EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Nos: S/4105198/16, S/4105199/16, S/4 105200/1 6
(Multiple Case No 7959)
Held In Glasgow on 3 December 2018 (Preliminary Hearing)
Employment Judge: Ian McPherson

1. Mr Brian Aitken	**1st Claimant Represented by: Mr Mark Allison - Solicitor**
2. Miss Courtney Aitken	**2nd Claimant Represented by: Mr Mark Allison - Solicitor**
3. Mrs Elizabeth Aitken	**3rd Claimant Represented by: Mr Mark Allison - Solicitor**
K7X Ltd	**Respondents Represented by: Mr Ian S Meth**

WRITTEN REASONS FOR JUDGMENT OF THE EMPLOYMENT TRIBUNAL

dated 15 January 2019, and entered in the Register and copied to parties on 16 January 2019.

Introduction

1 . These combined cases called again before me on the morning of Monday, 3 December 2018, at 10.00am, for a public Preliminary Hearing, on Strike Out Deposit previously intimated to parties' representatives by the Tribunal by Notice of Preliminary Hearing dated 20 September 2018, assigning one day for this Preliminary Hearing.

2. This Preliminary Hearing was fixed to determine two preliminary issues as follows: -
(i) Consider whether the claims against the Second Respondent K7X

Ltd T/a Pro Soccer should be struck out under **Rule 37** on the ground that they have no reasonable prospect of success;
(ii) Consider making a Deposit Order under **Rule 39** as a condition of the claimants' continuing to advance their complaints against the Second Respondent if the Tribunal considers that it has little reasonable prospect of success.

Background

3 As vouched by the now three volume casefiles held by the Tribunal, these cases have a long and substantial procedural history going back more than 2 years, and they are yet to be heard on their merits.

4 On 7 September 2016, following ACAS early conciliation between 12 July and 12 August 2016, the claimants, acting through their solicitor, Mr Mark Allison, from Livingstone Brown, Solicitors, Glasgow, brought an ET1 against K7X (t/a Pro-Soccer), complaining of automatically unfair dismissal when their employment was terminated following a TUPE transfer, and a complaint of failure to consult under TUPE, and asserting a TUPE transfer from their employment in Aitken Multi-Purpose Arenas Ltd ("AMPA") to the respondents on 14 April 2016.

5 That claim was accepted by the Tribunal, on 20 October 2016, and served on the respondents, then K7X t/a Pro-Soccer, for response by 17 November 2016. On 15 November 2016, Mr Ian S. Meth, Director Employment Services with XACT Group Ltd, Bellshill, lodged an ET3 response in the name of Pro-Five Ltd in each of the three separate claims, defending the claims, and setting out in a detailed, 97 paragraph paper apart, grounds of resistance, with the respondents denying that there had been a relevant transfer under TUPE, and describing the claims as ***'entirely factually Inaccurate and wholly misconceived both in fact and in law."***

6 Thereafter, on instructions from Employment Judge Susan Walker, on 22 November 2016, the cases were listed for a Preliminary Hearing on whether the claimants' employment transferred to the respondents, that Preliminary Hearing to be held on 11 January 2017. That Preliminary Hearing was postponed, as Mr Meth was unavailable, and following a case management application made by Mr Allison, solicitor for the claimants, for Document Orders, against the respondents, and certain third parties, the cases were listed for a Case Management Preliminary Hearing on 18 January 2017, to be conducted by way of telephone conference call.

7 On that date, the claimants' solicitor, Mr Allison, failed to appear and that Preliminary Hearing was aborted and relisted for 26 January 2017, when it took place before Employment Judge Nick Hosie. By written Note and Orders, dated 6 February 2017, Employment Judge Hosie issued Document Orders for compliance within 21 days, following which the cases should be listed for a Preliminary Hearing on the disputed issue of whether or not there was a TUPE transfer from AMPA Ltd to the respondents.

8 The case thereafter first called before me, on 5 May 201 7, for a further Case Management Preliminary Hearing, following which my written Note and Document Orders, dated 9 May 2017, were issued for compliance within 14 days, along with standard Case Management Orders for a 5-day Final Hearing to be listed in July / September 2017. On 23 May 2017, the cases

were then listed for a 5-day Final Hearing for full disposal, including remedy if appropriate, on Monday / Friday, 4 to 8 September 2017.

9 On 1 June 2017, further Document Orders and Additional Information Orders were issued by me, for compliance by 9 June 2017, to a third party a Mr James Stephen, being the liquidator of AM PA Ltd, and to the claimants themselves, following an application by Mr Meth, opposed by Mr Allison, but granted by me, in part, for the reasons set forth in the Tribunal's letter of 1 June 2017 to both parties* representatives.

10 An application by Mr Meth, for Strike Out of the claims, in their entirety under **Rule 37,** as having no reasonable prospects of success or, in the alternative, a Deposit Order, under **Rule 39,** was refused by me, for the reasons set forth in the Tribunal's letter of 1 June 2017 to both parties' representatives, including that parties had previously agreed that there be a 5 day Final Hearing listed.

11 On 23 May 2017, Mr Meth had sent to the Tribunal a confidential sealed envelope, containing certain documents produced by the respondents, for which he pled ***"confidentiality".***

12 After subsequent correspondence with the parties' representatives, and by joint agreement recorded at a later Preliminary Hearing held before me on 8 September 2017, it was agreed that the matter of confidentiality of the documents produced in the sealed envelope should be addressed by me in chambers, and without the need for any Preliminary Hearing in person.

13 I subsequently dealt with that matter at an in chambers Judge only, Preliminary Hearing, on 9 November 2017, the outcome of which I detail later in these Reasons.

14 There was also sundry correspondence between parties' representatives, and the Tribunal, regarding compliance with the Tribunal's previous Orders, as also an application by Mr Allison, on 8 June 2017, to postpone the listed Final Hearing, as the claimants, and their proposed witness, Mr Gary Aitken, were all to be abroad on holiday on the listed dates. So too there was a fresh application, on 13 July 2017, by Mr Meth, for Strike Out of the claims, which failing Deposit Orders.

15 On 1 8 July 201 7, I postponed the listed Final Hearing, otherwise due to be heard on 5 to 8 September 2017, and I instructed that it be relisted for October ***I*** November 2017, and I also directed that a Preliminary Hearing be set to consider the respondents' application for Strike Out under **Rule 37,** and Deposit Orders under **Rule 39.** By Notice of Preliminary Hearing issued on 25 July 2017, that Preliminary Hearing on Strike Out / Deposit Orders was fixed for Monday, 1 1 September 2017.

16 Following further sundry correspondence between parties' representatives and the Tribunal, by letter from the Tribunal dated 4 August 2017 I instructed that these cases should not become ***"litigation by correspondence"*** which is why I fixed the Preliminary Hearing for 11 September 2017. At the request of parties that date was later changed to Friday, 8 September 201 7, by amended Notice of Preliminary Hearing issued on 16 August 2017.

17 On 8 September 2017, the cases called before me for Preliminary Hearing

on Strike Out of the claims, which failing Deposit Orders. Having heard both parties' representatives on the respondents' opposed application for Strike Out, Mr Meth withdrew that application for Strike Out under **Rule 37,** but he insisted upon his application for Deposit Orders under **Rule 39.**

18 After private deliberation, I refused his Deposit Order application in my written Judgment with Reasons dated 18 September 2017, entered in the Register and copied to parties on 20 September 201 7.

19 Further, having noted parties' agreed position that the claims and response, not having been struck out, should be relisted for Final Hearing for full disposal, including remedy, if appropriate, I made further Case Management Orders, including for the case to be relisted for Final Hearing in November / December 201 7, or January 201 8.

20 I also Instructed a private Case Management Preliminary Hearing in chambers, for me to consider the respondents' sealed envelope, produced on 23 May 2017, in light of both parties' representatives previously submitted written representations. A fresh, inventoried and paginated set of those productions was produced on 11 July 2017, further to my Case Management Order to Mr Meth of 29 June 2017.

21 That in chambers Hearing took place on 24 November 2017, following which my written Note and Orders, dated 19 December 2017, was issued to both parties' representatives under cover of a letter from the Tribunal dated 20 December 2017. I repelled the respondents' representative's argument that the documents produced are confidential, and ordered their release, unredacted, to the claimants' representative, Mr Allison.

22 On 22 September 2017, Mr Allison made an application to the Tribunal, for the ET1 claim forms to be amended, at paragraph 7 of the statements of claim, to add an ***esto*** argument that if there was not a direct transfer between AMPA Ltd and the respondents, then there was a relevant transfer for the purposes of TUPE by a series of transactions affected by a tripartite transfer involving AMPA Ltd, Hansteen Pic (AMPA's former landlord), and the respondents, then Pro-Fives Ltd.

23 On 11 October 2017, Mr Meth, the respondents' representative, advised the Tribunal that there was no objection to the claimants' application to amend, as he was aware that Mr Allison planned to argue the point raised in the amendment, albeit he did not see it as making any material difference to the claimants' cases before the Tribunal.

24 On that same date, 22 September 2017, Mr Allison also produced, as ordered by the Tribunal on 8 September 2017, Further and Better Particulars on behalf of the Second and Third claimants, and also, on 3 October 2017, Mr Allison provided discrete Schedules of Loss for each of the 3 claimants, with related vouching documents for the Tribunal.

25 On 5 October 2017, following issue of the Tribunal's Judgment on 20 September 2017, refusing to grant Deposit Orders, and listing the cases for Final Hearing, Mr Allison applied for Costs, or alternatively Wasted Costs, against the respondent, under **Rules 76 and 80,** which was objected to by Mr Meth, on 11 October 2017, leading to an opposed Expenses Hearing before me in chambers, on 22 December 2017.

26 I refused the claimants' opposed application for Expenses, which failing, Wasted Costs., against the respondents, or their representative, Mr Meth, and I ordered that the cases proceed to a Final Hearing to be listed in March May 2018. My written Judgment, with Reasons, dated 4 January 2018, was entered in the Register and copies to parties' representatives on 8 January 2018.

27 Following my Judgment of 18 September 2017, the Tribunal issued date listing stencils to both parties' representatives seeking to list the cases for Hearing on dates to be set in December 2017 to February 2018.

28 On 23 October 2017, Mr Meth indicated to the Tribunal, with copy sent to Mr Allison, for the claimants, that his clients, identified as Pro-Fives Ltd, were not minded to present oral evidence to the Tribunal, because the company had ceased trading, and it would not be in a position to pay any award in the event the applications were successful.

29 Mr Meth further explained that one of the respondents' key witnesses (but not an identified witness) would not be available to give evidence, but he stated that the respondents did not admit liability and a Hearing would still be required.

30 On 25 October 2017, Mr Allison, the claimants' representative, advised the Tribunal, with copy sent to Mr Meth for the respondents, that he found Mr Meth's e-mail of 23 October 2017 to be ***"troubling",*** as when the case commenced, the respondents were designed as ***uK7X t/a Pro-Soccer",*** and Mr Allison stated this was taken from what was understood to be the respondents' website, at www.pro-soccer.co.uk, and the company number was also given, being SC235540.

31 At the point of lodging an ET3 response, Mr Allison further stated that the respondents asserted that the correct designation of the respondents was ***Pro-Fives Ltd",*** and this was accepted "at ***face value",*** but it was noted that the respondents were now suggesting that that company is no longer trading.

32 Arising from parties* representatives' correspondence, there was further sundry correspondence between them and the Tribunal between 31 October 2017, and 15 January 2018, when there was an application by the claimants' solicitor, Mr Allison, for an Order of the Tribunal in terms of **Rule 34** for the addition of "K7X t/a Pro-Soccer", on the basis that there was "a ***colourable basis to consider that the correct Respondent in this case is that party, rather than the existing Respondent"*** (then being Pro-Fives Ltd).

33 Mr Meth replied to the Tribunal, on 19 January 2018, stating his position, and that of his clients, and he disputed what he believed to be Mr Allison's complaint against him about misleading the Tribunal, and stating that if K7X were to be sisted, then they should be given the requisite 28-day period to enter a response.

34 Given the issues raised in the claimants' applications, and the respondents' objections, I decided, as per the letter from the Tribunal dated 31 January 2018, that the cases should not be listed, being time, for Final Hearing, as previously ordered, but, instead, there should be a public Preliminary

Hearing, as soon as possible.

35 I so decide because I wanted both parties' representatives to address me on (1) the claimants' application to sist K7X t/a Pro-Soccer, as an additional respondent, in terms of **Rule 34,** and (2) the claimants* separate application for Strike Out of the existing respondents, Pro-Fives Ltd, ET3 response, in terms of **Rule 37.**
36 Thereafter, there was yet further sundry correspondence between parties' representatives, and the Tribunal, and the cases were listed for Preliminary Hearing on 9 March 201 8 to determine the additional respondent, and Strike Out applications.

37 Further correspondence then ensued, and that Preliminary Hearing was postponed, to avoid the case going part-heard, as parties' representatives were not agreed on whether evidence would be led or, if so, from whom, or for how long, and so I decided the interests of justice required that that listed Preliminary Hearing be cancelled.

38 At that stage, I directed parties' representatives to have further dialogue between themselves about further procedure, as per their duty to assist the Tribunal to further the overriding objective under **Rule 2.**

39 Thereafter, yet further correspondence ensued from parties' representatives, from 9 March 2018 onwards, leading to the Preliminary Hearing being relisted for 8 May 2018, by amended Notice of Preliminary Hearing dated 25 April 2018. On 8 May 2018, the cases called before Employment Judge Sandy Meiklejohn, with Mr Allison appearing for the claimants, and Mr Meth for the respondents.

40 It emerged, at that Preliminary Hearing, before Employment Judge Meiklejohn, that there had not been full disclosure of documents, nor compliance with an earlier Order of the Tribunal, and it also emerged that, that very day, Companies House had struck out the respondents, Pro-Fives Ltd, which was dissolved as a company as of 8 May 2018.

41 In those circumstances, Employment Judge Meiklejohn decided that the listed Preliminary Hearing could not proceed, and he adjourned it to allow the claimants, through Mr Allison, to advise the Tribunal, within 21 days, how they intended to proceed.

42 While Judge Meiklejohn's Note, dated 11 May 2018, was issued to both parties' representatives by letter from the Tribunal on 18 May 2018, there was no update provided to the Tribunal from either of the parties' representatives and so, on 9 July 2018, when the case files were referred to me, the allocated Judge, I directed that the claimants' representative be written to and asked to reply, and why he had not previously replied to Employment Judge Meiklejohn's Note.

43 On 17 July 2018, Mr Allison apologised for the failure, due to oversight, and confirmed that the claimants' wished to proceed with their claims, and Pro-Fives Ltd having been dissolved on 8 May 2018, and consequently that company having no legal standing and in consequence no right to object, or continue to defend proceedings, the claimants sought to invite the Tribunal to grant their application to sist K7X Ltd, as additional respondent as a party in terms of **Rule 34,** there then being no contradictor to that application, and

to grant the claimants' application for Strike Out of the Pro-Fives Ltd ET3 response, but not to thereafter make any Default Judgment award.

44 When the case files were thereafter referred again to me for further instructions, I instructed that Mr Allison, as the claimants' representative, be sent the proforma ***Respondent Company Dissolved"*** letter from the Tribunal, which was issued by the Tribunal clerk to him on 5 September 2018 and, of even date, Notice of Claim was served on ***K7X Ltd t/a Pro Soccer,*** giving them until 3 October 2018 at latest to lodge any ET3 response. It was served on them because I had granted the claimants' application under **Rule 34.**

45 Thereafter, on 12 September 2018, Mr Meth, now acting for K7X Ltd, defending the claim, he lodged a detailed, 41 paragraph paper apart with grounds of resistance to the claim, denying any liability in respect of matters complained of by the claimants against that company.

46 Included, at paragraph 34 of that paper apart to the ET3 response was an invitation to the Tribunal to dismiss those respondents under **Rule 27,** and, at paragraph 35, in the alternative, an argument that invited the Tribunal to Strike Out the claim against them under **Rule 37(1)(a)** as having no reasonable prospect of success or make a Deposit Order against the claimants or their representative under **Rule 39** for the same reasons.

47 Following Initial Consideration by me, on 19 September 2018, in light of that ET3 response, I instructed that the cases be listed for a one day Preliminary Hearing to determine the respondents' application for Strike Out and Deposit Orders, and further, I directed the claimants' representative to confirm what action, if any, had been taken to have ***Pro-Fives Ltd",*** the then first respondents, restored to the Companies Register, as per the Tribunal's correspondence to parties' representatives sent on 5 September 2018. A reply was requested by 26 September 2018.

48 On 20 September 201 8, formal Notice of Preliminary Hearing (Strike Out ***I*** Deposit) was issued by the Tribunal to both parties' representatives, assigning Monday, 3 December 201 8, for a one-day Preliminary Hearing, to determine the two preliminary issues, as already reproduced above at paragraph 2 of these Reasons.

49 By e-mail of 20 September 2018 to the Tribunal, copied to Mr Meth, the claimants* solicitor, Mr Allison, advised that the claimants **"do *not intend to seek to have the First Respondent - "Pro-Fives Ltd" restored to the Companies Register, it is now accepted that - given their status - any award against them is of no consequence. The ciaimants would be content to withdraw and agree dismissal of the claim in so far as directed against them, and therefore the claim proceedings against the Second Respondent (K7X Ltd) only."***

50 Thereafter, on 8 October 2018, 1 signed a **Rule 52** Judgment, entered in the Register and copied to parties on 9 October 2018, recording that the claims against Pro-Fives Ltd having been withdrawn by the claimants, they were dismissed by the Tribunal, following that part withdrawal of the claims. The claims, against the now only respondents, ***K7X Ltd,*** having not been withdrawn, they proceeded to a listed Preliminary Hearing on 3 December 2018.

Preliminary Hearing before this Tribunal

51 When the cases called before me, on the morning of Monday, 3 December 2018, Mr Allison, solicitor, appeared, along with the three claimants, accompanied by Mr Gary Aitken, observing. Mr Meth appeared representing the respondents, accompanied by a Mr Peter Kelly, and Ms Caroline Gurevitz, both observing. The clerk advised me that there were also in attendance two witnesses for the respondents, being a Mr John O'Hara, an Accountant, and a Mr Paul Kelly, a Director of the respondents.

52 Mr Allison lodged an Inventory of Documents for the claimants, comprising 23 documents, and extending to some 163 pages, in a tagged Bundle. Mr Meth produced a separate bound Inventory of Documents comprising 12 documents, extending to 77 pages but, in the course of this Preliminary Hearing, arising from a query about the ***"Licence to Occupy",*** he later produced, and I added to the respondents' Bundle, as document R13, a copy of the extract registered Licence to Occupy between Hansteen Property Investments Ltd and Pro-Fives Ltd, registered in the Books of Council and Session on 25 April 201 6.

53 While both Mr O'Hara and Mr Kelly were present, with a view to being led as witnesses for the respondents, in the event they were not led as witnesses by Mr Meth. Indeed, no evidence was led at this Preliminary Hearing, by either party, and, as such, there are no findings in fact made by me.

54 In this regard, I note and record here that, on 2 October 2018, the claimants' solicitor, Mr Allison, wrote to the Tribunal, with copy to Mr Meth, enquiring whether the respondents proposed to lead evidence at this Preliminary Hearing in support of their application under **Rules 37 and 39** and, if so, seeking clarification of the nature and extent of that evidence.

55 I also note and record that Mr Meth replied, on 3 October 201 8, stating: ***"we will be calling the same witnesses as we called / proposed to call at the aborted PH on 8 May 20128, mainly John O'Hara and Paul Kelly."***

Authorities provided by Parties

56 In making their respective submissions to me, at this Preliminary Hearing, Mr Meth did so, using, as his base document, a written skeleton argument. Typewritten, over 9 pages, and extending to some 95 entries, he required to depart from certain parts of that, and in particular points 30 to 35, on page 3, given that there was no evidence led from Mr Kelly, on the basis of which he had included this brief factual narrative at those paragraphs.

57 Mr Allison, solicitor for the claimants, on the other hand, made oral submissions only, there having been no previous Order of the Tribunal directing either party's representative to provide a written outline skeleton of their arguments for use at this Preliminary Hearing.

58 For the respondents, Mr Meth relied upon the following cases: -
(1) **HIREL - Harvey on Practice and Procedure (excerpt from Section T: Striking Out, at paragraphs [629] to {633.02]**
(2) **HM Prison Service v Dolby [2003] EAT/0368/02, at paragraph 7.**
(3) **TaysIde Public Transport Co Ltd (t/a Travel Dundee) v Reilly**

[2012] CSIH 46; [2012] IRLR 755, at paragraph 30.
(4) **ED & F. Mann Liquid Products Ltd v Patel and Another [2003] EWCA Civ 472, at paragraph 10.**

59 For the claimants, Mr Allison reproduced the 4 authorities he had produced to the Tribunal, at the earlier Strike Out Preliminary Hearing, on 8 September 2017, being:
(1) **Cheesman v R. Brewer Contracts Ltd [2001] IRLR 144 [EAT] ;**
(2) **Liqhtways (Contractors) Ltd v Associated Holdings Ltd [2000] SC 262 (CSIH)**
(3) **ECM (Vehicle Delivery Services Ltd) v Cox [1999] IRLR 559 (CA)**
(4) **Transfer of Undertaking (Protection of Employment) Regulations 2006 (SI 2006 No. 246)**

60 In addition, Mr Allison produced the following new case law authorities for the claimants, as well as a further copy of the **TUPE Regulations,** as follows: -
(5) Hyde Housing Association v Layton [2016] ICR 261 (EAT)
(6) **The Print Factory (London) 1991 Ltd v Millam [2007] ICR 1331 (CA)**
(7) **Gloag & Henderson: "The Law of Scotland" (13th edition), chapter 45 "Partnerships", at paragraphs 45.02-04, and 45.11-12.**

Claimants' means and ability to pay any Deposit Order

61 At the start of this Preliminary Hearing, I made specific enquiry of Mr Allison, the claimant's representative, as regards his clients' ability to pay, if I were to decide to order any of them to pay a Deposit Order. I did so because, under **Rule 39(2) of the Employment Tribunal Rules of Procedure 2013,** I had a duty to make reasonable enquiries into their ability to pay, and to have regard to any such information when deciding on the amount of any deposit.

62 No statement of means, or any documentation regarding the claimants* individual means and assets, had been lodged with the Tribunal, nor, for the avoidance of any doubt, had the Tribunal ordered any such statement of means and assets, or vouching documentation. That said, it was disappointing to note that it had not been produced voluntarily, particularly given paragraph 93 of the Reasons to my earlier Preliminary Hearing Judgment, dated 18 September 2017.

63 In that Judgment, I had made it plain that, where a Deposit Order is being sought against a party, it is my view that, consistent with the obligation to assist the Tribunal to further the overriding objective, under **Rule 2,** parties' representatives should make full disclosure, in advance of any Preliminary Hearing and, if such information is not provided voluntarily to the other party, then recourse can, of course, be made to the Tribunal, by the other party, by way of case management application, for the Tribunal to order the production of a statement of means and assets, and supporting vouching documentation, if such an Order is not made by the Tribunal, acting on its own initiative, when listing a case for a Strike Out / Deposit Order Preliminary Hearing.

64 I raised this matter, at the start of this Preliminary Hearing, with Mr Allison, and with Mr Meth, and I also referred them to the Judgment of the Employment Appeal Tribunal President, Mrs Justice Simler, in **Hemdan v Ishmail and Another [2016] UKEAT/00021/16,** extracts from which, I had previously reproduced in my earlier Preliminary Hearing Judgment of 18 September 2017. **Hemdan** is now reported at **[2017] IRLR 228** and **[2017] ICR 486.**

65 Following the adjournment allowed to parties' representatives, to have a further discussion about the claimants' means, and ability to pay, when proceedings resumed, I was advised by Mr Allison that he and Mr Meth had agreed that it was not necessary to call any evidence from the claimants, and it was accepted by the respondents that if the Strike Out application was refused, then they accepted that a Deposit Order in the amount of **£100 per claimant** would be appropriate, if the Tribunal was minded to make any such Deposit Order.

Submissions for the Respondents

66 I invited Mr Meth to make his submissions to the Tribunal on behalf of the respondents. He spoke to his written skeleton submission, the full terms of which I do not repeat here, for they are held on the casefile, and I noted the following points from his oral submissions: -

(a) Mr Meth referred to his respondents' Bundle of 77 pages, and his intention to lead evidence from John O'Hara and Paul Kelly. When I enquired why there were witnesses for the respondents to be led at this Preliminary Hearing for Strike Out/Deposit Order, he replied stating that he believed there was ***'Incontrovertible documentary evidence"*** that would allow him to pass the threshold for Strike Out of the claims, and he would be asking his witnesses about the accounts from Pro-Fives Ltd, and the veracity of those accounts in respect of the claim now before this Tribunal.

(b) Further, Mr Meth then stated that the lease, or more correctly, the Licence to Occupy, in respect of Pro- Fives Ltd in April 201 6, was relevant, and however it was dressed up (and he appreciated that Mr Allison might well say there were two or more transactions in this transfer), Mr Meth would be saying that the documentary evidence is so overwhelmingly that, at best for the claimants, for on or around 16 April 2016, the transferee was, and could only be, Pro-Fives Ltd, and that there was more than sufficient documentary evidence before the Tribunal to conclude there were no reasonable prospects of success against K7X Ltd, and given the Tribunal's overriding objective, the Tribunal should dismiss the claim against K7X Ltd.

(c) In those circumstances, submitted Mr Meth, it was appropriate to hear witnesses on aspects of these documents, given Mr Allison, the claimants' representative, had made certain allegations, that he had not withdrawn, and he submitted that Mr Allison's allegations were in error, and that therefore there is no factual dispute to resolve between the parties. He anticipated evidence from Mr O'Hara for a maximum of 45 minutes, with 15 to 20 minutes for evidence from Mr Kelly, allowing evidence to be concluded before lunch, and submissions afterwards.

(d) As a preliminary matter, Mr Meth then referred to an e-mail sent by Mr Allison, the claimants' Solicitor, at 15:04 on Friday afternoon, 30 November 2018, but not sent to the Tribunal, from which he

understood that the claimants would be arguing for a TUPE transfer but submitting that there was no need to amend their pleadings, on the basis that a transfer can be to more than one individual.
(e) Further, Mr Meth submitted that is different from what has been said in these cases before, given the length of these cases in the Tribunal system. Claims were originally against Pro-Fives Ltd, and it was dissolved as a company, and the case against them dismissed by the Tribunal. In his view, a joint venture, and/or joint and several liability, had never been suggested by the claimants before, and this case had been going for some 27 months now, but it appeared that different facts were now being pled on the claimants' behalf, and he further stated that he was anticipating there may not be an application to amend the ET1 .
(f) In reply, Mr Allison stated that in most cases, it is not appropriate that evidence is led at a Strike Out Preliminary Hearing, and he referred to the Judgment from the Inner House of the Court of Session in **Reilly,** about avoiding an *impromptu* trial of the facts. Neither of the documents Mr Meth was referring to were incontrovertible, or he needs evidence, and Mr Meth appeared to be saying that he needed witness evidence. As a rough estimate, Mr Allison stated that he estimated cross-examination of Mr O'Hara for about half an hour, and probably one hour with Mr Kelly.
(g) Mr Allison then stated that there was no application to amend the ET1 claim form, and that there is no formal system of pleadings in the Employment Tribunal, and he had made sufficient factual averments from the outset of these claims, referring back to the statement of claim lodged on 22 September 2017, in particular at paragraph 7, copy provided at page 54 of the claimants' Bundle. In his view, what was before the Tribunal was a legal issue, and not a factual issue, and even if needed, there were no different averments of fact to refer to a transfer on a joint and several basis, where the respondents say it is not K7X Ltd.
(h) Thereafter, in reply, Mr Meth stated that, in most cases, Mr Allison would be right, but he has made a number of allegations that the abbreviated accounts produced show that Pro-Fives Ltd cannot have been the operating company at East Kilbride, and that allegation had not been withdrawn by Mr Allison.
(i) Referring to item 9, in the claimants' Bundle, at pages 24 and 25, being a letter sent to Companies House on 15 January 2018, Mr Meth stated that at no point has Mr Allison sought to suggest that his allegation of 15 January 2018 are false information. He had suggested the respondents were attempting to deceive the Tribunal, but Mr Meth submitted that there can be no reasonable factual dispute between the parties, and that Mr Allison totally misunderstands company law and company accounts, as a factual dispute has to be reasonable.
(j) At this point, being around 10.37am, the Tribunal adjourned for 15 minutes for Mr Meth to consider the EAT's Judgment in **Hemdan** as cited by me, in particular at paragraph 13 of Mrs Justice Simler's Judgment that if there is a core factual conflict it should properly be resolved at a full Merits Hearing where evidence is heard and tested.
(k) I also referred, at the same time, to Mr Justice Langstaff, then

President of the Employment Appeal Tribunal's Judgment in the well-known case of **Chandhok v TIrkey [2015] IRLR 195, about** where the essentials of any claim are to be found.

(l) When proceedings resumed, around 10.45am, Mr Allison had stated that even if the respondents' application for Strike Out were refused, and a Deposit Order were to be granted by the Tribunal, he submitted that while it should be at the rate of **£100 per claimant.** He added that he would lead evidence, and documents, if required.

(m) At that stage, Mr Meth, stated that he would consider the position, so the Tribunal adjourned again until 11.15am, to allow agents to discuss, and advise the Tribunal of their position about the paying parties' ability to pay, if Deposit Orders were to be made by the Tribunal.

(n) At around 11.19am, when the public Hearing resumed, a list of authorities from Mr Allison was tendered, as also a skeleton argument from Mr Meth on behalf of the respondents. Mr Meth advised that the respondents were not now calling any evidence, and they accepted £100 per head per claimant for any Deposit Order, and accordingly no evidence was being led by the claimants about their means.

(o) Thereafter, at around 1 1 .23am, Mr Meth stated that there might be parts in his skeleton argument submitted to the Tribunal that are not relevant, in that they related to evidence that he had intended to call, and he was now not calling before the Tribunal. His principal argument was for Strike Out of the claims, which failing Deposit Orders.

(p) Given the history of the case, Mr Meth referred to Deposit Orders may be a ***"more relevant penalty.*** He submitted that anything that had been done to date, including Mr Allison's application to sist K7X Ltd to the proceedings, had been based upon what he referred to as ***"misconceptions and misunderstandings by the claimant and their solicitor",*** Mr Allison, and other than the amendment to paragraph 7 of the statement of claim, there had never been an attempt to modify, or amend, the claim brought against the now respondents.

(q) Further, Mr Meth queried whether that amendment had made any practical difference to the case, given the question whether or not more than one transfer (which was in dispute), and he submitted that it made no odds, and that it needs to be determined by a full panel. In his view, the issue before the Tribunal at this Preliminary Hearing is, even if more than one transfer, whether from 1 6 April 2016 onwards, could there be any other transferee than Pro-Fives Ltd?

(r) Mr Meth then submitted that, on the documentary evidence before the Tribunal, the transferee is a matter of fact and law and he submitted that it could only be Pro-Fives Ltd, and never K7X Ltd. In his view, it ought to have been obvious it could only ever be a case under **TUPE Regulation 3(2),** and never a case **under TUPE Regulation 3(1).** What is pled is in paragraphs 3 to 7 of the ET 1 paper apart, and those pleadings have never been amended, and that is the case before this Tribunal, irrespective of the other extraneous documents, and, in his submission, that is key in this case.

(s) Mr Meth continued stating that the business of AMPA was sold as

a ***"goingconcern,"*** and it ought to have been fairly obvious it would only ever be a claim under **Regulation 3(2),** that is a ***"Service Provision Change".*** However, submitted Mr Meth, at no point, had there been any suggestion from the claimants that this is a claim for a Service Provision Change.

(t) Further, Mr Meth stated that ***"it is a characteristic of this case that the claimants go blindly on arguing the unarguable, even where provable facts clearly do not support the contentions being made by them".*** He had anticipated an amendment from the claimants, but that had never come, and he submitted that that was a completely different case under a completely different set of facts.

(u) As per paragraph 14 of his written skeleton argument for the respondent, Mr Meth submitted that:-

(a) the claim against K7X as the ultimate transferee is Incompetent, put simply, how can an Employment Judge properly directing himself In law on the Incontrovertible facts of the case find a transfer to K7X?

(b) there was and would always have been a remedy for the claimants against Pro-Fives Ltd which might be reduced from the potential award from K7X, but that was nothing to the point

(c) the decision to withdraw the case against Pro-Fives Ltd again suggested Incompetence, as well as being inexplicable; and

(d) Withdrawing the case against Pro-Fives Ltd does not make It axiomatic In any way that a case can proceed or there can be a remedy against K7X Ltd.

(v) Further, submitted Mr Meth, a joint and several liability on the part of the respondents has never been suggested by Mr Allison until the previous Friday afternoon, and a joint enterprise had not been suggested by him until this Preliminary Hearing. Mr Meth described Mr Allison's e-mail of 15 January 2018 as making really serious allegations against him, and while his profession as Employment Consultant is not regulated, he stated that Mr O'Hara is an Accountant and such allegations, if established, would constitute automatic strike off offence for an Accountant. He added that false information on the account of a company is also a potentially serious criminal offence, for both Mr O'Hara and Mr Kelly, and those allegations have never been withdrawn by Mr Allison, acting for the claimants.

(w) As no evidence had been led from Mr Kelly, Mr Meth stated that paragraphs 30 to 35 in his skeleton argument should be omitted, and from the documents about K7X Ltd, from Companies House, included in the claimants' Bundle before this Tribunal, with Pro-Fives Ltd being a dormant company, and K7X being an active company, while there was no dispute that there had been discussions with Pro-Soccer (K7X) about taking on the East Kilbride site, ***"discussions do not make a transfer",*** and the Tribunal should have regard to the April 2oi6 e-mails included in the claimants' Bundle at pages 1 to 12.

(x) Mr Meth then referred to a ***"key document*** for the respondents, to be found in their Bundle at page 28, being an e-mail of 29 March 2016 from Peter Darroch describing the ***"operating company"*** for

the Play Sport facility as Pro-Fives Ltd. He also referred to how there were significant pleadings in the ET3 response about the trading history at East Kilbride, and he understood that it was common ground with Mr Allison that there had been rent arrears, and seeking assets to assist making good those rent arrears.
(y) Further, submitted Mr Meth it is quite normal and sensible business practice to use a separate legal entity in case a business is not viable, and to use the concept of legal liability when entering new areas of business, so as to insulate one company in the event of another collapsing, so that it does not have a domino effect. He also submitted that there is no document or other evidence that K7X entered into any agreements, contracts or operated in any way from East Kilbride.
(z) Continuing his submissions to the Tribunal, Mr Meth stated that the incontrovertible evidence must be in the various documents before the Tribunal, and that included the e-mail from Peter Darroch, as also the Licence to Occupy provided by DLA Piper Solicitors, as produced in the respondents' Bundle at pages 34 to 56.
(aa) Mr Meth then explained that ***"Play Sport"*** is a multi-faceted sports complex at East Kilbride, and that the licence was operated only by Pro-Fives Ltd, and there was no reference whatsoever to K7X Ltd. Further, he added, Pro-Fives Ltd is the only company that operated from East Kilbride and, on that basis, he queried how an Employment Judge could say that Pro-Fives Ltd was not the transferee on 16 April 2016.
(bb) At this stage, in looking at the document referenced by Mr Meth, in his Bundle, I commented that it appeared to be a draft Licence to Occupy, rather than an extract registered Licence to Occupy, to which Mr Meth responded, stating that it had been signed on 19 April 2016, and the extract registered in Books of Council and Session on 25 April 2016. Explaining that the extract registered Licence to Occupy had been disclosed earlier in the proceedings to the claimants, Mr Meth undertook to get it copied, and lodged with the Tribunal, for use at this Preliminary Hearing.
(cc) Mr Meth further explained that the landlord, Hansteen Properties, did not want an interruption to service on 15 April 2016, but to carry on the business with no, or little interruption, and that the date of entry was to be 15 April 2016, with the first day of trading being 1 6 April 201 6.
(dd) He further stated that the claimants' case to sist K7X was predicated by a total misconception by Mr Allison about Pro-Fives Ltd not being possible to be the company that operated at East Kilbride, and that was based upon a total misunderstanding of company law, and limited liability.
Further, Mr Meth added, the full accounts lodged entirely refuted Mr Allison's allegations, and rather than contradict, they substantiated the arguments for K7X there is no requirement to produce full trading accounts, or a profit and loss account, and all that is required for Companies House is a balance sheet. In his submission, there is no evidence that K7X Ltd had operated in any way from East Kilbride, and he described the present litigation as a case of ***"pass the parcel",*** about ***"who is holding the baby when the music stops'*.***
(ee) Mr Meth further stated that on the documents before the Tribunal, there was no credible agreement that the transfer had been to K7X

Ltd, other than on the basis of perversity of argument from the claimants' solicitor, and there was no evidence of any transfer of business to K7X, and he reiterated that he had no doubt that this application would not be brought before the Tribunal had Pro-Fives Ltd continued trading.
(ff) Referring then to case law on Strike Out being ***"draconian**,*** Mr Meth submitted that that was not relevant in the present case where, even in cases where that description was made, and Tribunals were overturned, that was because there were points of fact that needed to be determined, and they could only be determined at a full Merits Hearing.
(gg) Mr Meth submitted that the facts in this case were ***"incontrovertible"*** having regard to the Tribunal's overriding objective, at **Rule 2(d) and (e),** it was invidious to expect K7X Ltd to incur expense and inconvenience defending a case where there is no prospect of them being held liable, and for them to go through a 5 or 6 day Hearing only to come to the inevitable conclusion that could easily be arrived at at this Preliminary Hearing, that if there was a TUPE transfer it could only be to Pro-Fives Ltd, and they are no longer a legal entity, or a party to these proceedings.
(hh) Further, Mr Meth added that the claimants may have a remedy against Mr Allison, as their solicitor as also seeking restoration of the dissolved company Pro-Fives Ltd by restoration to the Register of Companies under **Section 1029 of the Companies Act.** He expressed surprise that the claimants' solicitor had not sought restoration of Pro-Fives Ltd, and while there had been correspondence from Mr Allison to the Tribunal, on 20 September 2018, resulting in a **Rule 52** Judgment dismissing the claim against Pro-Fives Ltd, Mr Meth stated that that was Mr Allison's call, but that was no justification for bringing any case against K7X Ltd.
(ii) Mr Meth described this as a classic ***"Dedman"*** case, being a reference to the well-known principle in **Dedman v British Building and Engineering Appliances Ltd [1974] ICR 53 (CA),** that a claimant is affixed with the conduct of his professional adviser, which applies to the reasonable practicability test for bringing a claim before the Tribunal.
(jj) Further, Mr Meth then referred me to various extracts from **Harvey** on Practice and Procedure, in particular at paragraphs T633 , and he cited, in support, relevant passages from **HM Prison Service v Dolby; TaysIde Public Transport Company Ltd v Reilly;** and **ED & F Mann LIguld Products v Patel,** and also referred to the Tribunal's overriding objective, under **Rule 2(d) and (e),** about saving costs, and delay, and that in this case, the documentary evidence is ***"conclusive and Incontrovertible"*** that only Pro-Fives Ltd entered into a contractual relationship of any sort in respect of the undertaking at East Kilbride and that, accordingly, the Strike Out sought by K7X Ltd is overwhelming, and he invited me to Strike Out the claims accordingly.
(kk) Further, as per paragraph 91 of his skeleton argument, Mr Meth stated that the accounts and Licence to Occupy are conclusive and easily meet the standards in the cited authorities, and the argument that K7X Ltd was the real respondent is based on genuine misconceptions and misunderstandings of the full and

factual position as relied on Mr Allison's e-mail of 1 5 January 2018, and Mr Meth stated that, accordingly, it is patently contradicted by contemporaneous documents.
(ll) Mr Meth further submitted that ***K7X is clearly and unassallably the wrong person In this case",*** and that the case for Strike Out is overwhelming, but if the threshold is not met, then the case meets the test for a Deposit Order against the claimants, and that I should also make a Wasted Costs warning about expenses against Mr Allison, as the claimants* solicitor, if the claimants continue with a case with so little prospect of success.
(mm) Mr Meth's submissions concluded at around 12.54pm, when the Tribunal adjourned for lunch, to resume at 2.00pm. When proceedings resumed, I was provided, as was Mr Allison, with a copy of the extract registered Licence to Occupy, dated 25 April 2016, which was added to the respondents' Bundle, and about which Mr Meth stated he had nothing further to say.
(nn) I added it to the Bundle, as document R13. Relating to Unit 1 in the outdoor area, at Play Sport, East Kilbride, the licensee is shown as Pro-Fives Ltd (Company Number SC281871), and the licensor as Hansteen Property Investments Ltd with a date of entry of 15 April 2016, and the Licence to Occupy signed by Paul Kelly on 19 April 2017 for Pro-Fives Ltd.
(oo) Once Mr Allison had addressed the Tribunal with his submissions for the claimants, I gave Mr Meth the opportunity to reply, at about 3.28pm. So as to allow for those further submissions being read in context, I have detailed them at the end of the following paragraph 67 below.

Submissions for the Claimant

67 Thereafter, I invited Mr Allison to make his submissions to the Tribunal on behalf of the claimants. I heard submissions for the claimant at around 2.00pm. He did so orally, and without any written skeleton argument, and I noted the following points: -
(a) Mr Allison stated that this was not a re-hearing of the previous decision made by the Tribunal in September 2017 on the respondents' earlier application for Strike Out of the claims. This was a ***"crisp issue",*** that even if there was a TUPE transfer, was it ever to K7X Ltd?
(b) . On the case law authorities about Strike Out, Mr Allison stated that he was not at odds with what Mr Meth had stated, and that Strike Out required a very high test, as shown by the Lord Justice Clerk at paragraph 30 of the Court of Session's Judgment in **Tayside v Reilly.** In the present case, he submitted, there is ***"unequivocally a crucial core of disputed facts Including, but not limited to, who was the transferee".***
(c) With reference to Lady Smith's Judgment in **Balls,** at paragraphs 4, 6 and 7, he laid emphasis on the fact that a respondent bringing such a Strike Out application requires to convince the Tribunal that there are ***"no reasonable prospects of success".*** He laid emphasis on the word ***"no".***
(d) Inviting me to rely on the contents of the Employment Tribunal's file, Mr Allison recognised that this might create what he described as a ***"judicial conundrum",*** given my previous references in this case to the EAT Judgment in **Chandhok v Tirkey,** and the

essentials of a case to be found in the claim, or response, and not elsewhere.
(e) Given the size of the case files, now at 3 volumes, Mr Allison stated that I should not embark upon an onerous exercise, as in a TUPE case, there may be further relevant material, and an analysis of all the circumstances in the case, and not just a ***"hypothetical argument"*** by Mr Meth, is required. Mr Allison stated that there were no proven facts in this case, as suggested by Mr Meth, nor any findings on matters in dispute between the parties.
(f) Mr Allison then referred me to the nine factors, set forth at paragraph 11(i) to (ix) in the **Cheesman** Judgment, and that matters should not be considered in isolation one from the other, that there were factual disputes on several matters, and that certain matters were not necessarily conclusive in their own right. Further, he argued, the absence of a Licence to K7X Ltd is not determinative, but it may be an important adminicle of evidence.
(g) Further, Mr Allison added, **Regulation 3(6)(a) of the TUPE Regulations 2006** refers to a transfer by two or more transactions. It was not in dispute, he stated, that Paul Kelly, a Director of K7X, is the sole shareholder and person in control, and he was the new operator at Pro-Soccer. Mr Allison referred to copy documents in the claimants' bundle and how Mr Paul Kelly was the person with significant control, having one hundred per cent shareholding.
(h) Further, under reference to the documents at pages 27 to 29 of the claimants' Bundle, Mr Allison stated there was no reference to Pro-Fives Ltd in those e-mails, just in the Licence to Occupy, and all other documents referred to ***"Pro-Soccef .*** He then referred to the screen print from the Pro-Soccer. co.uk website, operated by K7X at Rouken Glen, and at Ayr, and that K7X trading as Pro-Soccer was the trading name of K7X, but there was no reference there to Pro-Fives Ltd.
(i) Nothing, in either Bundle, she submitted, supported conclusively that Pro-Soccer is a trading name used by Pro-Fives Ltd. He submitted that the matter required the subject of proper enquiry, given the Facebook post, by Pro-Soccer, on 16 April 2016, stating ***"we are delighted to announce that Pro-Soccer East Kilbride is now open for business"*** In his view, K7X Ltd were holding out that they were operating from East Kilbride Play Sport.
(j) When I commented that that Facebook post, quoted from by Mr Allison, had not been produced to the Tribunal, Mr Allison replied stating that he was telling me that it is evidence that can be led at the Final Hearing, and that the Tribunal does not need to see it, at this stage, I just need to know that it exists, and the claimant would lead evidence on it at the full Hearing.
(k) Mr Allison then turned to review the terms of the ET3 response from K7X Ltd, and the paper apart at pages 132 to 139 of the claimants' Bundle. While there was a narrative, he stated that the narrative came to a point where things changed, but it was not clear when, or why, or how the change had come about. He submitted that there were strong indicators that K7X Ltd were the ultimate transferee, and it was difficult for Mr Meth to succeed in an argument that there is no reasonable argument that it could not be K7X.
(l) Mr Allison submitted that there was a ***"colourable case"*** for the

claimants that there had been an intention to be a TUPE transfer, and the intended recipient was Pro-Soccer, or Paul Kelly. That begged the question who was the transferee, and whether it was K7X Ltd, or was it part of something else.
(m) Next, Mr Allison then referred me to paragraph 49 of her Honour Judge Eady QC's EAT Judgment in ***Hayle Housing Association,*** and submitted that it could not be disputed that Pro-Fives was a subsidiary of K7X, and so exercised legal control over Pro-Fives Ltd. This is matter, he submitted, for the Final Hearing, and the transfer occurred on a joint and several basis.
(n) Further, he argued, it does not require amendment to a matter of law to be heard in evidence to be led. Indeed, he commented, Mr Meth's own skeleton submissions, at paragraph 18, had referred to it being ***"churlish",*** as how could the claimants reasonably be expected to know the mechanics of what had happened.
(o) Mr Allison further submitted that the claimants were not dealing with this in a clandestine, or technical way, which is why they had had to have documents recovered via the Tribunal, and the claimants cannot know all what happened in a transaction they were not party to, and how could they be aware. He further submitted that evidence is needed to clarify who is the transferee, and that will turn on the whole evidential picture to be led at a full merits Hearing.
(p) Further, submitted Mr Allison, it is ***"pars judlcls"*** to apply the law as a whole, and it does not require an amendment to the ET 1 , and, if he was wrong, he would address the Tribunal on a potential amendment, and if needed, he would draft an amendment. However, he added, he was not seeking proactively to seek leave to amend, and at best, it would be a ***Selkent*** re-labelling, as this is still an unfair dismissal complaint, and there is no new reason for dismissal, and no new respondent, and at best, it is a new analysis of the existing averments.
(q) Mr Allison then stated that, in the Employment Tribunals, ***"we don't operate a system of pleadings, like a commercial case",*** and, anyway, he submitted that clear notice of the case had been given to the respondents. Mr Meth now has notice of the case, which the claimants will advance at any Final Hearing, and Mr Allison was sure that Mr Meth would see their position as being misconceived, but there was no prejudice to the respondents, as they would be heard in evidence at any Hearing.
(r) Mr Allison then referred to the Court of Appeal's Judgment in **Print *Factory,*** in particular per Lord Justice Moses at paragraph 1 4. He submitted that whether there is a transfer is a matter of fact, based on all of the evidence, and it is important to determine who exercises day to day control of the transferred economic entity. He further submitted that you need a Final Hearing to know what was happening at ground level, and there was nothing in the documents produced, except the accounts, and he submitted that Mr Meth does not have incontrovertible evidence.
(s) Alternatively, submitted Mr Allison, the claimants can rely on partnership, or joint venture, and he referred to ***Gloag and Henderson*** at paragraphs 45.02 about joint adventure, and 45.12 about joint and several liability. He added that there were many legal interpretations possible from the facts yet to be crystallised in this case, and that K7X Ltd is a holding company, and it had entire

legal control over Pro-Fives Ltd.
(t) When, at this stage, under reference to the EAT's guidance in ***Chandhok v TIrkey,*** I reminded Mr Allison that a claimant's case cannot be built on ***"shifting sands",*** Mr Allison responded by stating that he did not need leave to amend, and he submitted that this case was covered by TUPE, **Regulation 3(1)(a)** and there was nothing different to what had happened on 22 September 2017, at a previous Preliminary Hearing on Strike Out, and that Mr Meth did not suggest at that time that an amendment for the claimants was required, and he did not object and if that was his position then, then it should be his position now.
(u) Continuing his submissions, Mr Allison stated that the claimants were doing their best to interpret the documents, particularly on matters within the knowledge of the respondents, and its directors, and that is why "***shifting sands"*** arise.
(v) Referring then to Mr Meth's reliance on the Licence to Occupy, Mr Allison referred to the extract Registered Licence, dated 25 April 2016, which had been signed on 19 April 2016, albeit referring to date of entry on 15 April 2016. He stated that the claimants' position is that there was a transfer on 14 April 201 6, when AMPA stopped trading, but what has been produced does not tell us what happened before 19 April 2016 and, under reference to the ***Chessman*** Judgment, he stated again that no single factor is determinative.
(w) On the matter of company Accounts, Mr Allison stated that his email of 15 January 2018 did not use the word "misconduct", and he further commented that the respondents' ET3 is ***"littered with the various allegations about dishonesty on the part of the***
10 ***claimants"*** In a case where the claimants do not have the full picture, he submitted that that is a concern that is expressed, and he has nothing to say other than that the claimants are putting the respondents to the proof of what they allege. For the avoidance of any doubt, Mr Allison clarified that he had no intention to lead
15 evidence of express dishonesty on the part of Mr Meth, or the Accountant, Mr O'Hara.
(x) Mr Allison then stated that we now have a profit and loss account produced, for the first time, for Pro-Fives Limited, in e respondents' Bundle, to which comments, Mr Meth objected, stating that it had
20 been produced in front of Employment Judge Meiklejohn, and that Mr Allison had had it from May 2018. Mr Allison stated that, if he was wrong, he was sorry, but it was not available to the claimants at the point they made their application to amend on 15 January 2018.
(y) Referring to the profit and loss account, produced in the respondents' Bundle, Mr Allison stated that it did not indicate what is the business, where in general terms the turnover came from, and, at its highest, it shows that a group of companies had instructed that their turnover be recorded in this manner and it
30 does not tell us whether, at 14 April 2016, there was a TUPE transfer or not. He submitted that the profit and loss account is a single adminicle of evidence, and not determinative of anything.
(z) Referring then to Mr Darroch's e-mail, at page 63 of the claimants' Bundle, Mr Allison stated that it referred to Pro-Fives Ltd as the operating company, but all it tells us is that, at 29 March 2016, Paul Darroch, on behalf of Hansteen, was referring to the Licence

to Occupy being in the name of Pro-Fives Ltd.
(aa) There were various e-mails in April 2016, he submitted, which referred to Mr Kelly and Pro-Soccer, and the significance of this particular e-mail depends on seeing the entire picture. Further, this claim was only brought against K7X Ltd after Pro-Fives had stopped trading and, in summary, and as per the Judgment in ***Chees man,*** the Tribunal has to assess the facts from all the evidence, and, as such, he could not agree with Mr Meth that there is no dispute in fact.
(bb) Mr Allison then stated that findings in fact can be made by inference from the whole picture, and it had to be recalled that, in September 2017, Mr Meth, on behalf of the respondents, had submitted that there was no factual dispute, and he had then withdrawn the respondents' Strike Out application, and agreeing to the case going to a Final Hearing.
(cc) He then suggested that there were some factors to be considered, to give a flavour of the case, including (1) was AMPA a qualifying economic entity at 14 April 2016; (2) who the intended transferee was when there were discussions between James Stephen (Liquidator), and Peter Darroch, on behalf of Hansteen; (3) if, at a point in time, there was a change in transfer from K7X to Por-Fives, when did that happen, and why did that happen? and (4) did a transfer occur in the overall circumstances. He added that the ***Llqhtways*** and ***ECM*** Judgments referred to the avoidance of TUPE, and that there was a principle in those cases which was equally applicable to who is the transferee, as to whether or not there is a transfer at all.
(dd) By way of his fifth, headline point, Mr Allison stated that there were a series of questions to be answered, if a transfer did occur, and he listed them as including the following: -
(a) Who acquired the goodwill, if any?
(b) If not, who proposed to take on the goodwill when there were discussions?
(c) Who in person was giving direction on behalf of the transferee?
(d) Who did the other parties to the transaction understand to be the proposed transferor?
(e) Although, as an adminicle of evidence, the Facebook website suggested K7X, who operated the day to day control of the business after the date of transfer?
(f) Who was the licensee for the bar operated at the premises?
(g) Did the physical assets transfer, and if so, from whom?
(h) In whose name were the associated contracts for supplies, and utilities, which had all been in the name of AM PA before the transfer?
(i) Who worked at the premises after the date in which it is suggested Pro-Fives started trading there, and were they K7X employees, given the business traded immediately on the claimants' account?
(j) Who managed the existing employees of K7X?
(k) What happened when the business ceased to trade from Play Sport - was there a business transfer or some other arrangement entered into by the occupiers and, if so, by whom?

(ee) Mr Allison submitted that all of these matters are in dispute, and presumably within the knowledge of the respondents, and they have yet to be evidenced before the Tribunal. As such, he submitted there is "a ***crucial core of disputed facts"*** which included things in the knowledge of one party, and not evidence, and as it is a binary system, it is disputed, unless and until it is proved, or conceded, in very much the same way as an employee's disability status, in a disability discrimination claim, is often in dispute, unless and until it is conceded, or proved by evidence.
(ff) Further, Mr Allison then conceded, at the end of a Final Hearing, an Employment Judge may decide that the claim is misconceived on the facts, as the evidence led shows there was no transfer, or a transfer to Pro-Fives Ltd only, but that is a conclusion made after evidence has been heard and assessed.
(gg) In his view, Mr Meth seeks a classic mini-trial, as referred to in the caselaw authorities, and it is simply not appropriate for the Tribunal to deal with that, and, as such Mr Allison submitted that Mr Meth had not met the test for Strike Out of the claims.
(hh) On the matter of a Deposit Order against the claimants, Mr Allison stated that he had very much the same arguments as for resisting the Strike Out. If there was a core of disputed facts, it was equally inappropriate to make a Deposit Order, and he referred to paragraph 13 of the ***Hemdan*** Judgment from the EAT, which had been referred to at the last Preliminary hearing on Strike Out in September 2017.
(ii) In summary, Mr Allison submitted that both of the respondents' applications should fail, and even if a Deposit Order was to be made by the Tribunal, it was agreed that it should be at the amount of £100 per claimant. When I enquired whether the Deposit Order was per allegation, or argument, Mr Allison submitted £1 00 was a global figure, and Mr Meth stated that he was content that it is £100 globally, and that the amount of Deposit Order did not need evidence.
(kk) it then being 3.28pm, I invited Mr Meth to reply to Mr Allison's submissions to the Tribunal. In reply, Mr Meth stated that his case ***'stands and falls on whether It can be established that there could be a transfer to K7X"*** He further submitted that there had been no malfeasance by the respondents, and while the Judgment in ***Cheesman*** is in point, in considering whether or not there is a TUPE transfer, that is not the point in the question of transfer to whom.
(II) Further, added Mr Meth, Mr Allison was correct, that in September 2017, there were factual issues to look at as regards the transfer. Further, he added, Mr Allison had conceded, in his submissions, that it could be a claim under **Regulation 3(1)(b),** however Mr Allison had not pled that, and he had stated he had no intention to plead it, and no intention to seek leave to amend, as that would require formal amendment.
(mm) Mr Meth further asked where is the evidence that there was a business transfer, and any evidence to be led by the claimants that there would be a transfer under **Regulation 3(1)(a),** whereas Mr Meth argued that this was a **Regulation 3(1)(b)** case, and that Mr Allison's reliance on ***Cheesman,*** ignored the fact that ***Cheesman*** pre-dated the introduction of Service Provision Change in to the

TUPE Regulations.
(nn) Further, added Mr Meth, Mr Allison referred to **Pro-Soccer Ltd,** yet another company, and significantly there is no claim against that company. One would have thought, given the logic of Mr Allison's arguments, that he would have sued Pro-Soccer Ltd, but there is no claim against that company.
(oo) Also, Mr Meth submitted, Mr Allison also had referred to Mr Paul Kelly's relationship with K7X Ltd, and Pro-Soccer Ltd, and he quite rightly asserts that Pro-Fives is a wholly owned subsidiary of K7X, and that is not a disputed fact, but there has perhaps been an argument about ***associated employers .***
(pp) Referring to the ***Hyde*** Judgment, Mr Meth stated that it was a deliberate decision taken that the employees would be jointly employed by various members of the employer's group, but he did not see how that squares with the known facts in this present case.
(qq) As regards the Judgment in ***Print Factory,*** plain and simply put, there is no corporate veil here, and the question of whether it is 14 or 16 April 2017 does not matter. Mr Meth submitted that it is incontrovertible that there was a transfer to Pro-Fives Ltd on 1 6 April 2016.
(rr) To find transfers between companies is to signal that in April 201 6, there was some prior knowledge that Pro-Fives Ltd would not make a success of East Kilbride, stop trading, and somehow try to avoid liability under the TUPE Regulations.
(ss) Mr Meth then submitted that Mr Allison was asking the Tribunal to defeat the purposes of limited liability, and while the concept is to limit liability, that is its purpose in terms of public policy to encourage enterprise, and that directors and shareholders do not have to find funds from a black hole.
(it) Turning them to ***Gloaq and Henderson,*** Mr Meth stated that there 30 was no reference to partnership here in the current case, as this was limited liability companies, and it is trite law that companies can do certain things, that there can be joint several liability between principals and agents, or joint ventures, and if that is the case, Mr Meth asked why Pro-Fives Ltd had been dismissed as a respondent. That was entirely contradictory, he submitted, of the claimants' position.
(uu) Mr Meth then stated that he did not object to Mr Allison's amendment to the ET1, at paragraph 7, as it made no material difference, and there was no point in objecting just for the sake of objecting. As regards the alleged factual disputes, Mr Meth submitted that it is not whether there was a transfer, but whether there can be a transfer to K7X Ltd. In his view, it is ***"relatively myopic",*** and not a wide-angle view, and he went back to his ***"pass the parcel"*** point in his written skeleton argument.
(w) In closing, Mr Meth invited the Tribunal to take into account the overriding objective, and the real consequences if the case were to be listed for a 6-day Final Hearing, with a significant expense to them, when ***"there Is no reasonable prospect that they will be held to be holding the parcel when the music stops"***

Judgment Reserved

68 Having heard from both parties' representatives, and they having concluded their respective submissions to the Tribunal, I advised all present that I would be reserving my decision, and that I would issue that reserved

Judgment, with Reasons, as soon as possible, in the New Year.

Relevant Law: Strike Out and Deposit Orders

69 At this Preliminary Hearing, I was addressed by parties' representatives on some case law authorities, as detailed earlier in these Reasons, and some of the relevant law relating to both Strike Out, and Deposit Orders. However, in coming to my Judgment, I gave myself a more fulsome self-direction in law.

70 The relevant statutory provisions are to be found within **Rules 2, 37 and 39 of the Employment Tribunals Rules of Procedure 2013,** which, so far as material for present purposes, provide 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 practicablefa)
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.
37.— (1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds -
(a) that It is scandalous or vexatious or has no reasonable prospect of success;
(b) that the manner In which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;
(c) for non-compliance with any of these Rules or with an order of the Tribunal;
(d) that it has not been actively pursued;
(e) that the Tribunal considers that It Is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).
(2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.
(3) Where a response is struck out, the effect shall be as If no response had been presented, as set out in rule 21 above.

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 "

71 Having carefully considered parties' 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 considered that, in terms of **Rule 37(2),** the claimants has been given a reasonable opportunity at this Preliminary Hearing, through their solicitor, Mr Allison, to make their own representations opposing the respondent's written application for Strike Out, which failing Deposit Order.

72 **Rule 37** entitles an Employment Tribunal to strike out a claim in certain defined circumstances, (a) to (e). 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.

73 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.
74 In **Abertawe Bro Morgannwg University Health Board v Ferguson UKEAT/0044/13, [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.

75 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.

76 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.

77 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.

78 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.

79 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.

80 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 ciaim is struck out, that is an end of It. He cannot take it any further forward. From an employee Claimants perspective, his employer 'won 1 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. "

81 Further, 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. "

82 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."

83 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."***

84 On the subject matter of Deposit Orders, I have taken into account, as I did at a previous Preliminary Hearing in these cases, Mrs Justice Simler's judgment from the EAT in **Hemdan -v- Ishmail & Ali-Meqraby, [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 falls. 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 Ait-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 alm and if there is a reasonable degree of proportionality between the means used and the alm 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 reasonabie 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. "

Discussion and Disposal

85 After careful consideration, I decided that it is not appropriate for me to Strike Out the claims, and so I refused Mr Meth's application. I could not be satisfied, on the limited information provided at the Preliminary Hearing, that I could decide, at this stage of the proceedings, that the claims have **no** reasonable prospects of success.

86 To have struck out the claims would have been draconian, and a barrier to justice for the claimants, where they continue to assert that they have a sustainable and arguable case against these respondents, and that they can prove that case, with a view to obtaining Judgment against these respondents.

87 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. It was not possible, at the Preliminary Hearing, to have a mini-trial of the facts, and I was 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.

88 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 April, May or June 2019, I, in effect, agreed with Mr Allison that the case is best addressed by parties leading evidence, and the Tribunal coming to a determination, with the benefit of evidence led by both parties, tried and tested through cross-examination in the usual way, any necessary clarifications of that evidence by the Tribunal, and both parties' representatives then making closing submissions to the Tribunal on the basis of the evidence as led, and their submissions on the factual and legal issues arising in these claims.

89 However, in light of the points raised at this Preliminary Hearing, by Mr Meth for the respondents, I felt that there was scope for making Deposit Orders on the basis that the claims have little reasonable prospects of success. In coming to my determination on the matter of whether or not to grant any Deposit Orders in these 3 cases, I did so after a period for private deliberation, taking account of the submissions made to me at this Preliminary Hearing by both Mr Meth and Mr Allison, for no evidence was led at the Preliminary Hearing, and also reading again the ET1 claim form, and the ET3 response, as also parties' correspondence with the Tribunal, as held on the casefile.

90 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 ofsuccess*** 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.

91 As it is referred to in counsel for the appellant's submissions to the EAT, in **H M Prison Service v Dolby [2003] UKEAT/0368/12,** at paragraph 14 of Mr Recorder Bower' QC's judgment on 31 January 2003, this is the ***"yellow card"*** option, Strike Out being described by counsel as the ***"red card"***

92 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 Rensburq 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.

93 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,** deals with the relevant legal principles on Strike Out applications, as well as the *quantum* of Deposit Orders.

94 Although I was not referred to it by either Mr Meth, or Mr Allison, from my own judicial experience I know that, although unreported, it is a case law authority commonly cited to Employment Judges determining Strike Out / Deposit Order applications. Indeed, I had referred both agents to it, at paragraph 79 of the Reasons to my Judgment dated 18 September 2017 in the claim then against Pro-Fives Limited.

95 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.

96 In the present cases, the claimants' complaints in the ET1 claim form are registered by the Tribunal under 2 separate administrative jurisdictional codes, for unfair dismissal *("UDL"),* and failure of the employer to consult with an employee representative or trade union or a transferor with a transferee about a proposed transfer *(υFCT"),* 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.

97 **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.

98 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 Rensburq** cited above.

99 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.

100 At this Preliminary Hearing, as detailed earlier, I made specific enquiries of the claimant’s solicitor, Mr Allison, as regards his clients’ ability to pay, if I decided to order any of them to do so, because, under **Rule 39(2),** I had a duty to make reasonable enquiries into their ability to pay, and to have regard to any such information when deciding on the amount of any deposit.

101 That enquiry of the claimants, at this Preliminary Hearing, proceeded on the basis only of my enquiry through their solicitor, Mr Allison, and I heard no evidence, and no vouching documents were produced by, or on behalf of, the 3 claimants. Mr Meth, for the respondents, had discussion, during an adjournment of the Preliminary Hearing, with Mr Allison, and when the Hearing resumed in public I was advised that they had agreed that if a Deposit Order was to be made, a sum of **£100 per claimant** was agreed as being an appropriate amount.

102 I should record here, for the sake of completeness, that while that was the 5 position adopted at the Preliminary Hearing, Mr Meth subsequently raised the matter in correspondence with the Tribunal. Specifically, on 11 January 2019, Mr Meth wrote to the Tribunal, with copy to Mr Allison, to state that: ***“if the EJ is minded to make a deposit order rather than a strike*** io ***out, we would seek to have the tribunal reconvened for a full explanation from each of the Claimants under oath as to their financial means in accordance with Regulation 39 and with particular reference to Regulation 39(2). ”***

103 By way of reply, on 14 January 2019, Mr Allison emailed the Tribunal, with copy to Mr Meth, stating that he opposed any further Hearing being fixed, as sought by Mr Meth, and that Mr Meth’s proposal ***“presupposes a particular outcome, and we do not yet know the Employment Judge's decision”.*** He then detailed 3 grounds of objection, including that an agreed position as 20 to the approach to any Deposit Order (i.e. the level of it) was put before the Tribunal at the PH, and ***“it is not open to a party to change their mind after a hearing, and the principle of personal bar would preclude the from doing so...”.***

104 Further, submitted Mr Allison, the Tribunal’s Rules do not allow the Tribunal to compel a party to give evidence, so Mr Meth’s proposal that ***“the Tribunal interrogate the Claimants' finances in misconceived”,*** and a Hearing is unnecessary, as no request had been made by Mr Meth for any information or clarification on a voluntary basis, and that nothing had changed (other 30 than the family now live in a different, lesser value, property than the one they previously lived in, but neither of which are owned by them.

105 Following referral to me, on 15 January 2019, a reply was sent to parties’ correspondence of 11 and 14 January 2019 by the Tribunal, by letter dated 1 6 January 201 9, in the following terms:

*"/ refer again to the above case.
Parties' representative's correspondence of 11 and 14 January 2019 is acknowledged, and it has been placed on casefile, and today referred to Employment Judge Ian McPherson.
The Tribunal's records have been updated, to reflect the change of address intimated for the claimants Elizabeth and Courtney Aitken, although It is not clear when the change of address occurred. Parties and their representatives need to ensure that any change in circumstances, particularly address or contact details, is intimated to the Tribunal, and the other party's representative, without undue delay.
As regards the respondents' representative's proposal, on 11 January 2019, that If the Judge is minded to make a Deposit Order, rather than a Strike Out, the Tribunal should be reconvened, the Judge notes Mr Allison's objections of 14 January 2019, and the Judge further advises that he has already made his decision, following private deliberation after the Preliminary Hearing, held on 3 December 2018, but he was awaiting clarification of the claimant's addresses, before his Judgment was issued to parties' representatives.
Now that the change of address has been intimated, the Judge has signed off the Judgment only, which will follow under separate cover. Given the passage of time since the Preliminary Hearing, the Judge considers it appropriate to issue his Judgment only, so that parties are advised of his decision. The full written Reasons are awaiting typing, and they will follow in due course.
Meantime, please note that the Judge states that, having already made his decision, it is not appropriate for him to take into account the Zoopla search Information provided by Mr Meth, in his email of 11 January 2019, as that was not information provided at the Preliminary Hearing, and nor is it appropriate to re-convene that Hearing, when Judgment was reserved, based on parties' submissions on 3 December 2018, and the Judge has now made his decision.
Further, the respondents made no prior application for any Order against the claimants, to disclose information for the purposes of Rule 39(2), and no evidence was given by the claimants, at that Hearing, as regards their means and assets, and ability to pay any Deposit Order, if so ordered by the Tribunal, and parties' representatives agreed, after an adjournment, that it was not necessary to call any evidence from the claimants, and It was accepted by Mr Meth for the respondents that if the Strike Out application was refused, then they accepted that a Deposit Order in the amount of £100 per claimant would be appropriate, if the Tribunal was minded to make any such Deposit Order.
Once the Judgment is entered in the register and copied to parties, both sides have the usual rights to apply for reconsideration, and the 14-day period will run from date of issue of the Written Reasons."*

106 In light of the jointly agreed approach taken by Messrs. Allison and Meth, as presented to me in their oral submissions at this Preliminary Hearing, I decided upon £100 per claimant as the amount of the Deposit Order in each

case, and I so ordered, when signing off the Deposit Orders. In any event, I was satisfied that £100 was an appropriate and proportionate sum to order the claimants to pay by way of a deposit.
107 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/0030/1 1,** 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.
108 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)."

109 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."***

110 For the purposes of giving my Judgment in these cases, I noted the differing approaches identified by Lady Smith in **Simpson,** and Mrs Justice Simler in **Hemdan. Simpson** is not referred to in the EAT's reported Judgment in **Hemdan.** Given the subsequent Judgment of Her Honour Judge Eady, in **Tree v South East Coastal Ambulance Service NHS Foundation Trust [2017] UKEAT 0043/17,** where **Hemdan** is cited, I decided to follow **Hemdan.**

Disposal

111 For the foregoing Reasons, in my Judgment dated 15 January 2019, as issued to parties on 16 January 2019, I decided to refuse the respondents' opposed application for Strike Out of the claims, under **Rule 37(1)(a) of the Employment Tribunal Rules of Procedure 2013,** as having no reasonable prospect of success. I did not regard Mr Meth's application to be wellfounded.

112 Put simply, I cannot say the claims have **no** reasonable prospects. 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, I agree with Mr Allison that the case is best addressed by parties leading evidence, and the Tribunal coming to a determination, with the benefit of evidence led by both parties, tried and tested through cross- examination in the usual way, any necessary clarifications of that evidence by the Tribunal, and both parties' representatives then making closing submissions to the Tribunal on the basis of the evidence as led, and their submissions on the factual and legal

issues arising in these claims .

113 Indeed, I pause to note and record that I have made that point before, in my Judgment dated 18 September 2017, at paragraph 89. Further, my view mirrors that of Mrs Justice Simler at paragraph 13 of **Hemdan,** that where there is a core factual conflict, it should properly be resolved at a full Merits Hearing where evidence is heard and tested.

114 As I held in September 2017, at a Preliminary Hearing such as this a Tribunal cannot sensibly or safely focus only on a single factor, as a judicial determination of the prospects of success of any claim requires an overall assessment of a variety of factors at play, and, as per **Cheesman,** individual factors cannot be considered in isolation. That approach goes back to **Spljkers v Gebroeders Benedlk Abattoir CV [1986] ECR 119 (ECJ).**

115 Accordingly, I allowed the claims and response to be listed for a Final Hearing for full disposal, including remedy if appropriate, on dates to be hereinafter assigned by the Tribunal, in the listing period of April, May or June 2019, further to receipt of completed date listing stencils from parties' representatives, those stencils being issued by the clerk to the Tribunal, along with my Judgment.

116 Further, having heard parties' representatives on the respondents' opposed alternative application for Deposit Orders to be made against each of the claimants, in terms of **Rule 39,** on the basis that the claims have little reasonable prospect of success, I granted the applications for Deposit Orders to be made against each of the claimants in the amount of £100 for payment to HM Courts & Tribunals, within 21 days of issue of the separate Deposit Orders signed by me, and issued by the clerk to the Tribunal, along with my Judgment.

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

118 In writing up these Reasons, a further issue has surfaced from my re reading of the voluminous casefiles. In Mr Meth's e-mail of 21 September 2017, he referred to: ***"We continue to believe that we are playing a game of judicial hide and seek attempting to obtain information from the claimants and to EJ Paul Cape's adage that "Litigation is a game played with the cards face up."***

119 When these cases proceed, hopefully without any further interlocutory skirmishing, to a Final Hearing, I propose that the other issues then raised by Mr Meth, about the possibility of Mrs Elizabeth Aitken having less than 2 years' continuous service with AM PA, and whether her contract is tainted by any illegality, if issues still insisted upon by the respondents, then they will be reserved for determination as part of the Final Hearing, and a discreet Preliminary Hearing will not be held, as that is likely to further delay getting all 3 claims to be heard on their merits.

Postscript

120 On 22 January 2019, the claimants' solicitor, Mr Allison, wrote to the Tribunal, with copy to Mr Meth for the respondents, applying for a variation of the Deposit Orders dated 1 5 January 201 9, issued on 1 6 January 201 9, to 21 days from date of issue of these Written Reasons reserved in my Judgment, rather than within 21 days of issue of that reserved Judgment.

121 Further, on 23 January 2019, Mr Meth wrote to the Tribunal, copied to Mr Allison, stating that he was applying for the Tribunal not to list the case for a full Hearing until the Written Reasons were available, as the terms of these Reasons might affect the scope of and manner in which the evidence is to be led at the Merits Hearing.

122 Thereafter, on 28 January 2019, on instructions from e, having considered parties' representatives' correspondence off 22 and 23 January 2019, the Tribunal clerk advised parties, by letter of that date, that there being no objection by the respondents' representative, Mr Allison's application was granted, and rather than the deposits being paid by 6 February 2019, it would now be payable no later than 21 days from the date of issue of these Written Reasons.

123 While date listing stencils were issued on 16 January 2019, for a Final Hearing in April, May or June 2019, and for return by 25 January 2019, neither party's representative has returned them but, given my variation to the date for payment of the deposits, I will now instruct the Tribunal clerk to issue, along with theses Written Reasons, fresh date listing stencils for a Final Hearing in the period of **June, July and August 2019.**

Further Procedure

124 Any further procedure will be addressed by correspondence with the Tribunal, in the first instance. Should any other matters arise between now and whatever date is to be assigned for a 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.

125 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 the allocated Employment Judge, or a Preliminary Hearing fixed, either in person, or by telephone conference call, as might be most appropriate.

Employment Judge: Ian McPherson
Date of Judgment: 28 March 2019
Entered in register: 29 March 2019
and copied to parties