EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4103549/2018

Heard at Glasgow on 14 August 2018

Employment Judge: Mr C Lucas (Sitting Alone)

Mr Glenn Marr	Claimant Present but not represented
Energetics Design & Build Limited	Respondent Represented by:- Mr J J A Lee, Solicitor

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is in 4 parts, namely,-

(First) That the application made by the Claimant to amend his claim by adding allegations first made in either or both of an email sent by him to

the Tribunal on 8 July 2018 and an email sent by him to the Tribunal on 10 July 2018 - [emails which were both sent in response to Directions which were given by the Employment Judge who conducted a (closed) preliminary hearing on 21 June 2018 and are as recorded in the 22 June 2018 Note of that preliminary hearing] - is refused.

(Second) That the application made on behalf of the Respondent in terms of Rule 37 as contained in Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 to strike out the Claimant's claim in whole or in part on the ground that such claim or any part of such claim has no reasonable prospect of success is refused, it being the considered view of the Tribunal that there are no grounds on which it would be justifiable for it to find that the Claimant's claim has no reasonable prospect of success.

(Third) That because the Tribunal considers that the Claimant's claim that he had been unfairly (constructively) dismissed by the Respondent has little reasonable prospect of success the Claimant is ordered to pay a deposit of One Thousand Pounds - (£1,000.00) - as a condition of continuing to advance that allegation, the Claimant's attention being drawn specifically to the provisions contained in sub-clauses (3), (4), (5) and (6) as contained in Rule 39 as set out in Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

And

(Fourth) That because the Tribunal considers that the Claimant's claim that the Respondent had, contrary to the provisions of section 13 of the Equality Act 2010, discriminated against him by treating him less favourably than it treated or would treat others and did so because of his protected characteristic, his sex - (which, in the case of the Claimant is a reference to his being a man) - has little reasonable prospect of success the Claimant is ordered to pay a deposit of One Thousand Pounds - (£1,000.00) - as a condition of continuing to advance that allegation, the Claimant's attention being drawn specifically to the provisions contained in sub-clauses (3), (4), (5) and (6) as contained in Rule 39 as set out in Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

REASONS

Background

1. In his claim as presented to the Tribunal Office on 24 April 2018 - (hereinafter, "the ET1") - the Claimant named the employer or the person or organisation he was claiming against as being "Energetics Design & Build" with an address at "Fenwick House" at Lister Way, Glasgow, alleged that he had been employed throughout the period which had begun on 5 October 2015 and had ended on 23 February 2018, that he had been unfairly dismissed by his employer and that his employer had discriminated against him on the ground of sex. The remedy that the Claimant sought in respect of both of his heads of claim was

compensation. In the case of his discrimination claim he also sought a recommendation.

2. In a paper apart annexed to - (and confirmed by the Claimant as intended to be part of and considered by the Tribunal to be part of) - the ET1 the Claimant reproduced a letter dated 18 September 2017 which, where the context permits, is hereinafter referred to as "the Claimant's 18 September 2017 letter".

3. The Claimant's 18 September 2017 letter, although purportedly providing some detail of what he was alleging when claiming that he had been discriminated against on the ground of sex, bore to have been written nearly five months prior to the alleged effective date of termination of his employment.

4. In a response form ET3 received by the Tribunal Office on 24 April 2018 - (hereinafter, "the ET3") - it was contended that the company which had employed the Claimant throughout the period specified in the ET1 had been the Respondent, a limited liability company known as "Energetics Design & Build Limited" with an address at "Fenick House" at Lister Way, Hamilton International Technology Park, Glasgow.

5. The Claimant now accepts that throughout the period which had begun on 5 October 2015 and had ended on 23 February 2018 his employer had been the Respondent and that the claim that he has made in the ET1 is properly directed against the Respondent.

6. The ET3 resisted the Claimant's claim as made in the ET1 in its entirety. In a paper apart annexed to - (and deemed by the Tribunal to form part of) - the ET3 the Respondent denied, specifically, both that it had discriminated against the Claimant "on any basis because of or associated with his sex" - (or at all) - and that it had constructively unfairly dismissed the Claimant.

7. The Respondent alleged in the ET3 that, by letter dated 24 November 2017 - (hereinafter, "the Resignation Letter") - the Claimant had resigned from his employment, that he had given three months' notice of the termination of his employment and that as a result of that voluntary resignation with notice "the Claimant was placed on garden leave throughout his 3 month notice period".

8. On the directions of an Employment Judge the Tribunal Office scheduled a routine, case-management-type (closed) preliminary hearing to take place on 21 June 2018 and invited the parties to submit agendas prior to that scheduled preliminary hearing.

9. In a pre-preliminary-hearing agenda - (hereinafter, "the Claimant's Agenda") - submitted by him to the Tribunal on 25 April 2018 the Claimant accepted that he had been employed by the Respondent, confirmed that he was claiming direct discrimination contrary to the provisions of section 13 of the Equality Act 2010 - (hereinafter, "the Equality Act") - and confirmed that he was also making a complaint of constructive unfair dismissal in which he would allege "procedural failings in both grievance & appeal".

10. The Claimant's Agenda had been completed in such a way as to make it clear that he did not wish to make any claim of indirect discrimination contrary to the provisions of section 19 of the Equality Act, of harassment contrary to the terms of section 26 of that Act or of victimisation as defined in section 27 of that Act.

11. In respect of his claim that he had been directly discriminated against on the ground of sex the Claimant's Agenda alleged that the less favourable treatment that he had suffered was that he was "not considered for senior position due to sex" before adding that "the person that got the job did not meet the criteria laid down by the company".

12. The Note issued on 22 June 2018 following the 21 June (closed) preliminary hearing is referred to, generally, for its terms but the Employment Judge wishes to record within this "Background" section of this Judgment that that Note - (hereinafter, "the 22 June Note") - makes it clear that during the course of the 21 June preliminary hearing various concerns were raised about the claims then stated to be being pursued by the Claimant, namely his claim of unfair constructive dismissal and his claim of direct ~ (Section 13) - discrimination on the ground of sex.

13. The 22 June Note referred to the Claimant's 18 September 2017 letter as being "the written case relied upon by the Claimant", a letter written "before he resigned" and "apparently ... before the comparator was even appointed to the job which is the subject of his complaints and recorded that "his written case consists only of

that letter" and that he, the Claimant, “had not ... set out any summary of the case which he makes, or the legal basis".

14. The 22 June Note recorded that at the 21 June preliminary hearing the Claimant accepted that he had not set out his claim in a way which would give the Respondent’s representative fair notice of the claims he was making and that “as things currently stand” his claim [1]reveals no valid claim for constructive dismissal or sex discrimination", in which case he, the Claimant, would be required “to provide further specification of the legal basis of his claim and identify the evidence upon which he proposes to rely” it being recorded, too, that the Employment Judge who conducted the 21 June preliminary hearing advised the Claimant at it that “before doing so, he might like to seek legal advice from a solicitor, a law centre or the Citizens Advice Bureau”.

15. The 22 June Note records that during the course of the 21 June preliminary hearing the Claimant agreed to submit a written summary of his claim providing the necessary specification within 3 weeks after the 21 June Preliminary hearing.

16. The 22 June Note records that during the course of the 21 June preliminary hearing the Claimant confirmed that the only comparator on whom he sought to rely when pursuing his claim of direct discrimination on the ground of sex was a Ms Alison Weir, this notwithstanding the Respondent’s representative’s argument that Ms Weir had been appointed to the role in question two weeks after the Claimant’s 18 September 2017 letter had been written. The 22 June Note also records that the Respondent’s representative contended that the role in question,

the position to which Ms Weir had been appointed, had been a role in respect of which, prior to Ms Weir's appointment to it, the Claimant had been given an opportunity to be considered.

17. The 22 June Note records that at the 21 June preliminary hearing the Employment Judge who conducted it had noted that the Claimant had not "offered any evidence to support his contention that the Respondent's recruitment policy favoured females for reasons related to their sex" and that the Respondent's representative had argued that even if it had been the case that the Respondent had operated a policy which favoured females the Claimant had not identified any detriment which he had suffered.

18. The 22 June Note records that during the course of the 21 June preliminary hearing the Respondent's representative maintained the Respondent's position that the Claimant's claim should be struck out in its entirety as having no reasonable prospect of success, that there should be a purpose-specific preliminary hearing to consider that matter and that at such (open) preliminary hearing the question of time bar should also be addressed.

19. The 22 June Note records that at the 21 June preliminary hearing the Respondent's representative, referring to the Claimant's unfair constructive dismissal claim, contended that the Claimant, "had failed to make any reference to a breach of contract, as required in a constructive dismissal claim" and "had made no reference to his resignation in his written case" but that the response of the Employment Judge who had conducted the 21 June preliminary hearing was to

the effect that because the Claimant had agreed to submit a summary of his claim to the Tribunal, in writing, "which will be treated as further specification or an application to amend his claim" it "would be premature to set down a preliminary hearing to consider either the question of prospects of success and/or the question of time bar". But the 22 June Note also recorded both that "Given that a preliminary hearing of some description will require to take place in this case, it was agreed that in order to ensure progress in this case that an open preliminary hearing to determine any substantive questions should be set down for 8 weeks' time" and that such a purpose-specific preliminary hearing was scheduled to take place on 14 August 2018 on the basis that "in the event that there are at that stage no issues which require to be considered at an open preliminary hearing the Hearing will be converted to a closed preliminary hearing to consider case management issues".

20. On 8 July 2018 the Claimant sent an email to the Tribunal - (with a copy to the Respondent's representative) - which purported to provide both further specification of his unfair constructive dismissal claim and his claim of direct discrimination on the ground of sex and a Schedule of Loss Where the context permits, that 8 July email and its attachments are hereinafter, collectively, referred to as "the July Further Particulars".

21. The July Further Particulars contained the statements that "I didn't resign from my post due to concerns regarding my employment" and that "my resignation letter makes it clear I have resigned due to the botched grievance procedure which is a fundamental breach of contract".

22. Discussing the Claimant's unfair constructive dismissal claim, the July Further Particulars referred to a resignation letter dated 24 November 2017 which, as it was put, "states that I am resigning due to the botched grievance procedure", that "I sent my resignation to the company after close of business on 24/11/17", that the Claimant had had a meeting with the Respondent on 27/11/17 "to finalise the initial interview notes" and that "at this point the company had not acknowledged receipt of my resignation letter nor had they accepted my resignation".

23. The Claimant's resignation letter was dated 24 November 2017, stated, -

> "Following the compromised investigation into my grievance dated 18 September 2017, I feel my only option is to resign. Please accept my 3 months' notice period as per my contract of employment. I will be raising an action in full with an Employment Tribunal regarding the unsatisfactory outcome of my grievance."

and was a resignation letter which, in terms, unequivocally identified that the reason why the Claimant was resigning was a reason relating solely to the investigation process following on from the grievance expressed in the Claimant's 18 September 2017 letter. And not anything other than that.

24. The July Further Particulars went on to refer to the Claimant's 18 September 2017 letter as being "the grievance" and to the procedure which followed on from the submission of that letter, of "my grievance of 18 September", before referring to "an updated grievance" being made on 22 October. They also referred, at length, to alleged faults in the grievance process followed by the Respondent and to allege that "due process has not been followed".

25. Under the heading “Constructive Dismissal Appeal Process”, the July Further Particulars alleged that at a time after the Claimant had tendered his resignation letter and “during my gardening leave” the Respondent had "continued to breach my contract, that what the Respondent had done during that period after he had tendered his resignation “was a material breach”, “was a breach of employers duties” and, specifically, that the Respondent had breached its duty "to act conscientiously and in good faith” and its duty "of implied mutual trust and confidence".

26. The July Further Particulars went on to provide examples of what purported to be material breaches on the part of the Respondent but which, in fact, referred only to what he had said in the Claimant’s 18 September 2017 letter had occurred prior to that letter being written and to how the Respondent had reacted to the grievance expressed in the Claimant’s 18 September 2017 letter.

27. On 10 July 2018 the Claimant sent a further email to the Tribunal - (with a copy to the Respondent’s representative) - to which he attached "Constructive Dismissal 2.docx” and which stated “Apologies, please use this document." That 10 July email and its attachments are hereinafter referred to as “the Second Set of Further Particulars”.

28. The Second Set of Further Particulars related to the Claimant’s unfair constructive dismissal claim and to the “botched grievance procedure" stated within his resignation letter as being the reason for his resignation.

29. The Respondent's representative responded to the July Further Particulars and to the Second Set of Further Particulars by providing the Tribunal and the Claimant with amended responses to the Claimant's claim. Those responses - (hereinafter, "the Respondent's responses to the July Further Particulars and to the Second Set of Further Particulars" included the acknowledgement that "the high threshold which must be met in connection with strike out applications and, more particularly, in connection with strike out applications in relation to discrimination claims". But they also contended that "the strike out of both claims is justified, in particular when one considers the relevant authorities as they apply to the case either as pled or as purportedly pled, per the Claimant's proposed amendments of 10 July".

30. The Respondent's responses to the July Further Particulars and to the Second Set of Further Particulars invited the Tribunal to consider the strike out of the claims in terms of Rule 37(1)(a) as contained in Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 - (hereinafter, "Schedule 1 to the Regulations") - and to do so "specifically on the basis that the claims have no reasonable prospects of success" before going on to submit, "in the alternative" that a Deposit Order be considered "pursuant to Rule 39(1) and in respect of which the Respondent invites the Tribunal to order the Claimant to pay £1,000 as a condition of continuing with either claim, on the grounds that the claims have little reasonable prospects of success".

31. The Respondent's responses to the July Further Particulars and to the Second Set of Further Particulars also invited the Tribunal "to consider time bar of the claims" for reasons set out, in detail, in such responses.

32. Dealing with the Claimant's unfair constructive dismissal claim, the Respondent's responses to the July Further Particulars and to the Second Set of Further Particulars made specific applications, namely, -

> "Rule 37(1)(a) - for strike out of the claim as pled as this has no reasonable prospect of success"

And,-

> "Rule 39(1) - for the payment of a Deposit Order (£1,000), on the basis that the claim as pled has little reasonable prospect of success."

And,-

> "The Respondent objects to the Claimant's application to amend by the Claimant's revised document submitted on 10 July 2018.
>
> .. it is contended (and has been accepted) that the claim as pled does not contain any valid claim for constructive unfair dismissal.
>
> Accordingly, the purported claim as set out in the Claimant's email of 10 July 2018..must be considered an attempt to now present effectively a fresh claim for constructive unfair dismissal.
>
> The Respondent objects to the Claimant's application to amend the claim..''

33. In respect of the Claimant's claim of direct discrimination on the ground of sex, the Respondent's responses to the July Further Particulars and to the Second Set of

Further Particulars argued that "the Claimant's claim for sex discrimination as presented .... is largely irrelevant", that the Claimant has "clarified that the claim he invites the Tribunal to consider is not foreshadowed within his ET/1 but instead relates to the internal recruitment of Alison Weir, which took place on 6th October 2017", that "this incident post-dates the date of the Claimant's grievance as referred to in his ET1 by almost 3 weeks, that "accordingly, there is no claim before the Tribunal at present regarding the issue identified by the Claimant now as the basis for his claim for sex discrimination", that "…. the claim as pled contains no allegation of detriment by the Claimant in relation to this appointment" and that "this is a matter of particular relevance on the applicable authorities and to which the Tribunal will be referred".

34. Dealing with the Claimant's claim of direct discrimination on the ground of sex the Respondent's responses to the July Further Particulars and to the Second Set of Further Particulars contained specific applications to the Tribunal namely, -

"Rule 37(1)(a) - strike out - no reasonable prospect of success"

And, -

"Rule 39(1) - Deposit Order - little reasonable prospect of success"

And, -

"The Claimant's Application to Amend - Direct Sex Discrimination - the Respondent objects to the Claimant's application to amend his claim as set out in his document entitled "Direct Sexual Discrimination" by email dated 10 July 2018", the Respondent's responses to the July Further Particulars contending that 'the proposed amendment is not an attempt to 're-label' facts and circumstances already pled for consideration before the

Tribunal nor is it linked to the claim as pled" but that "the purported amendment application is in effect the presentation of a new and distinct claim for direct sex discrimination, not foreshadowed within the terms of his ET1, nor could this be, again given that the Claimant's letter of grievance dated 18 September 2017 predates the recruitment with which the Claimant now takes issue, by some three weeks" and that "that issue simply had not happened when his grievance was presented."

35. On 2 August 2018 the Respondent's representative sent an email to the Claimant stating that "as you are aware, we are instructed for the Respondent …. and our client intends, amongst other applications, to invite the Tribunal to issue a Deposit Order as a precondition of continuation of your claims" and explaining that "one of the considerations the Tribunal shall make is your current financial position". That 2 August email went on to seek to obtain from the Claimant details of his disposable capital and capital assets, the Respondent's representative explaining to the Claimant that "in the event you intend to invite the Tribunal to have regard to your ability to pay, it is in your interests to make full information available".

36. On 9 August 2018 the Respondent's representative sent an email to the Tribunal - (with a copy to the Claimant) - which stated, -

"Amongst other matters, the Tribunal is to consider issuing a Deposit Order in respect of both claims, during the course of Tuesday's Hearing. In that regard, and particularly given the Claimant is unrepresented, we sought to assist the Claimant and to determine whether he intends to invite

the Tribunal to have regard to ability to pay, We asked for provision of information.."

And, -

"We confirm that we have had nothing further from the Claimant in this regard nor any indication as to his position on ability to pay."

37. At 1438 on 10 August the Claimant sent an email to the Respondent's representative stating, "I am opposing the Respondent's Motion for a Deposit Order" and, "you will have my objections by 1600 today'.

38. At 1441 on 10 August the Respondent's representative replied to the Claimant stating, "you do not need to provide grounds for your opposition right at this stage. Noting your objection is adequate. I think you do need to make it clear if you do not seek to oppose the Order on the basis of your ability to pay … ."

39. At 1519 on 10 August the Claimant sent an email to the Respondent's representative which included the statements that "I see a Claimant could be liable for costs if a Deposit Order is paid and the case fails on a point identified in the Deposit Order", that "I won't proceed with the case unless I have at least a 65% chance of success" and that "I confirm I am not opposing this Order on the basis of my ability to pay but rather on objections to be detailed later".

40. The scheduled (open) preliminary hearing took place at Glasgow on 14 August 2018 and is hereinafter referred to as "the 14 August Preliminary Hearing". It had been convened with the specific purposes of considering and determining, -

- Whether, if the July Further Particulars and / or the Second Set of Further Particulars respectively or collectively constituted an application or applications by the Claimant to amend his claim as made in the ET1, such application or applications should be granted or should be refused.
- Whether, in terms of Rule 37 as contained in Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, the Tribunal should strike out all or part of the Claimant's claim on the ground that it or that part has no reasonable prospect of success.
- Whether, if the Tribunal was not minded to strike out all or part of the Claimant's claim it, the Tribunal, should make an Order requiring the Claimant to pay a deposit not exceeding £1,000.00 as a condition of continuing to advance each part of his claim, i.e. £1,000.00 in respect of his claim of unfair (constructive) dismissal and £1,000.00 in respect of his claim of direct discrimination on the ground of sex.

41. The Claimant was present but not represented at the 14 August Preliminary Hearing. The Respondent was represented at it by Mr Lee.

42. During the course of the 14 August Preliminary Hearing the Respondent's representative invited the Tribunal to take account of the guidance given in the cases of, -

- Seikent Bus Co Limited v Moore
- ED&F Man Liquid Products Limited v Patel & another

- Ezsias v North Glamorgan NHS Trust
- Shestak v The Royal College of Nursing and others
- Norma Eastman v Tesco Stores Limited
- Tayside Public Transport Company Limited (t/a "Travel Dundee") v James Reilly
- Ahir v British Airways Pic 2017
- Wright v Nipbonkoa Insurance (Europe) Limited

as well as the provisions of the relevant legislation.

Where appropriate and relevant to the determination of the matters in respect of which determination was required at the 14 August Preliminary Hearing the Tribunal did so.

43. At commencement of the 14 August Preliminary Hearing, at a stage when preliminary matters were being discussed and prior to any evidence being provided to the Tribunal or legal submissions being made to it, the Respondent's representative made it clear to the Tribunal and to the Claimant that the Respondent did not wish to seek determination of any time-bar issue at the 14 August Preliminary hearing but reserved its position so far as time bar was concerned on the basis that that is an issue which may arise again for determination at an eventual final hearing of the Claimant's claim.

44. Also during the course of such preliminary discussions, at a stage prior to any evidence being heard or legal submissions being made, the Claimant confirmed that although he objected to the substance of the Respondent's arguments in respect of a Deposit Order or Deposit Orders he did not seek to argue that if the

Tribunal made Orders not exceeding £1,000.00 in respect of each of his heads of claim he was not in a financial position to pay such Deposits as a condition of continuing to pursue those heads of claim.

45. The preliminary discussions prior to evidence being heard or legal submissions being made also resulted in it being made clear by the Claimant to the Tribunal and to the Respondent's representative that when submitting the July Further Particulars and the Second Set of Further Particulars he. the Claimant, did seek to amend the claims as made by him in the ET1 by adding additional allegations.

Findings in Fact

46. During the course of the 14 August Preliminary Hearing the Claimant gave evidence which helpfully clarified what he had alleged in the ET1, in the July Further Particulars and in the Second Set of Further Particulars.

47. No evidence was led on behalf of the Respondent at the 14 August Preliminary Hearing.

48. The Tribunal has preferred to limit the findings in fact set out in this section of this overall document to only those findings in fact which might not have been readily apparent from the pleadings but which will have a bearing on the matters before the Tribunal for preliminary determination, i.e., -

49. The Claimant was not dismissed by the Respondent, i.e. not "actually" dismissed in the sense that the Respondent took any steps to bring his employment with it to an end at its instance.

50. The Claimant voluntarily resigned from his employment with the Respondent but when doing so set out in his 24 November 2017 resignation letter - (hereinafter, "the Resignation Letter") - that "following the compromised investigation into my grievance dated 18 September 2017, I feel my only option is to resign", the Claimant adding in the Resignation Letter that "I will be raising an action in full with an Employment Tribunal regarding the unsatisfactory outcome of my grievance".

51< The Resignation Letter was intimation on 24 November 2017 of termination by the Claimant of his employment with the Respondent but with the effective date of termination of that employment being 23 February 2018.

The Issues

52. The Tribunal identified the issues which it considered to be relevant to either the Claimant's application - (as constituted by the July Further Particulars and/or the Second Set of Further Particulars) - to amend his claim or to the Respondent's application for strike out of that claim or to the Respondent's, alternative, application for Deposit Orders to be made against the Claimant as being, -

Re Proposed Amendment of Claim

- Whether the amendments sought are arguable and substantial
- Whether the proposed new claims were out of time
- Whether an amendment was necessary and appropriate to the Claimant's claim

- Where the balance of hardship and injustice lay if, on the one hand, the application to amend was granted or, on the other hand, the application to amend was refused
- Whether the proposed amendments amounted to being new causes of action or, on the other hand, were merely an attempt by the Claimant to relabel his claim.

Re Strike Out

- Whether, in terms of Rule 37 as contained in Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, the Claimant's claim has no reasonable prospect of success

Re Deposit Orders

- Whether, in terms of Rule 37 as contained in Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, the Claimant's claim of unfair (constructive) dismissal has little reasonable prospect of success and, if so, whether a deposit not exceeding £1,000.00 should be ordered to be paid by the Claimant as a condition of continuing to advance that allegation or argument.
- Whether, in terms of Rule 37 as contained in Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, the Claimant's claim of direct discrimination on the ground of sex has little reasonable prospect of success and, if so, whether a deposit not exceeding £1,000.00 should be ordered to be paid by the Claimant as a condition of continuing to advance that allegation or argument.

The Relevant Law

A. Legislation

- The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, particularly Rules 37 and 39 as set out in Schedule 1 to those Regulations.
- The Employment Rights Act 1996, particularly Sections 94, 95, 97 and 98.
- The Equality Act 2010, particularly Sections 4, 11 and 13.

B. Relevant Cases

- Reuters Limited v Cole, UKEAT/0258/17/BA.
- Selkent Bus Co. Limited v Moore, 1996 ICR 836, EAT.
- Trimble and another v North Lanarkshire Council and another, EATS 0048/12.
- Foxtons Limited v Ms Ruwiel, EAT 0056/08.
- Anyanwo and another v Southbank Student Union and another, 2001 ICR 391, HL
- Ezsias v North Glamorgan NHS Trust, 2007 ICR 1126, CA.
- Timbo v Greenwich Council for Racial Equality, 2013 ICR D7, EAT.
- Three Rivers District Council and others v Bank of England (No 3), HL 23 Mar 2001.
- Balls v Downham Market High School & College, UKEAT/0343/10/DM.
- Reilly v Tayside Public Transport Company Limited t/a Travel Dundee, UKEATS/0065/10/BI.
- Williams v Real Care Agency Limited, 2012 ICR D27, EAT.
- Shestak v The Royal College of Nursing and others, 2008 WL3909388.
- Ms Norma Eastman v Tesco Stores Limited, 2012 WL4888601.
- Mr Ashok Ahir v British Airways Pic, 2017 WL02978862.
- Short v Birmingham City Council and others, EAT0038/13.
- Mr J Wright v Nipbonkoa Insurance (Europe) Limited, 2014 WL495908.

Discussion

Re Proposed Amendment of Claim

53. In the view of the Tribunal provision by the Claimant of the July Further Particulars and of the Second Set of Further Particulars did constitute an attempt by him to amend his claim as made in the ET1.

54. The Tribunal considered whether an amendment, as such, was either necessary or appropriate in this case. Having done so, it felt that to add the allegations that the Claimant sought to introduce in either the July Further Particulars or in the Second Set of Further Particulars was, on the one hand, unlikely to enhance the Claimant's prospects of success at an eventual hearing of his claim and, on the other hand, was unlikely to detract from the Respondent's arguments that such allegations were irrelevant to the claim as made by him.

55. Before reaching its conclusion that provision by the Claimant of the July Further Particulars and of the Second Set of Further Particulars did constitute an attempt by him to amend his claim the Tribunal considered whether, in the alternative, what the Claimant had done, or was intent on doing, amounted to no more than an attempt to relabel the claim already made by him in the ET1. When doing so the Tribunal bore in mind the guidance given by the Employment Appeal Tribunal - ("EAT") - in the case of **Reuters Limited v Cole** that new heads of claim require consideration of different facts, factual inferences, and different legal onuses" and that "if the amendment is allowed the Tribunal will require to determine the full factual, and legal, basis of the new claims". It also took into

account the earlier guidance of the EAT in the case of **Selkent Bus Co. Limited v Moore** in that context and considered whether it was appropriate for the Tribunal to take account of what the Claimant, an unrepresented party at the stage of submitting his ET1 and throughout the Tribunal proceedings, believed he was doing so far as any attempt at amendment was concerned and whether he had understood the consequences of what he was doing to be.

56. Having concluded that provision by the Claimant of the July Further Particulars and of the Second Set of Further Particulars did constitute an attempt by him to amend his claim, the Tribunal considered what prejudice would be caused to the Claimant if his application to amend was not granted and, as a balancing exercise, what prejudice would be caused to the Respondent if it was granted.

57. The concept of the Claimant being deprived of the right to amend his claims being disproportionate was also borne in mind.

58. The Tribunal took guidance from the relevant case law including those cases of **Reuters Limited v Cole** and **Selkent Bus Co. Limited v Moore.** Having considered the relevant law and heard evidence from the Claimant the Tribunal was satisfied that there was no reason why the allegations which the Claimant sought to introduce in the July Further Particulars and / or in the Second Set of Further Particulars as amendments could not have been made in the ET1 and the Tribunal was of the view that that question of timing was relevant.

59. The Tribunal bore it in mind that it is relevant to consider whether any claim implicit within an application being made either within the July Further Particulars or in the Second Set of Further Particulars might be time barred because what was alleged within those attempts at application to amend must have happened some time prior to the termination of the Claimant's employment on 23 February 2018. Indeed, bearing in mind that he had been on garden leave since 24 November 2017, must in all probability have happened prior to his tendering his resignation, by letter, on 24 November 2017.

60. Which begs the question of why the application made by the Claimant, whether in the July Further Particulars or in the Second Set of Further Particulars, was not made sooner.

61. The Tribunal bore it in mind so far as the time bar issue was concerned that this is a case where time bar, if not an insurmountable problem, is at least an issue and that no argument has been put forward by the Claimant that the time limit for presenting a claim based on the allegations which he sought to introduce in the July Further Particulars or in the Second Set of Further Particulars should be extended.

62. The Tribunal bore it in mind that when determining whether to grant an application to amend a claim any Employment Tribunal must always carry out a careful balancing exercise of all the relevant factors, having regard to the interests of justice and to the relative hardship that would be caused to the parties by granting or refusing the amendment.

63. When making his submissions at the 14 August Preliminary Hearing the Respondent's representative referred the Tribunal to the guidance given in the case of **Selkent Bus Co Limited v Moore,** a case in which the EAT held that where a proposed amendment pled facts which had not previously been pleaded and where fresh primary facts would have to be established then, in the circumstance that no explanation was offered as to why those facts - (which must have been within the knowledge of the employee at the time) - were not alleged in an original application, and where refusal of leave to amend would not cause hardship to the employee in that such refusal would not prevent the employee from pursuing the original complaint, the likelihood would be that, on balance, the risk of hardship by way of increased costs caused to the employer would be greater if the amendment was granted than if it was refused. In the view of the Tribunal, that guidance is relevant to the circumstances of the present case.

64. The Tribunal took the view that, in the present case, for the Respondent to have to defend a claim which, if the Claimant's amendments were allowed, would include allegations which might be out of time and not properly particularised would tilt the balance of hardship against the Respondent.

65. As guided by the EAT in the case of **Trimble and another v North Lanarkshire Council and another,** the Tribunal bore it in mind at it is rarely enough to look only at the downsides or "prejudices" themselves without putting them into context of the whole surrounding circumstances.

66. Having taken the guidance given in **Trimble and another v North Lanarkshire Council and another** and having applied the balancing exercise envisaged by the EAT, particularly in the cases of **Selkent Bus Company Limited *v* Moore** and of **Foxtons Limited v Ms Ruwiel,** the Tribunal determined that the proposed amendment to the Claimant's claim should not be permitted and is refused.

Re Strike Out

67. So far as the Respondent's application for strike out of the Claimant's claim is concerned, the Tribunal bore it in mind that an Employment Tribunal has power to strike out a claim on any of the grounds set out in Rule 37 as contained in the Schedule to the Regulations and that that power may be exercised at any stage of the proceedings, either on the Tribunal's own initiative or on the application of a party.

68. One of the grounds specified in Rule 37 as contained in the Schedule to the Regulations - (and in this case the only ground on which the Respondent's representative relies) - is that the Claimant's claim has no reasonable prospect of success.

69. The Tribunal bore in mind that where strike out is sought on such a ground - (the Rule 37(1)(a) ground that it "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.

70. The word “no” is stressed to emphasise that the test is not whether the Claimant’s claim is likely to fail, nor is it a matter of asking whether it is possible that his claim will fail, nor is it a test which can be satisfied by considering what is set out in the ET3 or, indeed, in submissions made on behalf of the Respondent. It is, in short, a high test, the application of which must result in the Tribunal finding that there is *no* reasonable prospect of success before it can strike out the Claimant’s claim on that ground.

71. The Tribunal also bore it in mind that the legislature created this standard as one different from the standard required to comply with the Deposit Order provisions referred to in Rule 39 as contained in the Schedule to the Regulations - (that lower standard as applied in the making of a Deposit Order being that the claim has *little* reasonable prospect of success).

72. Applications for strike out of claims or heads of claim are not unusual. The Tribunal did, however, take cognisance of the fact that although it is open to an Employment Tribunal at a purpose-specific preliminary hearing to strike out a claim or heads of claim under Rule 37 as contained in Schedule 1 to the Regulations on the basis that it has no reasonable prospect of success the Authorities suggest that an Employment Tribunal should only strike out a discrimination claim in exceptional circumstances, not least because discrimination cases are generally fact-sensitive, so much so that any issues should usually only be decided after all the evidence has been heard at a final hearing of a claimant’s claim.

73. This concept was discussed, in detail, by the House of Lords in the case of **Anyanwo and another v Southbank Student Union and another** to which the Respondent's representative referred in his submissions.

74. And in the case of **Ezsias v North Glamorgan NHS Trust -** (to which the Respondent's representative also referred in his submissions) - guidance was given by the Court of Appeal that a whistleblowing claim - (with which a discrimination claim has much in common) - should only be struck out on the ground that it has no reasonable prospect of success in exceptional circumstances, for example where an employee seeks to establish facts that are totally and inexplicably inconsistent with undisputed contemporaneous documentation.

75. The case of **Timbo v Greenwich Council for Racial Equality** added to the emphasis by finding that it is inappropriate for a first-instance Employment Tribunal to strike out a claim on the ground that it has no reasonable prospect of success where there is a crucial core of disputed facts which cannot be determined other than by evaluating all the evidence at a final hearing.

76. When giving evidence at the 14 August Preliminary Hearing the Claimant referred to both the Claimant's 18 September 2017 letter and to a further grievance expressed by him and he sought to refer, at length, to what his employers had or had not done during the course of the grievance investigation process, including the eventual grievance appeal hearing.

77. The Tribunal has borne in mind the guidance given by Lord Hope in the House of Lords case of **Three Rivers District Council v Bank of England (No.3).** That case involved discussion of the English law of tort and was therefore discussing the concept of strike out in the context of English Civil Courts' powers to strike out. That notwithstanding, the Tribunal considers that it is valid to take cognizance of Lord Hope's comment that, "I think that the question is whether the claim has no real prospect of succeeding at trial and that it has to be answered having regard to the overriding objective of dealing with the case justly but the point which is of crucial importance lies in the answer to the further question that then needs to be asked, which is - what is to be the scope of that inquiry?" In answer to his own question Lord Hope went on to state that, "the method by which issues of fact are tried in our courts is well settled. After the normal processes of discovery and interrogatories have been completed, the parties are allowed to lead that evidence so that the trial Judge can determine where the truth lies in the light of that evidence. To that rule there are some well-recognised exceptions. For example, it may be clear as a matter of law at the outset that even if a party were to succeed in proving all the facts that he offers to prove he will not be entitled to the remedy that he seeks. In that event a trial of the facts would be a waste of time and money, and it is proper that the action should be taken out of court as soon as possible. In other cases it may be possible to say with confidence before trial that the factual basis of the claim is fanciful because it is entirely without substance. It may be clear beyond question that the statement of facts is contradicted by all the documents or other material on which it is based. The simpler the case the easier it is likely to be to take that view and resort to what is properly called summary judgment. But more complex cases are unlikely to be capable of being resolved in

that way without conducting a mini-trial on the documents without discovery and without oral evidence."

78. The Tribunal has taken into account the guidance given by the Honourable Lady Smith in the case of **Balls v Downham Market High School & College** in which, discussing the concept of the power of strike out, she explained that, "to state the obvious, if a Claimant's claim is struck out, that is the end of it. He cannot take it any further forward. From an employee Claimant's perspective, his employer has 'won' without there ever having been a Hearing on the Merits of his claim. The chances of him being left with a distinct feeling of dissatisfaction must be high." The Honourable Lady Smith went on to say that, "..strike out is often referred to as a draconian power. It is." She did, however, accept that "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."

79. In the even more recent case of **Reilly v Tayside Public Transport Company Limited t/a Travel Dundee** the Honourable Lady Smith again addressed the need for an Employment Judge to have regard to the draconian impact of an Order for strike out, again reminding us that, "such an Order is, put shortly, the end of matters..".

80. These Employment Appeal Tribunal cases of **Balls v Downham Market High School & College** and of **Reilly v Tayside Public Transport Company Limited t/a Travel Dundee** both involved consideration of decisions being taken by an Employment Judge at preliminary stages of a first instance Tribunal process and the criticisms made by the Honourable Lady Smith, particularly in the case of **Reilly v Tayside Public Transport Limited t/a Travel Dundee,** were based on strike out having been effected at such a preliminary stage, i.e. without a full Tribunal having sat at a Hearing on the Merits to consider evidence. Which is the stage reached in the present case where no evidence has yet been heard at a final hearing - (hearing on liability) - of the Claimant's claim.

81. In this context the Tribunal also bore in mind the guidance given by the EAT in the case of **Williams v Real Care Agency Limited** to the effect that the power of strike out must be exercised in accordance with reason, relevance, principle and justice and that that care must be exercised even in a circumstance where an Employment Judge might be tempted to take a view that it is pointless even to continue with the hearing of evidence on which a claimant's claim is based.

82. In the context of his application for strike out of the whole or part of the Claimant's claim as made in the ET1 the Respondent's representative referred the Tribunal to the guidance given by the EAT in the case of **Mrs B Shestak v The Royal College of Nursing and others** as to the approach to be adopted by first-instance Tribunals when considering an application for strike out. He referred particularly to paragraphs 34 to 36 of that Judgment.

83. The Respondent's representative referred, too, to the guidance given by the EAT in the case of **Ms Norma Eastman v Tesco Stores Limited** in which the case of **Ezsias v North Glamorgan NHS Trust** was distinguished The Respondent s representative suggested that the facts implicit within that case of **Ms Norma Eastman v Tesco Stores Limited** were on-all-fours with the facts of the present case.

84. The case of **Tayside Public Transport Company Limited (t/a Travel Dundee) v James Reilly** to which reference has been made earlier in this Judgment was accepted by the Respondent's representative at the 14 August Preliminary hearing as being authority for the argument that a first-instance Tribunal should strike out a claim at a purpose-specific (open) preliminary hearing only where it, the first-instance Tribunal, determines that the claim "has no reasonable prospect of success - (which is what Rule 37 as set out in Schedule 1 to the Regulations requires) - and that even if a Tribunal determines that a case has no reasonable prospect of success it retains a discretion not to strike out the claim.

85. By referring in his submissions to the guidance given in the case of **Tayside Public Transport Company Limited (t/a Travel Dundee) v James Reilly** the Respondent's representative was clearly inferring that, as was discussed at paragraph 30 of that Judgment, there may be cases where it is instantly demonstrable that the central facts in a claim are untrue, for example where alleged facts are conclusively disproved by the productions.

86. That argument is something which the Tribunal has borne very much in mind. But it has also borne in mind that later in that same paragraph 30 of that Judgment in

the case of **Tayside Public Transport Company Limited (t/a Travel Dundee) v James Reilly** the guidance given was that "… in the normal case where there is a 'crucial core of disputed facts' it is an error of law" for a first-instance Tribunal "to pre-empt the determination of a full Hearing by striking out".

87. The guidance given in the case of **Tayside Public Transport Company Limited (t/a Travel Dundee) v James Reilly** is such that in the view of the Tribunal it would not be in accordance with that guidance for it to strike out either element of the Claimant's claim when evidence is still to be given at a final hearing of it.

88. But the case of **Mr Ashok Ahir v British Airways Pic -** (to which the Respondent's representative also referred the Tribunal in his submissions) - is one which, not only because of its recent issue but also because of what Lord Justice Underhill said in it, has given the Tribunal considerable cause for thought.

89. In that case of **Mr Ashok Ahir v British Airways Pic** the Court of Appeal decided that strike out can be justified if a claim is based on only mere assertions and where no clear argument or substance is demonstrated.

90. As was pointed out by the Respondent's representative, what was said by Lord Justice Underhill in that case of **Mr Ashok Ahir v British Airways Pic** was that "Employment Tribunals should not be deterred from striking out claims, including discrimination claims, which involve a dispute of fact if they are satisfied that there is indeed no reasonable prospect of the facts necessary to liability being established, and also provided they are keenly aware of the danger of reaching such a conclusion in circumstances where the full evidence has not been heard

and explored, perhaps particularly in a discrimination context and that "whether the necessary test is met in a particular case depends on an exercise of judgment".

91. The Tribunal has noted, however, that Lord Justice Underhill repeated that, "..it remains the case that the hurdle is high" and, specifically, that it is higher than the test for the making of a Deposit Order, which is that there should be "little reasonable prospect of success".

92. In the view of the Tribunal, it may well be the case that the Claimant may ultimately struggle to demonstrate either that his resignation amounted to termination, with notice, of the contract under which he was employed in circumstances in which he was entitled to terminate it without notice by reason of the Respondent's conduct - (which is the test for dismissal set out in section 95(1)(c) of ERA 1996 or that in terms of section 98 of that Act such (constructive) dismissal was unfair or that in terms of section 13 of the Equality Act the Respondent had discriminated against him by treating him, a man, less favourably than it treated others and did so because of his sex. But, having heard evidence from the Claimant and considered the submissions made by the Respondent's representative at the 14 August Preliminary Hearing, the Tribunal has found that, based on the information before it, it cannot find that the Claimant's claims as made in the ET1 have no reasonable prospect of succeeding, i.e. either the claim of unfair (constructive) dismissal contrary to the provisions of ERA 1996 or the claim of direct discrimination on the ground of sex contrary to the provisions of the Equality Act. In this context, the Tribunal took guidance from the EAT in the case of **Short v Birmingham City Council and others** where it was found that an ,

Employment Judge who had considered whether, on the balance of probabilities, a Claimant was unlikely to succeed in her claims had misdirected herself in law and that the correct position to have been taken was that strike out was not justified because it could not properly have been said that the claims being made in that case had no reasonable prospect of success.

93. In the view of the Tribunal, these are matters in respect of which it may prove to be the case that the Claimant is, metaphorically, building the foundation of his arguments on weak ground. Nevertheless, the Tribunal believes that they are matters which will require to be tested at a final hearing of the Claimant's claim before it can be determined whether his claim is successful. And that comment relates to both the Claimant's claim of unfair constructive dismissal and to his claim of direct discrimination on the ground of sex.

94. Having considered the Authorities - (including what Lord Justice Underhill said at paragraph 16 of the Judgment in the case of **Mr Ashok Ahir v British Airways** Pic and also what he also said at paragraphs 19 and 24 of that Judgment) - the Tribunal has maintained its view that, on balance, there are sufficient allegations made by the Claimant to encourage it, the Tribunal dealing with the preliminary matter of strike out at the August Preliminary hearing, to defer to the ultimate decision of a full Tribunal at a final hearing of the Claimant's claim.

95. The Tribunal has determined that the Respondent's application for strike out of the whole or parts of the Claimant's claim shall be refused.

Re The Making of Deposit Orders

96. Reference has been made earlier in this Judgment to the fact that the standard, the threshold, which justifies a Tribunal in deciding that a party - (in this case the Claimant) - should be required to pay a Deposit not exceeding £1,000.00 as a condition of continuing to advance an allegation or argument is that the claim or response is a lower standard or threshold than that required for a Strike Out Order. The standard applicable to Deposit Orders is, in fact, in fact that such a claim has little reasonable prospect of success.

97. Earlier in this Judgment the Tribunal expressed the views that it may well be the case that the Claimant may ultimately struggle to demonstrate either that his resignation amounted to termination, with notice, of the contract under which he was employed in circumstances in which he was entitled to terminate it without notice by reason of the Respondent's conduct - (which is the test for dismissal set out in section 95(1)(c) of ERA 1996 or that in terms of section 98 of that Act such (constructive) dismissal was unfair or that in terms of section 13 of the Equality Act the Respondent had discriminated against him by treating him, a man, less favourably than it treated others and did so because of his sex. Those views were expressed in the context of the Respondent's representative's application for strike out of the whole or part of the Claimant's claim as made in the ET1 but although made earlier in that specific context the Tribunal believes in the context of the Respondent's application for a Deposit Order or for Deposit Orders that the Claimant may well struggle to demonstrate to the Tribunal dealing with his claim at final hearing either that he was constructively dismissed - (and that any such

constructive dismissal was unfair) - or that he was subjected by the Respondent to direct discrimination on the ground of his sex.

98. Which is another way of expressing the Deposit Order criterion required by Rule 39(1) as contained in Schedule 1 to the Regulations, a Rule which states that, -

> "(1) Where at a Preliminary hearing (under Rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable 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."

99. In the present case, the Respondent's representative has asked the Tribunal to make an Order that in respect of each head of claim made by the Claimant in the ET1 - [i.e. in respect of each of his unfair (constructive) dismissal claim and his direct sex discrimination claim] - he should be required to pay a deposit not exceeding £1,000.00 as a condition of continuing to advance the allegation or argument in question.

100. When making his submissions the Respondent s representative has referred the Tribunal to the guidance given by the EAT in the case of **Mr J Wright v Nipponkoa Insurance (Europe) Limited,** a case in which the way in which a Claimant had put his case before the first-instance Tribunal had not been taken into account by the Employment Judge who conducted that first-instance Hearing and where it was determined that Rule 39(1) as contained in Schedule 1 to the Regulations entitled a first-instance Tribunal to make separate Deposit Orders in

respect of individual arguments or allegations provided, when doing so. it the first-instance Tribunal, had regard to both the question of proportionality in terms of the total award made and proper regard to the total sum awarded.

101. The Tribunal believes that the facts in the present case are such that the Claimant has little reasonable prospect of succeeding in persuading a Tribunal at a final hearing of his claim either that he had been unfairly (constructively) dismissed by the Respondent or that the Respondent had directly discriminated against him on the ground of his sex. In which case, the Tribunal has determined that it is, in this case, appropriate to make one Deposit Order in respect of the Claimant's claim of unfair (constructive) dismissal a separate Deposit Order in respect of his claim of direct sex discrimination.

102. The Claimant has stated in correspondence and again at the 14 August Preliminary Hearing that he accepts that so far as each of his heads of claim is concerned “I cannot prove either 100%” that “at present I am in a 50/50 situation where the Respondent disputes my version of events and that although his hope is that presentation of his case at Final Hearing will result in the percentages changing to “70 and 80 percent respectively” by casting “serious doubt on the Respondent’s version of events" “if I didn’t think I had at least a 65% chance of success I wouldn’t have started the process” and that he would not be willing to continue to a Final Hearing by paying a Deposit Order if, after the August Preliminary hearing, he felt that he had less than a 65% chance of success.

103. So far as these observations made by the Claimant, both in correspondence and at the 14 August Preliminary Hearing, are concerned, the Tribunal wishes to stress - (indeed, cannot stress too strongly) - both that the decision as to success or otherwise will, in the end of the day, rest with the Tribunal considering the Claimant's complaint at final hearing and that the Tribunal dealing with the issues with which it was charged to deal at the purpose-specific 14 August Preliminary Hearing is not intent on attributing any percentage figure to the likelihood - (or otherwise) - of either of the Claimant s heads of claim succeeding at final hearing.

104. The Tribunal has noted that the Claimant had been warned by the Respondent's representative, in writing, that the Respondent's representative would seek Deposit Orders at a figure of £1,000.00 in respect of each head of claim, i.e. a total of £2,000.00.

105. The Tribunal was satisfied from what he had said both in writing and during the course of the 14 August Preliminary Hearing that the Claimant did not seek to argue that he would be unable to pay the Deposit sought in respect of each head of his claim, a total of £2,000.00.

106. The Tribunal has therefore determined that the Claimant shall be ordered to pay a deposit of £1,000.00 as a condition of continuing to advance his allegation or argument that he had been unfairly (constructively) dismissed by the Respondent and, separately, a deposit of £1,000.00 as a condition of continuing to advance his allegation or argument that he had been discriminated against by the Respondent on the ground of sex.

107. The decision as to whether or not to go ahead with his claim in the face of and in the realisation of Deposit Orders being made against him is a decision which must rest entirely with the Claimant. That said, however, it is appropriate for the Tribunal to refer the parties to the provisions of sub-sections (4), (5) and (6) of Rule 39 as contained in Schedule 1 to the Regulations, provisions, to which, in part at least, the Tribunal Office will no doubt refer when sending the Claimant a covering letter with the Deposit Orders that will follow on from the promulgation of this Judgment.

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Employment Judge: **C Lucas**
Date of Judgment: **06 September 2018**
Entered in register: **17 September 2018**
and copied to parties