EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4102523/2020 (A)

Held on 18 September 2020
(Preliminary Hearing conducted remotely by telephone conference call)

Employment Judge Ian McPherson

Mr Edward Johnston	**Claimant** **In Person**
MPMH Construction Limited	**Respondents** **Represented by:** **Mr Alan Philp -** **Consultant**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that:

(1) Having heard the claimant in person, and the respondents' representative, in Case Management Preliminary Hearing, and having reserved decision, in light of parties' competing submissions, the Judge's decision to be advised later in writing, with reasons, after time for private deliberation in chambers, the Tribunal **grants** the respondents' opposed application for a Deposit Order to be made, in terms of **Rule 39 of the Employment Tribunals Rules of Procedure 2013**, requiring the claimant to pay a deposit as a condition of continuing to advance his specific allegations or arguments in his claim

against the respondents that he was unfairly dismissed by the respondents, and that he is owed notice pay, holiday pay, and arrears of pay.

(2) Further, taking into account the information provided by the claimant to the Judge, at this Preliminary Hearing, about his ability to pay a deposit, if ordered by the Tribunal, the Tribunal further **orders** that the deposit to be paid by the claimant shall be at the rate of **£250 (Two hundred and fifty pounds) per allegation**.

(3) A Deposit Order, requiring the claimant to pay a deposit of up to **£,1000 (One thousand pounds)**, in whole or in part, dependent upon the specific allegations he seeks to continue to advance against the respondents, is issued under separate cover, to be paid by the claimant to HMCTS Finance Centre, Bristol, **within 21 days of date of issue of this Judgment**, in terms of the Deposit Order signed by the Judge, and issued with guidance notes, along with this Judgment.

REASONS

Introduction

1 This case called before the Tribunal on the morning of Friday, 18 September 2020, at 11.30am, for a Case Management Preliminary Hearing previously intimated to both parties by the Tribunal by Notice of Preliminary Hearing by Telephone Conference Call issued by email on 5 August 2020. One hour was, as per standard practice, allocated for this Preliminary Hearing, to discuss case management.

Claim and Response

2 Following ACAS early conciliation between 13 and 14 April 2020, the claimant, who is acting on his own behalf, presented his ET1 claim form to the Tribunal, on 11 May 2020, alleging that he was unfairly dismissed by the respondents, on 3 April 2020, and that he is owed notice pay, holiday pay, and arrears of pay. His claim was accepted by the Tribunal, and served on the respondents by Notice of Claim issued by the Tribunal on 27 May 2020.

3 At vetting by the Tribunal administration, the claim was given 5 specific administrative jurisdictional codes, being **ADG, UDL, BOC, WA**, and **WTR(AL).** The first (**ADG**) is a complaint that an employee has suffered a detriment and / or dismissal resulting from a failure to allow an employee to be accompanied or to accompany a fellow employee at a disciplinary / grievance hearing, as per the **Employment Relations Act 1999, Sections 11 and 12.**

4 From my reading of the ET1 claim form, this seems to be referenced at section 8.2 of the narrative, describing a meeting with the claimant on 3 April 2020, with Graham Hancock (director), James Snodgrass (director), and Stephen Keenan (Contracts manager), where the claimant refers to : "***I was not giving*** (sic) ***the opportunity to take a colleague to witness meeting conversations. I was out numbered 3 to 1.***"

5 The other codes flowed directly from how the claimant had completed section 8.1 of his ET1 claim form. **UDL** is a complaint, under **Section 111 of the Employment Rights Act 1996**, that an employee has been unfairly dismissed, while **BOC** is a claim by an employee for breach of the contract of employment, in this case failure to pay notice pay, in terms of the **Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994**, while **WA** is a claim for unlawful deduction from wages, brought under **Section 23 of the Employment Rights Act 1996**, and **WTR(AL)** is a complaint, under **Regulation 30 of the Working Time Regulations 1998**, that an employer has failed to allow a worker / employee to take or to pay them for statutory annual leave entitlement.

6 On 23 June 2020, an ET3 response was filed on behalf of the respondents, defending the claim, through their representative, Mr Alan Philp, senior litigator, with RBS & Natwest Mentor Services, Glasgow. He set forth detailed grounds of resistance, over a 7 page, 31 paragraph, paper apart, where he raised certain preliminary issues, and requested a telephone Preliminary Hearing be fixed, under the ET Rules, to consider whether the claims have little prospects of success, and to consider any Deposit Orders, under **Rules 39 and 53(1)(d) of the ET Rules of Procedure 2013.** That response was

accepted by the Tribunal administration, on 24 June 2020, and a copy sent to the claimant and ACAS, as per standard practice.

7 Specifically, at paragraphs 1 and 2 of those grounds of resistance, Mr Philp raised preliminary jurisdiction issues that there was no dismissal in law, and so the alleged unfair dismissal claim was vexatious and misconceived in law, and should be struck out, or alternatively the claimant should be ordered to pay a deposit, as a prerequisite of proceeding with that claim.

8 Further, the grounds of resistance, at paragraphs 3 to 5, also submitted that other parts of the claim had had no / little prospects of success, and as regards the claims for notice pay, arrears of pay, pension contributions, and holiday pay, he submitted that they too were misconceived in fact and law, and should be struck out, or they had no prospects of success and should be struck out, or else the claimant should be ordered to pay a deposit, as a prerequisite of proceeding with those parts of the claim.

9 The **ADG** head of complaint was not specifically addressed in the respondents' grounds of resistance, and so I have taken it, from the general denial, at paragraph 33 of the grounds of resistance, that it is not accepted by the respondents. At this Hearing, Mr Philp did not ask me to strike out that part of the claim for having no / little prospects, which failing to consider ordering the claimant to pay a deposit, as a prerequisite of proceeding with that part of the claim.

Preliminary Hearing before this Tribunal

10 Before the start of this Preliminary Hearing, I had pre-read and considered the Tribunal's casefile, including the ET1 claim form, the ET3 response, and the claimant's email of 27 July 2020, copied to Mr Philp for the respondents, in reply to the Tribunal's letter to the claimant of 14 July 2020 following initial consideration of the claim and response.

11 Following initial consideration of the claim and response, by Employment Judge Laura Doherty, on 14 July 2020, she confirmed that all of the jurisdictional codes under which the Tribunal administration had registered

the claim were correct, and she instructed that the claim and response proceed, and that the claimant should provide his comments on what was said by the respondents regarding payment of notice, and specify the amounts claimed by way of unauthorised deductions from wages, pension contributions, and holiday pay, and that within 14 days.

12 In a 7-page, typewritten response to the ET3 provided by the respondents, the claimant set forth his position, and also attached a detailed Schedule of Loss seeking total compensation from the respondents of some **£102,861.81,** excluding damages to his reputation, which he indicated he would be seeking from the respondents in such sum as the Tribunal might think fit.

13 In light of that correspondence from the claimant, I noted from the casefile that Employment Judge Frances Eccles had, on 30 July 2020, instructed that a one-hour telephone Case Management Preliminary Hearing be fixed to discuss further procedure. While that was then listed, on 30 July 2020, to be held on 27 August 2020, that listing was postponed, by Employment Judge Robert Gall, on 5 August 2020, on application by Mr Philp, who indicated that he was on leave on the date fixed by the Tribunal. It was then re-listed for 18 September 2020 to suit the availability of both parties to attend this telephone Preliminary Hearing.

14 I also advised both parties that I had also pre-read, from the Tribunal's casefile, Mr Philp's email of 11 September 2020 to the Tribunal, sent at 15:55, and copied to the claimant, where he had enclosed, acting on his own initiative, a respondents' completed PH Agenda, together with a respondents' draft List of Issues, and various emails referred to in the respondents' Agenda.

15 So too I had pre-read the claimant's email of 11 September 2020, sent at 21:29, responding to the respondents' Agenda, and attaching documents that the claimant wanted to make reference to at this telephone Hearing. I pause to note and record that while Mr Philp's draft List of Issues refers to wrongful dismissal (**Art.3 ETEJ(EW) O**) that is clearly a mistaken reference to the

England & Wales Extension of Jurisdiction Order 1994, whereas, in this case, the appropriate reference should be to the separate Scotland Order 1994.

16 This Preliminary Hearing took place remotely given the implications of the ongoing Covid-19 pandemic. I was present in the Glasgow Tribunal Centre, and it was an audio (A) hearing held entirely by telephone, and parties did not object to that format. It was to discuss how to progress the case in accordance with **ET Presidential Guidance and Direction in connection with the Conduct of Employment Tribunal Proceedings during the Covid-19 Pandemic.**

17 The claimant appeared on his own behalf, unrepresented. Mr Philp appeared, also unaccompanied, for the respondents. Given the claimant's situation, as an unrepresented, party litigant, I explained to him, as I would do for any unrepresented party litigant at a first Case Management PH, the purpose of this Hearing was to "***road map***" the case to another substantive Hearing, and not to hear any evidence, nor to look at any documents, at this stage, other than the ET1 claim and ET3 response, but to clarify the factual and legal issues and discuss with both parties, and so work out how to progress forward to an appropriate type of further Hearing at a later date. Likewise, I clarified that it was not for me to act as advocate, or representative, for either party, which must take its own independent advice.

18 Specifically, I referred the claimant to the terms of the Tribunal's ***"overriding objective"*** under **Rule 2** to deal with the case fairly and justly, including "***ensuring that the parties are on an equal footing."*** I think it would be helpful here to note, for his future information, the precise terms of **Rule 2 of the Employment Tribunals Rules of Procedure 2013**, as follows:

"***Overriding objective***

2. The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable -

(a) ensuring that the parties are on an equal footing;

(b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;

(c) avoiding unnecessary formality and seeking flexibility in the proceedings;

(d) avoiding delay, so far as compatible with proper consideration of the issues; and

(e) saving expense.

A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal."

Matters discussed at this Preliminary Hearing

19 At this Preliminary Hearing, I opened discussion by seeking to clarifying parties' respective positions . The claimant's position, as per his ET1 claim form, is that he was immediately dismissed by the respondents, on 3 April 2020, without proper protocol, and without notice, whereas the respondents' position is that the claimant's employment with them ended on 6 April 2020, the claimant having resigned on 9 March 2020, with 4 weeks' notice, which expired on 6 April 2020, and that he worked his notice, being placed on garden leave for the remainder of his notice on 3 April 2020.

20 Having seen and considered the respondents' ET3 response, the claimant advised me that he was wishing to proceed with his full claim, and not seeking to withdraw any part of it, and that he was still seeking compensation from the respondents, as per his Schedule of Loss intimated on 27 July 2020. He

invited me to go ahead, at this Hearing, on the basis of the information which he had already provided to the Tribunal, stating that he had been dismissed immediately on 3 April 2020, and that anything previously is "***wholly irrelevant".***

21 Mr Philp, for the respondents, under reference to section R4.2 of his completed PH Agenda, submitted that, in short, all of the claims listed in paragraphs 1 to 5 of the respondents' grounds of resistance, as per their ET3 response, are misconceived in fact and law, and that he was seeking at this Preliminary Hearing that the Tribunal order the claimant to pay a deposit, or deposits, as a prerequisite of proceeding further with his claims, if he was not withdrawing them.

22 Rather than seek a Preliminary Hearing on Strike Out of the claims, under **Rule 37**, which would require a public Hearing in terms of **Rules 53(1)(c) and 56,** Mr Philp stated that he sought to deal with his application for Deposit Orders under **Rule 39** at this telephone Hearing, given **Rule 56** states that that can be dealt with at a private Hearing, under **Rule 53(1)(d),** and given the claimant had had advance notice in the ET3 response, and in the respondents' PH Agenda, of the respondents' intention to seek Deposit Orders.

23 Having considered **Rules 53 and 56**, I was satisfied that Deposit Orders could be considered at this Hearing, and the claimant confirmed that he understood what a Deposit Order is, but that he felt he has enough evidence to progress his case to a Final Hearing, without the need for any deposit being ordered by the Tribunal.

24 I stated that, in terms of **Rule 39(2),** the Tribunal is obliged to "***make reasonable enquiries into the paying party's ability to pay the deposit and to have regard to any such information when deciding the amount of the deposit."***

25 I then asked the claimant to advise me of his current circumstances, noting that, at the time of his ET1 claim, he had not indicated that he had found any new employment after his employment with the respondents ended in April 2020.

26 In reply, the claimant stated that he has been doing freelance work in the last 2 weeks, but otherwise he had not been working, although actively seeking work, and in receipt of State benefits in the form of Jobseeker's Allowance at the rate of £75 per week , from April to the end of August 2020. Otherwise, he advised, he was living off his savings.

27 When I asked him about his ability to pay a deposit of up to £1,000, as sought by the respondents, the claimant stated that he would have "***no problem***" in paying up to that amount, if the Tribunal so ordered, and that he could do so from his savings. That said, the claimant further stated that be believes his case can be won, and while he added that he does not dispute that he previously submitted his resignation by email, in March 2020, he stated that that was "***totally irrelevant***" to what happened in April 2020, when he insisted that he had been dismissed by the respondents.

28 I then asked the claimant if he could clarify his position with reference to the additional information stated by him, in his ET1 claim form, at page 12, where he had stated as follows:-

"***You will here*** (sic) ***a counter claim that I had handed in my notice. This is correct on the 9th March. I handed in my notice in the heat of the moment. After a few days I had a meeting with my line manager Stephen Keenan (contractors manager) on site. We discussed the resignation and it was agreed that I should remain with the company to finish the full project. At no time was I contacted by any directors. Conclusion – If the directors assumed that my resignation was imminent, why did they call the meeting on the 3rd April where they dismissed me with immediate effect and damaging my reputation."***

29 In reply to my enquiry, the claimant stated that Mr Keenan accepted withdrawal of his resignation, but as this was a 1:1 meeting, that was not put in writing, but he recalled it being within a few days of 9 March 2020. After the meeting on 3 April 2020, the claimant advised me that he received nothing at all from the respondents, stating that he had been dismissed, but he did recall getting a P45 termination of employment form some 2 to 3 weeks later, which he assumed showed 3 April 2020 as his leaving date, although he did say that he would have to check that point.

30 For the respondents, Mr Philp stated that they continued to defend the claim, on the basis set forth in the ET3 response, and nothing there was withdrawn, or conceded. He added that he sought Deposit Orders for all claims made by the claimant, as per his ET3 response, and, in that regard, he invited me to look at the terms of the claimant's email of 27 July 2020, being his response to the points made by the respondents in their ET3.

31 In particular, Mr Philp stated that the claimant's resignation on 9 March 2020, by email (copy produced) was unambiguous and clear, it gave 4 weeks' notice, it was undisputed in terms of its content, and that it was written by the claimant, and it was undisputed that the claimant worked his notice until 3 April 2020, when he was then put on garden leave to 6 April 2020, and paid to 6 April 2020.

32 While the claimant says after the meeting with Mr Keenan, in March 2020, it was agreed that he would remain, at best that was a variation, rather than a withdrawal of the resignation, submitted Mr Philp, and the claimant's e-mail of 27 July 2020 does not say the resignation was withdrawn. I pause here to note and record that, on page 2 of his email document intimated on 27 July 2020, the claimant stated :

"In attempt to create a smoke screen, the respondent continuously refers to the fact that I had handed in my notice on the 9th of March 2020 which I have not disputed and I have highlighted the events in my ET1.

I resolved any issues with my line manager Stephen Keenan on the 13th March 2020 and it was agreed that I should remain to complete all 3 phases and then review my position, and was working as normal before the meeting on the 3rd April 2020. At no time was I contacted by any of the Directors to discuss my resignation."

33 Mr Philp referred to the well-known legal principle that once notice of resignation has been given to terminate a contract of employment, it cannot be withdrawn unilaterally, but only by agreement between the parties. He stated that the respondents dispute that they, as employer, agreed to the claimant withdrawing his resignation.

34 He did not cite any legal authority for that proposition, but it accords with my own understanding of the law. As noted in the **IDS Handbook on Unfair Dismissal**, at **1-20**, that general rule is shown in **Harris and Russell Ltd v Slingsby 1973 ICR 454 (NIRC)**, and it was re-affirmed by the Court of Appeal in **CF Capital plc v Willoughby 2012 ICR 1038 (CA).**

35 Further, added Mr Philp, the claimant does not dispute the content of his contract of employment with the respondents, at clauses 15 and 16, relating to notice of termination, payment in lieu of notice, and garden leave. On this basis, he sought a Deposit Order against the claimant, for the unfair dismissal and wrongful dismissal / notice pay heads of claim.

36 Next, Mr Philp referred to the claim for unlawful deduction of wages, and what the claimant had written at paragraph 27 of his response email of 27 July 2020 commenting on the respondents' ET3 response. Mr Philp highlighted that the claimant had stated : ***" I would confirm all salary has been received with exception to Feb 2018 where 3 days are outstanding."*** He commented that any such claim was time-barred, that being 2 & ½ years ago now, and no such claim was ever pursued before, until this ET claim form.

37 Next, Mr Philp referred to the claimant's claim for pension contributions, and what the claimant had written at paragraph 28 of his response email of 27 July 2020 commenting on the respondents' ET3 response. Mr Philp highlighted that the claimant had stated : ***"I will be seeking pension contributions from March to August 2020."***

38 Mr Philp commented that he assumed the 2020 date was an error by the claimant, and, in context, he was claiming for March to August 2018, the claimant's employment having started on 26 February 2018, and pension contributions not starting until September 2018. In any event, he added, any such claim was time-barred, that being more than 2 years ago, whether the claimant was intending to pursue this head of claim as an unlawful deduction from wages, or a breach of contract claim.

39 Further, Mr Philp referred to the claim for carried forward holiday pay , and what the claimant had written at paragraph 29 of his response email of 27 July 2020 commenting on the respondents' ET3 response. Mr Philp highlighted that the claimant had stated : ***"Holidays due for year 2019 outstanding 7 days carried to year 2020, due all as confirmed by email from Irene Macdonald (MPMH Office Administrator) Director and Contracts Manager copied in and made no response. (Evidence will be provided)."***

40 Mr Philp further stated that the claimant had not produced any email showing the respondents had agreed to a holiday carry forward from 2019 and, as per **Regulation 13(9) of the Working Time Regulations 1998**, leave may only be taken in the leave year in respect of which it is due. While the claimant had stated that the Director and Contracts Manager were copied in and made no response, Mr Philp submitted that the claimant had not copied the Tribunal into the full email chain, and what had been provided was not evidence of approval to a carry forward by the respondents, and no response is not the equivalent of there being agreement.

41 In these circumstances, Mr Philp stated that he sought a Deposit Order for all these heads of claim, and he referred me to the **Van Rensburg** case from the Employment Appeal Tribunal, by Mr Justice Elias, stating that the test of little prospect of success is plainly not as rigorous as the test that the claim has no reasonable prospect of success, so a Tribunal has greater leeway when considering whether or not to order a deposit, but it must have a proper basis for doubting the likelihood of the claimant being able to establish the facts essential to the claim.

42 While **Van Rensburg** is a familiar EAT authority known to me, and often cited in these type of applications to the Tribunal, Mr Philp did not flag it up to the claimant, as an unrepresented, party litigant, when forwarding his PH Agenda, so I explained to the claimant that there are different tests for a Strike Out application (under **Rule 37**) and a Deposit Order under **Rule 39**.

43 I referred to the Court of Session's judgment in **Tayside Public Transport Company Limited (t/a Travel Dundee) v Reilly 2012 CSIH 46,** where it was held that the power of the Employment Tribunal to strike out a claim may be exercised only where it determines that the claim has no reasonable prospect of success, but, even if the Tribunal so determines, it retains a discretion not to strike out the claim.

44 In **Reilly**, as per paragraph [30] of the Opinion of the Court, delivered by the Lord Justice Clerk, it is recorded that :

"*Counsel are agreed that the power conferred by Rule 18(7)(b) may be exercised only in rare circumstances. It has been described as draconian (Balls v Downham Market High School and College [2011] IRLR 217, at para 4 (EAT)). In almost every case the decision in an unfair dismissal claim is fact-sensitive. Therefore where the central facts are in dispute, a claim should be struck out only in the most exceptional circumstances. Where there is a serious dispute on the crucial facts, it is not for the Tribunal to conduct an impromptu trial of the facts (ED & F Mann Liquid Products Ltd v Patel (2003)*

CP Rep 51, Potter LJ at para 10). There may be cases where it is instantly demonstrable that the central facts in the claim are untrue; for example, where the alleged facts are conclusively disproved by the productions (ED & F Mann Liquid Products Ltd v Patel, supra; Ezsias v North Glamorgan NHS Trust, supra). But in the normal case where there is a "crucial core of disputed facts," it is an error of law for the Tribunal to pre-empt the determination of a full hearing by striking out (Ezsias v North Glamorgan NHS Trust, supra, Maurice Kay LJ, at para 29).

45 As Lady Wise held, in **Hasan v Tesco Stores Ltd [2016] UKEAT 0098/16,** to which I also made reference, there is a 2-stage test to a Strike Out application under **Rule 37**. The first stage is to consider whether any of the five stated grounds (a)-(e) have been established. Thereafter, a Judge has to consider whether or not to exercise the discretion in favour of striking out. Support for that approach is found in the EAT case of **HM Prison Service v Dolby [2003] IRLR 694**.

46 Mr Philp stated that his application, at this Hearing, was only for a Deposit Order under **Rule 39,** and, in reply to a query from me, he stated that he had no further case law authorities to refer me to in support of his application.

47 Having briefly cited **Reilly**, then **Hasan**, I asked Mr Philp about a more recent EAT judgment by Her Honour Judge Eady QC (as she then was, now Mrs Justice Eady in the High Court) in **Tree v South East Coastal Ambulance Service NHS Foundation Trust [2017] UKEAT/0043/17,** where the Employment Appeal Tribunal had considered practice and procedure in the imposition of a deposit by Order under **Rule 39**.

48 Looking at that **Tree** judgment on my laptop, through the ***Bailli*** website, at www.bailii.org.uk, which I explained to the claimant is a publicly available, free to search database of judgments, I referred to the summary where it is stated that:-

"*When making a Deposit Order, an Employment Tribunal needed to have a proper basis for doubting the likelihood of a Claimant being able to establish the facts essential to make good her claims (see the guidance in Jansen van Rensburg v Royal Borough of Kingston-upon-Thames UKEAT/0096/07; Wright v Nipponkoa Insurance (Europe) Ltd UKEAT/0113/14 and Hemdan v Ishmail [2017] ICR 486 EAT).*"

49 I also referred to Mrs Justice Simler's EAT judgment in **Hemdan v Ishmail [2016] UKEAT/0021/16** , reported at **[2017] IRLR 228, [2017] ICR 486**, where the learned EAT President held that a Deposit Order, which was set at so high a level in context as to impede a claimant's access to justice because she could not comply with it, the Order imposed by a Judge was not therefore a proportionate and effective means of signalling to the claimant the low prospects of success and warning her as to costs.

50 Mr Philp stated that he sought a Deposit Order for each of the claimant's allegations identified by him, in his submissions for the respondents, and, at the end of the day, he invited the Tribunal to find that a Deposit Order is appropriate, and I should make Orders if I was satisfied that the claimant would be unable to support his claims advanced against the respondents.

51 Having heard the respondents' submissions, I then invited the claimant to reply, stating that while there had been reference to case law authorities, as presiding Judge, I would be dealing with applying the relevant law to the facts and circumstances of this case, and he should address the various points made by Mr Philp in his oral submissions to me.

52 In response, the claimant stated that, as regards pension contributions, while he understood there was generally a 3 month time limit for claims to the Tribunal, and while he accepted 2018 was a long time ago, he did not think he was time-barred, as he had only discovered that the respondents had not made contributions before September 2018 when the Peoples Pension

became involved and this came to light. As such, he stated that he resisted a Deposit Order being made for that part of his case against the respondents.

53 Next, the claimant stated that he did not believe the Tribunal could ask for any more than £1,000 total in a case, and it was not up to £1,000 per item. I commented that, from my recollection of the EAT judgment in **Wright,** which I would look at in writing up this decision, the Tribunal's powers were per allegation or argument, as per **Rule 39**. Mr Philp stated that his understanding from **Wright** was the same as my own.

54 The claimant also stated that the damage to his reputation, caused by his dismissal on 3 April 2020, was relevant to showing he had a strong case against the respondents for unfair dismissal.

55 As regards holiday pay, the claimant stated that there was a carry forward of 2019 into 2020, and that there was what he referred to as "***an agreement in principle"***, and the respondents did not cancel the verbal agreement that he stated he had with Mr Keenan, the respondents' Contracts Manager.

56 Mr Philp then stated that subject to a Deposit Order being made, and paid by the claimant, then the respondents would be seeking a Final Hearing of the case, and for the Tribunal's decision to advise the claimant of the consequences of a Deposit Order being made by the Tribunal.

57 Before proceeding to draw the Hearing to a close, I asked the claimant and Mr Philp if they had anything further to raise. Mr Philp stated he had nothing further, while the claimant asked me if he would have the right to appeal my decision if I decided to make any Deposit Order.

58 In reply, I stated that parties' rights to seek reconsideration by the Tribunal, or appeal to the Employment Appeal Tribunal, would be explained in the covering letter that the Tribunal would sent out to both parties when issuing my written Judgment, with Reasons, which would follow, as soon as possible

after I had reflected on the competing submissions made to me at this Hearing, and decided on my ruling. On that basis, the Hearing concluded, at 12.30pm, with me thanking both the claimant and Mr Philp for their attendance and contribution, and stating Judgment was reserved, to be issued later.

Discussion and Deliberation

59 Having carefully considered parties` competing submissions, written and oral, and also my own obligations under **Rule 2 of the Employment Tribunals Rules of Procedure 2013**, being the Tribunal's overriding objective to deal with the case fairly and justly, I consider that the claimant has been given a reasonable opportunity at this Preliminary Hearing, through his own oral submissions, in reply to those made by Mr Philp, to respond, and so to make his own representations opposing the respondents' application for Deposit Orders.

60 While, in other circumstances, had the matter not been foreshadowed in the ET3 and respondents' PH Agenda, I may have been inclined to relist for a specific Preliminary Hearing on Deposit Orders at a later date, I was satisfied that the claimant had had advance notice, and it was a matter that could be dealt with at this telephone Hearing, as per **Rules 53(1)(d) and 56**.

61 In terms of **Rule 39(2),** I also had the opportunity, at this Hearing, to make reasonable enquiries into the claimant's ability to pay any deposit, if I were to decide to make any Deposit Order.

62 For present purposes, it is helpful if I then refer to what Judge Eady stated in the body of her judgment in **Tree**, as follows:-

"19.The effect of a Deposit Order is also plainly different to that of a Strike-out Order under Rule 37: it does not dispose of the claim, or any part of the claim; it does not, of itself, summarily determine the claim. That said, a Deposit Order remains an important and significant deterrent to the pursuit of a claim: if not paid, the effect of a Deposit Order will be the same as a Strike-out, as

Rule 39(4) takes effect. This potential outcome led Simler J, in Hemdan v Ishmail [2017] ICR 486 EAT, to characterise a Deposit Order as being "rather like a sword of Damocles hanging over the paying party" (paragraph 10). She then went on to observe that "Such orders have the potential to restrict rights of access to a fair trial" (paragraph 16). See, to similar effect, Sharma v New College Nottingham UKEAT/0287/11 paragraph 21, where The Honourable Mr Justice Wilkie referred to a Deposit Order being "potentially fatal" and thus comparable to a Strike-out Order.

20. Where there is, thus, a risk that the making of a Deposit Order will result in the striking out of a claim, I can see that similar considerations will arise in the ET's exercise of its judicial discretion as for the making of a Strike-out Order under Rule 37(1), specifically, as to whether such an Order should be made given the factual disputes arising on the claim. The particular risks that can arise in this regard have been the subject of considerable appellate guidance in respect of discrimination claims, albeit in strike-out cases but potentially of relevance in respect of Deposit Orders for the reasons I have already referenced; see the well-known injunctions against the making out of Strike-out Orders in discrimination cases, as laid down, for example, in Anyanwu v South Bank Students' Union [2001] IRLR 305 HL per Lord Steyn at paragraph 24 and per Lord Hope at paragraph 37.

21.In making these points, however, I bear in mind - as will an ET exercising its discretion in this regard - that the potential risk of a Deposit Order resulting in the summary disposal of a claim should be mitigated by the express requirement - see Rule 39(2) - that the ET shall "make reasonable enquiries into the paying party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit". An ET will, thus, need to show that it has taken into account the party's ability to pay and a Deposit Order should not be used as a backdoor means of striking out a claim, so as to prevent the party in question seeking justice at all; see Hemdan at paragraph 11.

22. Although an ET will thus wish to proceed with caution before making a Deposit Order, it can be a legitimate course where it enables the ET to discourage the pursuit of claims identified as having little reasonable prospect of success at an early stage, thus avoiding unnecessary wasted time and resource on the part of the parties and, of course, by the ET itself.

23. Moreover, the broader scope for a Deposit Order - as compared to the striking out of a claim - gives the ET a wide discretion not restricted to considering purely legal questions: it is entitled to have regard to the likelihood of the party establishing the facts essential to their claim, not just the legal argument that would need to underpin it; see Wright at paragraph 34."

63 In writing up this Judgment, and coming to my reserved decision on the respondents' opposed application for Deposit Orders against the claimant, I have had regard to the case law authorities cited earlier, and the passages from which I have provided relevant extracts above. I wish to add reference to Mrs Justice Simler, then EAT President (now Lady Justice Simler in the Court of Appeal) in **Hemdan**, where rather than rely on the selected quotes in **Tree**, I reproduce the relevant paragraphs below, later in these Reasons, at paragraph 71. This reproduction of the judicial guidance available to me, from the higher Tribunals, allows the claimant to see that guidance in full. Further, and for the same reason, I also wish to refer specifically to the following parts of Judge Eady's EAT judgment in **Wright**, as follows:-

"*33. The test for the ordering of a deposit is that the party has little reasonable prospect of success; as opposed to the test under Rule 37 for a strike-out (no reasonable prospect of success). Although that is a less rigorous test, the Tribunal must still have a proper basis for doubting the likelihood of the party being able to establish the facts essential to the claim. There is little guidance in the authorities as to what is meant by little reasonable prospect of success, although it was considered by Bean J (as he then was) in Community Law Clinic Solicitors & Ors v Methuen UKEAT/0024/11/LA, who doubted whether there was any real difference between little reasonable prospect of success*

and little prospect of success. In that case the ET had made a deposit order but had refused to strike out the claims. There was no appeal against the deposit orders. The EAT was concerned only with the strike-out issue and ruled that the Employment Judge should indeed have struck out the claims of sex and race discrimination.

34. When determining whether to make a deposit order an Employment Tribunal is given a broad discretion. It is not restricted to considering purely legal questions. It is entitled to have regard to the likelihood of the party being able to establish the facts essential to their case. Given that it is an exercise of judicial discretion, an appeal against such an order will need to demonstrate that the order made was one which no reasonable Employment Judge could make or that it failed to take into account relevant matters or took into account irrelevant matters.

77. The main point in the appeal that was permitted to proceed under this heading was that the Employment Judge had failed to have regard to the question of proportionality and that he was particularly required to do so, given that the new rules allowed for a deposit in respect of separate allegations rather than the whole claim.

78. It is right that the clarification provided by the Employment Tribunal Rules 2013 may well result in separate awards being made in relation to different allegations and that this might give rise to a total level of award of some significantly higher value than the individual orders. When making such deposit orders Employment Tribunals should indeed stand back and look at the total sum awarded and consider the question of proportionality before finalising the orders made. In this case, however, I am satisfied that the Employment Judge did. He expressly had regard to what he described as "appropriate". In this case, it is clear that this was a reference to what was proportionate. The Employment Judge expressly had regard to the totality of the award made as comprised of each deposit order, allowing for the maximum that could be awarded under the Rules. He did not make the

maximum awards that he could have done but made orders which gave rise to a total sum that seemed to be proportionate – "appropriate" - when taking into account the number of allegations to which the orders related and the Claimant's means. That was a proportionate view on the totality of the award and a conclusion that was entirely open to the Employment Judge as an exercise of his discretion.

79. As to the amount of each individual deposit order, that was entirely for the Employment Judge. He expressly had regard to the Claimant's means. It cannot be said that the amount in each case was a sum he was not entitled to award. As for his reasons for doing so, those seem entirely clear. The Employment Judge had appropriate regard to the Claimant's means and to the level of the award Parliament considered could be made and made deposit awards at a level that was appropriate to the case. Those were all matters for the Employment Judge. They are not matters for the EAT. It cannot that he reached a perverse conclusion. There is no error of law in this respect and I duly dismiss this ground of appeal."

64 As recorded earlier in these Reasons, at paragraph 29 above, the claimant advised me that , after the meeting on 3 April 2020, he received nothing at all from the respondents, stating that he had been dismissed, but he did recall getting a P45 termination of employment form 2 to 3 weeks later.

65 I pause here to note and record that his statement at this Hearing does not sit easily with his email of 27 July 2020, responding to the respondents' ET3 response, where, at the top of page 3, he states***:-" I received a reply by email from James Snodgrass on the 8th April 2020 confirming the verbal reason received at the meeting on the 3rd April 2020 that I was being dismissed due to the poor feedback from the client and that MPMH Construction did not want myself involved with phases 2 & 3."***

66 That email has not been produced to the Tribunal by either party, nor has any P45, but, at paragraph 17 of his email to the Tribunal, on 27 July 2020, the

claimant refers to sending an email on 4 April; 2020 confirming the discussions of the meeting of 3rd April and asking for a written confirmation of the reason he was instantly dismissed, and that he received a reply on 8th April. The respondents' ET3 response, grounds of resistance, at paragraphs 18 and 19 provide some narrative around Mr Snodgrass's email of 8 April 2020.

67 This, I infer, is the email from James Snodgrass, director, that is referred to on pages 1, 2 and 3 of the claimant's response, after the claimant issued minutes of the meeting held on 3rd April; 2020. At page 2, he refers to the minutes "***will be provided as evidence***." He comments that the minutes were not contested and therefore can be assumed as being factual. Neither party has produced these minutes, or the subsequent e-mail chain, for my perusal at this Preliminary Hearing.

68 In coming to my decision, I have done so on the basis of the information available to the Tribunal at this Preliminary Hearing. There is nothing before me to show that these minutes, which the claimant seems to have written, have been agreed by the respondents as being factual, and reflective of the matters discussed at the meeting held on 3 April 2020.

69 At this Preliminary Hearing, Mr Philp only referred me to **Van Rensburg**. As detailed earlier in these Reasons, in discussion with both parties, and to try and put the claimant on an equal footing with Mr Philp, as regards the relevant law relating to both Strike Out, and Deposit Orders, as per my duty under **Rule 2,** I cited some further reported cases, in particular **Tree**.

70 However, in coming to this my reserved Judgment, I have given myself a more fulsome self-direction in law. The relevant statutory provisions are to be found within **Rules 2 and 39 of the Employment Tribunals Rules of Procedure 2013**. **Rule 2** I have already reproduced earlier in these Reasons, at paragraph 18 above, and so do not repeat here. **Rule 39** , so far as material for present purposes, provides as follows:

Deposit Orders

39(1) Where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party ("the paying party") to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.

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

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

(4) If the paying party fails to pay the deposit by the date specified the specific allegation or argument to which the deposit order relates shall be struck out. ….

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

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

(b) the deposit shall be paid to the other party…..

otherwise the deposit shall be refunded.

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

71 On the subject matter of Deposit Orders, I have taken into account, Mrs Justice Simler's judgment from the EAT in **Hemdan –v- Ishmail [2016] UKEAT/0021/16,** now reported at **[2017] IRLR 228 ; [2017] ICR 486,** at paragraphs 10 to 17, where the learned EAT President addressed the relevant legal principles, 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."*

72 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.

73 As it is referred to in counsel for the appellant's submissions to the EAT, in **HM Prison Service v Dolby [2003] UKEAT/0368/12**, at paragraph 14 of Mr Recorder Bower' QC's judgment, this is the ***"yellow card***" option, Strike Out being described by counsel as the "***red card***."

74 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. 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,** where the learned EAT President held 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.

75 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. The EAT's judgment on 17 September 2014, by Her Honour Judge Eady QC, in **Wright v Nipponkoa Insurance (Europe) Ltd [2014] UKEAT/0113/14,** *d*eals with the relevant legal principles on Strike Out applications, as well as the *quantum* of Deposit Orders.

76 HHJ Eady QC discusses the relevant legislation and legal principles, at paragraphs 29 to 31, and in particular I would refer here to the summary of HHJ Eady QC's judgment at paragraph 3, on the *quantum* of Deposit Orders, stating that the Tribunal Rules 2013 permit the making of separate Deposit Orders in respect of individual arguments or allegations, and that if making a number of Deposit Orders, an Employment Judge should have regard to the question of proportionality in terms of the total award made. Paragraphs 77 to 79 of the **Wright** judgment refer : I have reproduced those specific paragraphs above, earlier in these Reasons, at paragraph 63.

77 In the present case, as detailed earlier in these Reasons, at paragraph 3 above, at vetting, the claim was given 5 specific administrative jurisdictional codes, being **ADG, UDL, BOC, WA**, and **WTR(AL).** The last 4 relate to matters discussed at this Preliminary Hearing, and so each separate head of complaint is liable, 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.

78 **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. 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. Here, given this was a telephone Hearing, Mr Philp only pursued an application for Deposit Orders.

79 The test of '***little reasonable 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**.**

80 In private deliberation, in chambers, I have carefully considered parties' submissions, and decided that it is appropriate to make Deposit Orders. I consider that the following argument(s) or allegation(s) have little reasonable prospect of success:

> (***1) the complaint that the claimant was dismissed by the respondents on 3 April 2020 with immediate effect.***
>
> ***(2) the complaint that the claimant was wrongfully dismissed by the respondents on 3 April 2020, and not paid notice pay.***
>
> ***(3) the complaint that the claimant suffered an unlawful deduction from wages, by the respondents withholding salary payments, holiday payments, and pension contributions.***
>
> ***(4) the complaint that the claimant had a carried forward entitlement from 2019 for holiday entitlement accrued and***

untaken as at the effective date of termination of his employment with the respondents.

81 The reasons why I have reached this conclusion, and which I set forth in the Deposit Order signed by me, and issued under separate cover, along with this Judgment and Reasons, are as follows:

(1) (a) From the information available to the Tribunal, at this Hearing, it is an uncontestable fact that the claimant submitted his clear and unambiguous written resignation to the respondents, by email on 9 March 2020, which provided 4 weeks' notice, as per his contract of employment, that he did so after careful consideration, and that resignation was not thereafter withdrawn with the agreement of both parties, and that resignation cannot be unilaterally withdrawn by the claimant.

(1) (b) Further, it is clear from the content of his resignation email, sent on 9 March 2020, @18:59, to Stephen Keenan, with cc to Graham Hancock and James Snodgrass, copy produced to this Preliminary Hearing, and subsequent emails exchanged between the parties, as set out by the respondents in paragraphs 15 to 19 of the grounds of resistance included with their ET3 response, that the claimant raised no issue about his resignation being in the heat of the moment, or his notice being extended, until after the effective date of termination on 6 April 2020. He continued to work for the respondents until 3 April 2020, when the respondents then exercised their contractual right to put him on garden leave until 6 April 2020.

(1) (c) His submission that events prior to 3 April 2020, including his resignation, are irrelevant is not well-founded, as the Tribunal must have regard to the whole facts and circumstances of the case, and not the myopic focus which the claimant suggests.

(2) (a) From the information available to the Tribunal, at this Hearing, the claimant was not dismissed immediately and expressly by the respondents, on 3 April 2020, he had worked his notice from 9 March 2020, and at the meeting with the respondents' directors on 3 April 2020, which seems to have been convened as a regular fortnightly contract project meeting, and not as a disciplinary hearing, he was put on garden leave until expiry of his contract, on 6 April; 2020, following his resignation submitted on 9 March 2020.

(2) (b) It appears that the claimant has misconstrued being put on garden leave as a dismissal, when the respondents were simply exercising their contractual entitlement to do so in terms of the claimant's agreed contract of employment with them.

(3) (a) From the information available to the Tribunal, at this Hearing, the claim for outstanding salary for 3 days worked, but alleged as not paid, in February / March 2018, even if established in fact, is time-barred, and the claimant has provided no satisfactory explanation why this claim was not pursued by him before.

(3) (b) As such, it appears that it has been presented out of time, and so the Tribunal has no jurisdiction to entertain this head of complaint, having regard to **Section 23 of the Employment Rights Act 1996**, in circumstances where the claim is made well after 3 months from the date of the alleged unlawful deduction from wages, where he has not shown that it was not reasonably practicable to present this complaint before the end of the relevant period of 3 months and where, even if he could show it was not reasonably practicable to do so, the date of presentation of his claim to the Tribunal some 2 years later falls well outwith such further period as a Tribunal might consider reasonable, to grant him an extension of time to pursue that complaint. Further, and in any event, in terms of **Section 23(4A)**, inserted by the **Deduction from Wages (Limitation) Regulations 2014** [SI 2014 No. 3322] an Employment Tribunal is not to

consider a complaint relating to a deduction where the date of payment of the wages from which the deduction was made was before the period of two years ending with the date of presentation of the complaint.

(3) (c) As regards the respondents' alleged failure to make pension contributions, between March and August 2018, this head of complaint likewise appears time-barred for the same reasons, even if there was a breach of contract, or an unlawful deduction from wages. Pension contributions are excluded from the definition of wages in **Section 27 of the Employment Rights Act 1996**, and any complaint about this would seem to be outwith the jurisdiction of the Tribunal.

(3) (d) In any event, from the claimant's response of 27 July 2020, within his schedule of loss, he refers to his pension provider B&CE and the "***pension omnibus***" (sic), which is assumed to be the Pensions Ombudsman, are investigating these matters. If, as he alleges, he was not enrolled on the pension scheme until September 2018, any complaint about this would seem to be outwith the jurisdiction of the Tribunal.

(4) (a) From the information available to the Tribunal, at this Hearing, the claim for 7 days' unpaid holiday pay, based on an alleged carried forward entitlement from 2019 for holiday entitlement accrued and untaken as at the effective date of termination of employment with the respondents, is not vouched by the documents yet produced by the claimant.

(4) (b) What has been produced shows that the claimant requested a carry forward, in December 2019, but there is no evidence that this was agreed by the respondents. The fact that the respondents' directors were copied into the email correspondence with Irene McDonald, the respondents' accounts administrator, but did not challenge his request, is not equivalent to showing that there was express agreement to a carry forward.

(4) (c) The claimant has failed to produce any evidence of any agreement with the respondents to allow him to carry over his unused entitlement, from 2019, into 2020, and **Regulation 13 (9) of the Working Time Regulations 1998** therefore applies, and he has not established that he can prove there was an express agreement to carry forward.

82 As recorded above, at paragraph 27 of these Reasons, when I asked the claimant about his ability to pay a deposit of up to £1,000, as sought by the respondents, he stated that he would have "***no problem***" in paying up to that amount, if the Tribunal so ordered, and that he could do so from his savings. As such, I did not enquire further into the matter, and he did not volunteer any further information as to the exact extent of his whole assets and means, including his savings.

83 I have taken into account that information provided about his ability to pay, as also the judicial guidance from the higher Tribunals that Deposit Orders should not be used as a backdoor means of striking out a claim, so as to prevent the party in question seeking justice at all. Given there are 5 specific allegations or arguments that the claimant wishes to pursue against the respondents, and Mr Philp sought Deposit Orders in relation to the 4 specific allegations discussed at this Hearing, I have also considered the question of proportionality in terms of the total award made.

84 In these circumstances, I am satisfied that a deposit at the level of the maximum £1,000 per allegation or argument would, if 4 such deposits were ordered, be disproportionate, and likely well outwith the claimant's limited resources. As such, having carefully reflected on the matter of amount of each deposit, I have decided that it is appropriate and proportionate to order the claimant to pay a deposit of **£250** for each allegation he wishes to pursue against the respondents. If he wishes to continue to pursue all four, then he has stated he has the savings to fund that level of deposit.

85 Although at £250 per allegation these are nominal amounts, the warning in respect of costs that is one of the consequences of a Deposit Order will

continue to have effect and force in relation to these allegations if the sums are paid and the allegations are pursued but ultimately fail.

86 In deciding what deposits, if any, to pay, the claimant, as an unrepresented, party litigant, may wish to seek independent and objective advice from a solicitor, trade union, citizens advice bureau, or *pro bono* voluntary agency that advises unrepresented parties, e.g. the Strathclyde University Law Clinic.

87 Unless he pays the relevant deposits within the 21-day time limit, the allegations to which the Deposit Orders relate will be struck out by the Tribunal.

88 If he only wishes to pursue certain allegations, then in making any deposit payment, he should clearly advise HMCTS Finance Centre what allegations his deposit payments relate to, with cc to the Tribunal, and to Mr Philp for the respondents.

89 If he seeks to have the Deposit Order varied, suspended or set aside by the Tribunal, then he must make written application to the Tribunal, with cc to Mr Philp for the respondents, as soon as possible, and before the time limit for payment expires.

90 If the claimant decides not to proceed with his claim, or with any of the allegations, then he should give written notification to the Tribunal, with cc to Mr Philp for the respondents.

91 If any deposit is paid, then the casefile will be referred back to me to consider what arrangements might be appropriate for a Final Hearing, and date listing stencils would be issued at that stage, along with an enquiry to both parties whether they seek an in person Hearing, or a remote Hearing conducted by the use of video conferencing though the Tribunal's CVP (Cloud Video platform) facility.

Employment Judge: I McPherson
Date of Judgment: 29 September 2020
Entered in register: 1 October 2020
and copied to parties