Bundle, and supplemented his written submissions with oral submissions, commenting on the claimant's written submissions, and the claimant's list of authorities provided to the Tribunal.

82. In doing so, Mr Meechan submitted that the four authorities relied upon by the claimant could generally be distinguished from this case, with different factual circumstances, but while he did accept that the threshold for Strike Out of a claim is high, he emphasised that the Rules provide that cases can be struck out, and he submitted that this is such a case, where, he argued, despite the fact sensitive nature of any case, there is an honest explanation following on from the ECS check about restriction of the claimant's hours.

83. If not struck out for no reasonable prospects of success, he submitted that this is a case where a Deposit Order could be made, as there is disposable income available to the claimant from which he could pay a deposit, if ordered to do so by the Tribunal. As regards the documents produced in the claimant's Bundle, Mr Meechan submitted that this Strike Out Hearing should not be a mini and impromptu hearing of the evidence, but he referred to the respondents' description of the claimant's immigration status, and the

application of **Section 3C of the Immigration Act 1971**, as set forth in paragraphs 5 to 8 of the ET3 response from the respondents.

84. Further, Mr Meechan referred me to the documents lodged by the respondents, where their first document was the claimant's ET1 holiday pay claim in the earlier claim number **4106998/2018**, which he stated was a claim relating to holiday pay only, and an alleged breach of the **Working Time Regulations 1998,** but with no mention of any discrimination or victimisation contrary to the **Equality Act 2010**, nor any reference to any protected characteristic, or any relevant pay disclosure. He stated it was a multiple claim, by the claimant and his wife, against the respondents. Further, he contrasted that with the present claim, which is brought by the claimant only.

85. Mr Meechan also referred me to the claimant's email to the Tribunal of 13 November 2018, as noted in the Case Management Preliminary Hearing in this case held on 26 February 2019, but not included in either party's Bundle at this Preliminary Hearing, where the claimant had written : "***So, I feel victimized as respondent has put unlawful restrictions on my working rights after I raised claim for my holiday pay under the working time regulation."***

86. Further, Mr Meechan then took me to the ECS positive verification notice, at page 16 of the respondents' Bundle, dated 2 July 2017, the Home Office guidance at pages 17 to 19, and the email chain at pages 20 and 21 of that Bundle, from Sue Hill to David Perrin on 22 August 2018, David Perrin to Sue Hill on 2 September 2018, and Sue Hill to Tracy O'Kennedy and Anne Baker on 3 September 2018, all relating to "***Query on student hours post-course".***

87. Mr Meechan explained that, when the claimant raised queries about restrictions on his working hours, the respondents sought further guidance from the Home Office. In his opinion, these documents here show that in lifting the restrictions on the claimant, shortly after 3 September 2018, the respondents were acting on Home Office guidance from Mr Perrin, and not in

relation to the claimant's holiday pay claim against the respondents. Further, he added, Sue Hill's comment about a "***good response***" disproves the claimant's assertion that he was being victimised, or subject to a detriment, because of his holiday pay claim.

88. Thereafter, Mr Meechan addressed me on his cited case law authorities, referring me specifically to paragraphs 15 and 17 in **Hasan**, paragraphs 27 and 29 in **Ezsias**, paragraphs 13 and 14 in **Mechkarov**, that paragraph 13 quoting from the Lord Justice Clerk's judgment in **Tayside Public Transport Co Ltd v Reilly [2012] CSIH 46** at paragraph 30, paragraph 19 in **Croke**, paragraphs 21 and 24 in **Ahir, and** paragraphs 29 and 35 in **Shestak.**

89. Mr Meechan submitted that this case meets the criteria for Strike Out as it is an exceptional case, which he stated is not fact sensitive, as the claimant's holiday pay claim is not a relevant pay disclosure under **Section 77, Equality Act 2010**, no other protected act is given under **Section 27**, and so, he submitted, that part of the claim has no reasonable prospects of success, and so it should be struck out, which failing a Deposit Order should be made.

90. In his view, there are well-documented and innocent explanations for the act complained of by the claimant, and the consequences of getting it wrong for the respondents were significant, and nothing adverse can be drawn from the present case.

91. He described this part of the claim as "***speculative and fanciful"*** given the well documented and innocent explanation for the situation, which the respondents relied upon, being the email chain produced from August / September 2018.

92. He explained that the emails were produced in his Bundle to show that innocent explanation, but he accepted that the email authors / recipients were not at this Preliminary Hearing as a witness for the respondents.

93. On his alternative application for a Deposit Order against the claimant, Mr Meechan stated if he had not shown no reasonable prospects of success, then he invited the Tribunal to find that there was little reasonable prospect of success, and to make a Deposit Order against the claimant.

94. While the claimant's statement of income and expenditure had stated that, ***"if Tribunal even award £1 deposit order that cannot be fulfilled"***, Mr Meechan submitted that that was not the case, and while a deposit at the upper end of **£1,000** may not be appropriate, he felt somewhere around **£100**, as stated in the **O'Keefe v Cardiff and Vale University Local Health Board 1602248/15** ET judgment cited in **IDS at paragraph 11:248**, where a claimant had been ordered to pay a deposit of £100 for each of two grounds of claim, or perhaps **£250,** as per the former ET fees paid by a claimant.

95. As per the **Simpson** case, cited in his list of authorities for the respondents, where he referred me to paragraph 47, Mr Meechan further stated that the Tribunal should have regard to the claimant's whole means and assets: the Tribunal accepts that is so, further to the EAT's judgment in **Shields Automotive Limited v Greig [2011] UKEATS/0024/10,** which held that a claimant's whole means and assets (in that case, in an application for expenses / costs) includes any capital resources. In my view, the same basic principles apply when assessing a potential paying party's ability to pay any deposit.

96. Mr Meechan stated that he would address the matter of what Mrs Justice Simler, the EAT President, had to say about Deposit Orders, at paragraphs 12 to 17 in the **Hemdan** judgment cited by the claimant, until after he had heard the claimant's own submissions to this Tribunal.

97. Further, he added, under the Tribunal's overriding objective, in terms of **Rule 2**, the Tribunal and parties should not be required to incur significant time and cost in a case progressing which has no reasonable prospects of success,

and so Strike Out of the claim, or part of it, or making a Deposit Order in the alternative, is therefore in furtherance of the overriding objective.

98. Finally, submitted Mr Meechan, the orders requested by the respondents will deal with this case fairly and justly, and proportionately to the complexity and importance of the issues, and will also save expense, subject o any Deposit Order to be paid by the claimant. On the matter of the claimant's application for costs or expenses against the respondents, he closed his oral submissions by saying that he would reply to that, once he had heard the claimant's submissions on that very matter.

Reply by the Claimant

99. In opening his oral submissions to the Tribunal, the claimant stated that he opposed the respondents' application for Strike Out, and for Deposit Order, and he sought his costs against the respondents. He added that all the judgments cited by the respondents' solicitor show that a claim can only be struck out if there are no reasonable prospects of success, and that they can show that his case has no merit at this stage. He stated that he had a merited case, and that he seeks to have it heard on its merits and go forward to a Final Hearing.

100. In brief, the claimant stated that he had been victimised because he had raised a holiday pay claim against the respondents, and they reduced his hours of working. He stated that when he joined the respondents' employment in January 2018, his immigration status was the same as when they imposed conditions, and that they did so notwithstanding he stated he had submitted all his immigration status documents to the respondents, which he stated showed that he had a right to work full-time.

101. Further, the claimant added, he had seen the ECS check, at page 16 of the respondents' Bundle, showing a restriction of a maximum of 20 hours per week during term time while he was a student, but by July 2018, he was not

a student, having obtained his Masters degree in July 2017. While not disputing that the August / September 2018 emails produced by the respondents, at pages 20 and 21 of their Bundle, say what they say, he observed that they no where say he cannot work more than 20 hours.

102. The claimant further stated that he had provided details of Home Office guidance to the respondents in June 2018, and referred to it in his grievance to the respondents of 17 September 2018, at page 26 of his own Bundle, but that the respondents had reduced his hours to victimise him, after he brought his holiday pay claim in May 2018.

103. After the restrictions were removed, on 5 July 2018, the claimant stated that the respondents did not offer him additional hours work. On 22 August 2018, he stated that Caroline Armstrong, the respondents' Business Centre Manager in Glasgow, and his line manager, lifted the 20 hours restriction until 3 September 2018, as additional hours could be worked outside term times, as per the email on page 18 of his Bundle.

104. Further, the claimant referred to his email of 21 August 2018 to Ms Armstrong, entitled "***Discrimination and Harassment"***, as produced at page 19 of his Bundle, where he had stated: "***It seems that I have been discriminated and harassed and wilfully neglected in allocation of shifts."*** His further email to her, on 24 August 2018, as produced at page 21 of his Bundle, refers to ***"… only motive to harass and victimise me such issues are raised as I raised issue of non-payment of holiday***."

105. He also referred me to his subsequent email to Ms Kailee Coffin, the respondents' HR Advisor, on 4 September 2018, as produced at pages 23 and 24 of his Bundle, where he had stated: "***Thanks for acknowledging my grievances, but unfortunately nothing progressed in this case which has resulted in further harassment, victimization and discrimination against me."***

106. The claimant explained that he believed no restrictions could be imposed on his working conditions, as he has full right to work full-time, and that restrictions only applied after he raised his holiday pay claim, despite his immigration status being the same when he joined the respondents in January 2018, and he was then allowed to work full-timer for 2 to 3 months. In his view, the only reason for the restriction to his working hours was because he had raised his holiday pay claim against the respondents.

107. While, as per the copy letter produced at pages 26 and 27 of his Bundle, Ms Armstrong had not upheld his grievance, albeit she removed the limitation on his working hours with immediate effect on 17 September 2018, and Ms Blyth, the Regional Operations Manager had, on 12 October 2018 rejected his grievance appeal, as per the letter produced at pages 28 and 29 of his Bundle, the claimant stated that he has a *prima facie* case with good prospects of success against the respondents, and that there is no reasonable doubt on that, and so the Tribunal should refuse the Strike Out, and not make any Deposit Order against him.

108. Further, the claimant referred to the email of 3 July 2018, at pages 30 and 31 of his Bundle, and stated that one of the consequences of the restrictions on his working imposed by the respondents was that he had been unable to complete Medication Training booked for 18 July 2018, although he did advise, after the restrictions were lifted, in September 2018, he had completed this training, but it had been delayed from when he should have done that training.

109. As regards his claims against the respondents, the claimant stated he wished to proceed with them, describing his **Section 77** claim under the **Equality Act 2010** as an extension of his **Section 27** claim, and further stating that both sections need to be read together. He submitted there was no merit to the respondents' argument seeking Strike Out of that head of claim, and as regards his **Section 45A / 48(1ZA)** complaint under the **Employment Rights**

Act 1996, the claimant submitted there was no merit to the respondents' argument seeking Strike Out of that head of claim.

110. Further, the claimant advised me that he had been victimised from June to September 2018, and when he raised his holiday pay claim, the respondents put in place restrictions that had not been in place before. He described the Strike Out application as having no merit, and submitted that it should be dismissed by the Tribunal.

111. He further advised that Employment Judge David Hoey had held, in his earlier Tribunal claim, that he had a case against the respondents, under the Working Time Regulations, but no copy Judgment was produced to me by either party, so I am not aware of that Judge's judicial determination of that other claim.

112. Objecting to any Deposit Order being made against him, the claimant stated that he believes there are full reasonable prospects of success in his case, and that he has no doubt that there restrictions imposed by the respondents were because he had just raised his holiday pay claim against them, and also he submitted that while his argument was that there should be no Deposit Order in this case, he added that he cannot afford to pay any Deposit Order.

113. Then, by way of explanation of his current financial position, the claimant stated that, this month, his income only will be much less than the family's expenditure, and that he was worried about how to give food to his kids. He described the car as a necessity of work, and that he needs it, and that while bought by his sister, and owned by her, the car is not a luxury, but a necessity for him working, as his job does not work out of the respondents' Glasgow office, but involves working at different sites, and he needs the car to get to work, with early and late shifts, so he cannot rely on public transport.

114. Referring to his income and expenditure statement, at page 32 of his Bundle, the claimant stated that if the Tribunal awarded even £1 that could not be

fulfilled, and that a Deposit Order would be a "***hindrance to getting me justice through the ET".*** Further, regardless of the sum, the claimant stated that a Deposit Order would be a barrier for him.

115. Turing then to his application for Costs against the respondents, the claimant referred to his document dated 20 March 2019, attached to his email of 21 March 2019 to the Tribunal, where, at pages 4 and 5 of 5, the claimant had stated:

> ***It is further requested that respondent has filed the present application for strike out and deposit order which has no merits and in spite of the fact the respondent legally aware about the provisions of law and then also filed such merit less application before the Tribunal resulting in one day hearing and delayed the final hearing in the case, therefore respondent be directed to pay the costs incurred in relation to strike out hearing.***

116. In further submission, explaining the basis of this application, the claimant advised me that he is not represented, and so he has not incurred legal costs, but he has had to get time off to come to this Preliminary Hearing, and so he was seeking preparation time, and the cost of losing a day's wages.

117. As he did not quantify the amounts he was seeking, I asked him to clarify his position and, in response, he stated that he had had 2 to 3 days' preparation time, at 5 hours per day, so say 15 hours, and he had lost wages of £100. He further stated that he had incurred the costs of photocopying, of around £50, but no vouching documentation was produced in regard to any of these identified costs.

118. As his application of 20 March 2019 had not referred to the **Employment Tribunals Rules of Procedure 2013**, I asked the claimant whether he had considered the terms of **Rule 75** about Costs Orders and Preparation Time Orders, and I drew his specific attention to **Rules 74 to 84** included in Mr

Meechan's bundle of authorities for the respondents, where the relevant procedural rules are set forth.

119. I also stated that, in terms of **Rule 79(2),** the current hourly rate for preparation time is £39 per hour, for work on and after 6 April 2019, and £38 for the previous year's hourly rate.

120. At this stage, the claimant, who I was treating as an unrepresented, party litigant, whose only experience of this Tribunal was through his earlier claim, advised that he had decided not to go and get *pro bono* representation, as I has suggested at the Case Management Preliminary Hearing, because he had experience to best represent his case.

121. In particular, the claimant advised me that he had practised law for 10 years in India, as an advocate specialising in civil and labour law, so that a legal system was not new to him, and he further stated that he knew the facts of his case far better than going to a solicitor and paying money.

122. At this stage, it then being 1.17pm, the Tribunal adjourned for lunch, to resume after 2.15pm with further submissions from the claimant, when he addressed me on his authorities, and then dealt with the respondents' cited authorities. From his own authorities, he referred me to paragraph 23 in **Kwele-Siakam**, paragraphs 12, 15 and 17 in **Hemdan**, paragraph 37 by Lord Hope of Craighead in **Anyanwu** (as cited in **Kwele-Siakam**), and paragraph 29 in **Ezsias** (as referred to in **Kwele-Siakam**).

123. As regards his comments on the case law authorities cited by Mr Meechan, the claimant stated that **Rule 37** refers to Strike Out, and the facts in his case are totally different from the facts in the cases cited by the respondents' solicitor. Further, added the claimant, David Perrin's email of 2 September 2018, at page 20 of the respondents' Bundle, does not prevail over the law, and Mr Perrin's email does not specify that any restrictions were lawful, and the claimant regarded it as in his favour, because it says no restrictions on

him working full-time, and therefore, he argued, whatever the respondents did before was wrong, and that proves his case, and that is why he says there are reasonable prospects of success, although the respondents say there are not.

124. Further, the claimant submitted, a Strike Out should only be made if there are no reasonable prospects of success, and he submitted that there are such prospects, and so his claim should not be struck out. As he also stated he did not consider his case has little reasonable prospects, the claimant further submitted that there should be no Deposit Order either. Finally, he added, even if the Tribunal felt his case had little reasonable prospects of success, there should still be no Deposit Order, because he cannot afford to pay it, and it would be a barrier to justice.

Respondents' reply to Claimant's application for Costs

125. It then being 2.32pm, I invited Mr Meechan to reply for the respondents. He noted how the claimant had stated that he was familiar with the relevant Rules, yet his application of 20 March 2019 sought costs of this Strike Out Hearing, yet in this Tribunal costs don't follow the event, and they are exceptionally made rather than being the rule. Before the claimant's oral submissions, just delivered at this Hearing, he stated that the respondents were not aware of any costs incurred by the claimant, and costs must be incurred to be recoverable, and they must be compensatory, as opposed to punitive.

126. In that regard, Mr Meechan drew my specific attention to the Court of Appeal's judgment at paragraph 54 of the **Yerrakalva** case included in his list of authorities, and that costs should be limited to those reasonably and necessarily incurred. Further, he added, under **Rule 75(3)**, the Tribunal cannot grant costs under **Rule 75(1)(a)** and a preparation time order in favour of the same party in the same proceedings, and the Tribunal may defer until a later stage in the proceedings deciding what kind of order to make. It was

only at this Hearing that he had been advised the claimant was seeking 15 hours preparation time, and £150 (being £100 for lost wages, and £50 for photocopying).

127. Mr Meechan further stated that the claimant is not represented, and so he has not incurred any Tribunal expenses, and to date, he had not attended as a witness, but as the claimant. The respondents had not been put on any notice3 of any Preparation Time order being sought, but rather advised of a Costs / Expenses application, which did not expressly say Preparation Time Order was being sought.

128. Further, Mr Meechan commented that the claimant's quantification of 15 hours was not vouched, and he suggested that the claimant should have prepared a schedule of his preparation time to give notice to the other party, and that there needs to be another Hearing to put parties on an equal footing, and he further added that **Rule 75(1)** does not apply, and referring to **Rule 76(1)(a),** he submitted the respondents had not acted vexatiously or otherwise unreasonably in defending the claim.

129. Indeed, he argued, the respondents had conducted proceedings reasonably, and the claimant has not shown which parts of the **Rule 76(1)(a)** criteria he was relying upon. He had simply not done so, and he stated that the respondents are entitled to seek Strike Out, and this Hearing had been fixed by the Tribunal to consider Strike Out / Deposit Order, and notice of that application had been given to the claimant at the Case Management Preliminary Hearing.

130. When I asked Mr Meechan how he felt fixing a separate Expenses Hearing would be consistent with the overriding objective under **Rule 2**, as it would neither avoid delay nor save expense, he stated that that was appropriate because the claimant had given no notice of this detailed application until his oral submissions at this Preliminary Hearing. He further stated that, as per his written submissions, the respondents were themselves reserving their

right to seek expenses against the claimant, pending the outcome of this Preliminary Hearing.

Respondents' reply to Claimant's response to application for Strike Out

131. It then being 2.44pm, Mr Meechan stated that he would address me with his reply to the claimant's submissions opposing his application for Strike Out, which failing Deposit Order.

132. In doing so, he referred to the ECS check document at page 16 of the respondents' Bundle, dated 2 July 2018, and that the respondents had this Home Office instruction that the claimant was a student, and that these restrictions applied to his working hours. He further stated that the respondents understood, from Home Office guidance, these restrictions applied, while the claimant's appeal about his immigration status was outstanding, and he described this document as the innocent explanation for the restriction on the claimant's working hours with the respondents.

133. Further, added Mr Meechan, while the claimant had referred to the various emails in his Bundle, showing an exchange of correspondence with the respondents, the respondents did not deny that they had changed their position, but he explained that the respondents were dealing with "***a complex case, Home Office guidance, and contradictory advice at times from the Home Office".***

134. While the claimant had referred to allegations of discrimination and harassment as per those various emails in his Bundle, Mr Meechan stated that these emails were all dated after the holiday pay claim brought by the claimant, and it was only a complaint under the Working Time Regulations, and it was not a relevant pay disclosure, and it was not related to any protected characteristic.

135. Turning then to the EAT judgment in **Tree**, that I had cited, Mr Meechan stated that it involved a different set of facts to those the present case, and a Deposit Order at the upper end of £1,000 per head of claim, and the issue had been determined by the ET without notice, and after a short exchange with counsel for the claimant, so the appeal was allowed by the EAT and the £1,000 deposit set aside and £500 substituted.

136. Mr Meechan contrasted that with the procedure at this Preliminary Hearing. This Tribunal had heard oral submissions from both parties, and if no Strike Out granted, the Tribunal was entitled to take the view that there were little reasonable prospects of success, particularly with the victimisation claim, where he submitted the claimant had if not no reasonable prospects, certainly little reasonable prospects of success of making his case good in law.

137. As per paragraph 38 in **Tree**, Mr Meechan submitted this Tribunal was entitled to test the claimant's case as a matter of law. Further, in this case, unlike the facts in **Tree**, at paragraph 39, where the EAT was not convinced the ET had had regard to the case the claimant was actually pursuing, the Tribunal in the present case had clarified the legal basis of the claim, at the Case Management Preliminary Hearing.

138. When I referred him to **Rule 39(1),** about Deposit Orders being used as a condition of continuing to advance an allegation or argument, and I referred to the EAT judgment in **Wright v Nipponkoa Insurance (Europe) Ltd UKEAT/0113/14** (as cited in **Tree**), Mr Meechan stated that the respondents were seeking a Deposit Order in respect of each part of the claim not struck out.

Reply by the Claimant

139. It then being about 3.00pm, I invited the claimant to make any reply he felt appropriate. In doing so, he advised me that he had nothing further to say about the **Tree** judgment from the EAT, and added that he cannot afford to

pay a deposit, regardless of whether or not it is a global sum, or specific sums per part of the claim not struck out.

140. Next, on the matter of Costs and Preparation Time Order, the claimant stated that he felt **Rule 74(1)** allows him to recover photocopying costs as expenses, and that he saw, under **Rule 77**, how he could apply later on at any stage up to 28 days after final Judgment.

141. He then stated that, at this Hearing, he was withdrawing his claim for a Preparation Time Order, but he was still insisting upon seeking £100 lost wages, and £50 photocopying. He explained that he had done printing in his own house, not at a commercial printer, and that he regarded £50 as a reasonable estimate for his paper, ink and printer costs.

142. When Mr Meechan stared that he was not clear what the claimant was now asking for, the claimant stated that he was withdrawing his application for a Preparation Time Order, but still seeking £100 for a day's wages, and £50 for printing, totalling £150. He added that his dispute with the respondents as his employer had started on 30 April 2018, as per paragraph 3 of his statement of claim, and that his hours were restricted prior to 2 July 2018, and he felt Mr Meechan's views were not the full picture of the actual chronology of events.

143. In response, Mr Meechan stated that he referred to his written submissions, but while the claimant says his holiday pay claim is a relevant pay disclosure, the respondents dispute that. Further, he added while the claimant had highlighted that he had only disclosed the ECS check from 2 July 2018, that followed the holiday pay claim, and the claimant says his hours were restricted because of the holiday pay claim. Mr Meechan stated that he had lodged what is relevant to the claimant's case as pled before this Tribunal.

Discussion and Deliberation

144. Having now carefully considered both parties` written and oral 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 to make his own representations opposing the respondents' written application for Strike Out, which failing Deposit Order.

145. **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.

146. After the most careful and anxious 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.

147. 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.

148. The claimant's submissions, written and oral, as set forth earlier in 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 tried and tested. I regard as well-founded the claimant's arguments against a Strike Out.

149. 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.

150. To have struck out the claim now would have been draconian, and a barrier to justice for the claimant, where he has persistently argued 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.

151. While Mr Meechan has identified, in his written and oral submissions for the respondents, that there are certain aspects of the claim as pled by the claimant, as an unrepresented, party litigant, which suggest to him that the claim has no reasonable prospects of success, those matters are best addressed by the leading of witness evidence in the case, from both parties, being tried and tested at an evidential enquiry conducted at a Final Hearing of the claim and response.

152. 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.

153. The 2 July 2018 ECS check and subsequent emails require to be spoken to in evidence, so that there can be an enquiry into what was said and done, or not, by whom, when, and for what reason, at the times complained of by the claimant. I do not consider that this is a case where the alleged facts complained of by the claimant are ***"conclusively disproved"*** by the production of the documents relied upon by the respondents: paragraph 30 of **Tayside v Reilly** refers, following **ED & F Mann.**

154. This case, in my view, is clearly a matter for proof, where the claimant can give his evidence as to why be believes he suffered victimisation and detriment, and the respondents can lead whatever evidence they feel is appropriate to resist the claim brought against them. In my view, 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, after hearing evidence led from both parties.

155. 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 the proposed listing period of **September, October or November 2019**, I am of the view that this case is best addressed by both parties leading evidence, from relevant and necessary witnesses, at that Final Hearing.

156. By convening a Final Hearing, I consider that that Hearing will allow a full Tribunal to come to a judicial 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.

157. In light of some of the points raised by Mr Meechan, I did consider whether there was any scope for finding that the case as pled has little reasonable prospects of success and, if so, deciding whether or not there is any scope for making a Deposit Order against the claimant on the basis that the claim, as currently pled, has little reasonable prospects of success.

158. In the same way as Mr Meechan's primary submissions have failed to convince me that he has crossed the high threshold of showing that there are no reasonable prospects of success, so too do I consider that, on the information available to me at this stage, I can make a finding that the claim has little reasonable prospects of success. While it appears a weak claim to the respondents, I cannot hold that it is a fanciful claim.

159. Further, even if I had come to that view, I would have then required to decide whether or not it is appropriate to grant any Deposit Order in this case. After carefully considering parties' competing views on that matter, I would not have done so.

160. I agree with the claimant, in light of his current financial circumstances, as spoken to in evidence from him, that even a modest figure by way of a deposit for each allegation made against the respondents would, in effect, have been a barrier to justice, as the evidence led at this Hearing shows he has no disposable income, nor any capital or savings, from which to pay a deposit.

161. Had I made such an Order, I would have done so at **£20 per head of claim**, and I did not regard Mr Meechan's suggestion of maybe £250 as being at all appropriate having regard to the claimant's limited financial means. His reference to that figure of £250, and the former ET fees regime, held to be unlawful by the Supreme Court in the **Unison** case, was a novel argument that I, for one, have never heard of being deployed before.

162. It seems to me that if the case proceeds to Final Hearing, and the claimant is ultimately unsuccessful, then the respondents are not prejudiced by me not making a Deposit Order, because they still have the right, which they have already reserved, to seek an award of expenses against the claimant. They have, in effect, put him on a "***costs warning***" to that effect.

163. If, on the other hand, I were to have made a Deposit Order now, even in a modest amount of £20 per head of claim, and that sum of **£40** was not paid by the claimant, as seems likely given his dire financial straits, then his case would come to an end without being heard on its merits, and the respondents would obtain Strike Out of his claim, not based upon their successful defence of that claim, but based on the claimant's inability to pay that deposit. I do not consider that to be satisfactory, nor in the interests of justice.

Further Procedure

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

165. Having refused the respondents' application for Strike Out of the claim, which failing a Deposit Order, I have instead ordered that the case now be listed for a Final Hearing for full disposal, including remedy, if appropriate, before a full Tribunal on dates to be hereinafter assigned by the Tribunal, following the standard date listing process, in the proposed listing period of **September, October and November 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.

166. In this Judgment, I have not determined the claimant's application for costs / preparation time against the respondents. The respondents have reserved their rights to seek expenses against the claimant. In all the circumstances, given the case is to proceed further, I have decided that the best approach is to reserve the whole matter of costs / expenses / preparation time for determination at a later stage, namely for consideration at the Final Hearing, as part of parties' closing submissions to the Tribunal, where both parties can, if so minded, then make any submission they then consider appropriate on any application by either party for an award of expenses, or preparation time, in terms of **Rules 74 to 84**.

167. As parties have already prepared separate Bundles, I see no need to make any specific case management order in that regard. All I will order, at this stage, is that for that Final Hearing, it will be best if parties can co-operate and prepare a single, jointly agreed **Joint Bundle of all Documents** which either party seeks to refer to or rely upon, and that that Joint Bundle is duly indexed, and paginated, with four copies brought to the Final Hearing.

168. 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.

169. 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: I McPherson
Date of Judgement: 03 July 2019

Entered in Register,
Copied to Parties: 05 July 2019