



## EMPLOYMENT TRIBUNALS

**Claimant:** D

**Respondent:** E

**Heard at:** Birmingham (by CVP)

**On:** 8 January 2024

**Before:** Employment Judge Gilroy KC

### Appearances

For the Claimant: In person

For the Respondent: Mr S Willey (Solicitor)

## ORDER

1. The Claimant has, within the meaning of Rule 39 of Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, “the Tribunal rules”, “*little reasonable prospect of success*” in resisting the justification defence of the Respondent to the sole remaining claim of indirect sex discrimination, should the need for the Respondent to rely on that defence arise.
2. In the circumstances, the Claimant is ordered to pay a deposit of £400 no later than 4.00 pm on 22 January 2024 as a condition of being permitted to continue with this claim.

## REASONS

### Introduction

- (1) The Respondent applied for a deposit order against the Claimant, pursuant to Rule 39 of the Tribunal rules.
- (2) For the purposes of determining the Respondent’s application, I was provided with the following:

- (a) preliminary hearing bundle of documents (62 pages), and
- (b) skeleton argument dated 2 January 2024, prepared on behalf of the Respondent.

The bundle contained an order dated 17 May 2023 made by the Employment Appeal Tribunal, "EAT" in this matter following a hearing on 1 February 2023. The Tribunal also had available the full judgment delivered by the EAT following that hearing.

- (3) The Claimant sought an adjournment of the hearing of 8 January 2024, stating that he did not have a copy of the Respondent's skeleton argument or the papers generally. The Claimant was aware that the hearing on 8 January 2024 had been listed at a preliminary hearing conducted on 9 August 2023, at which he was represented by a pupil barrister, and that at that hearing, directions had been given for the provision of a bundle of documents and (if so advised) statements for the purposes of the hearing on 8 January 2024. In particular, the Respondent was directed to prepare a bundle of documents and send a hard copy to the Claimant by 14 December 2023, and further that the Claimant and the Respondent must both bring a copy of the bundle to the hearing for their own use.
- (4) Irrespective of whether or not the Claimant had received the papers for the preliminary hearing on 8 January 2024 (and Mr Willey for the Respondent maintained that they had been sent to him), the Tribunal was entirely satisfied that the Claimant was aware of the directions referred to at paragraph (3) above, and considered it noteworthy that if the Claimant had not been in receipt of those documents, he had taken no steps to obtain them before the hearing on 8 January 2024, notwithstanding his awareness that he should have received them no later than 14 December 2023, and the Tribunal's direction that both parties must both bring a copy of the bundle to the hearing for their own use.
- (5) The Tribunal took care to ensure that the Claimant was fully aware of the material the Respondent relied upon in support of its application, and required the Respondent's solicitor to go through his (two page; 21 paragraph) skeleton argument slowly and with care to ensure that the Claimant understood the basis of the Respondent's application.

### **Application for a deposit order**

- (6) This case began as a claim of sex discrimination and unlawful deductions. The matter came before Employment Judge Cookson at a case management preliminary hearing on 17 November 2020. It was directed that a preliminary hearing be convened for the purposes of the Tribunal determining whether the sex discrimination claim should be struck out under Rule 37 of the Tribunal rules, or a deposit order made under Rule 39.

- (7) I refer to the case summary contained in the record of the preliminary hearing held on 17 November 2020:

*“36. The claimant was employed by the respondent, a charity which works with young people. The claim form was presented on 1 August 2020.*

*37. The claim is about the reason for the termination of the claimant’s employment. The claimant was arrested in connection with an allegation of rape made against him by his wife in November 2019. It appears the case is still being investigated and he has not been charged. The claimant was subsequently dismissed and believes this was sex discrimination because it was connected with the rape allegation. The claimant does not have sufficient service to claim unfair dismissal.*

*38. In its response the respondent says that the reason for the claimant's dismissal was redundancy. It is significant that the respondent says (that) even if the tribunal finds that the allegation of sexual misconduct was the reason or part of the reason for the claimant's dismissal then the respondent will say that he was not dismissed because he was male. He was dismissed because he had been accused of sexual misconduct. The respondent would have acted in the same way if the person involved was female. It was the fact and nature of the allegation which was relevant and not the sex of the alleged perpetrator.*

*39. We spent some time discussing the claimant’s case. He says he is not claiming direct discrimination, that is that his dismissal was because of his sex. Rather he says he was the subject of indirect sex discrimination.*

***indirect discrimination (Equality Act 2010 (EqA) section 19)***

*40. Indirect discrimination occurs when an employer applies a provision, criterion or practise (PCP) to an employee which is discrimination discriminatory in relation to a protected characteristic possessed by that employee, in the claimant’s case disability<sup>1</sup>. Such discrimination can only occur where the PCP is one that the employer applies, or would apply, to people who do not share the protected characteristic - i.e. the PCP must be of neutral application.*

*41. The claimant says that the PCP in this case is a practice that if an allegation of rape is made it is investigated by a line manager who makes the decision about the individual's employment and he says this impacts disproportionately against men because only men will be accused of rape.*

*42. The respondent says that it does not have a specific practice in relation to rape. It has the same practise in relation to any serious criminal accusation and in particular in relation to any allegation of serious sexual misconduct because it looks after vulnerable young people. It denies that there are any statistics or evidence which would suggest a disproportionate impact on men.*

*43. I am aware that the claimant struggled to understand why I raised concerns about whether the claimant’s PCP could work both in terms of the PCP itself (and) also the question of disproportionate impact so I have added some further narrative here. For an indirect discrimination claim to succeed each (of) the four elements of s.19(2) EqA must be met, namely:*

---

<sup>1</sup> The reference to disability was plainly an error. The relevant protected characteristic is clearly sex.

43.1. *there must be a PCP which the employer applies or would apply to employees who do not share the protected characteristic of the claimant;*

43.2. *that PCP must put people who share the claimant's protected characteristic at a particular disadvantage when compared with those who do not share that characteristic;*

43.3. *the claimant must experience that particular disadvantage;*

43.4. *the employer must be unable to show that the PCP is justified as a proportionate means of achieving a legitimate aim.*

43.5. *In *Dziedziak v Future Electronics Ltd* EAT 0271/11, a claim of indirect sex discrimination brought by a woman, Mr Justice Langstaff, then President of the EAT, stated: "In this case the matters that would have to be established before there could be any reversal of the burden of proof would be, first, that there was a provision, criterion or practice, secondly, that it disadvantaged women generally, and thirdly, that what was a disadvantage to the general created a particular disadvantage to the individual who was claiming. Only then would the employer be required to justify the provision, criterion or practice, and in that sense the provision as to reversal of the burden of proof makes sense, that is, a burden is on the employer to provide both explanation and justification".*

43.6. *Since a claimant bears the burden of proof in respect of the first three conditions in s.19(2), the claimant must identify the PCP capable of supporting his case.*

43.7. *My concern about the claimant's alleged PCP is illustrated by the case of *Taiwov Olaigbe and anor* EAT 0254/12 where the EAT held that 'the mistreatment of migrant workers' did not amount to a valid PCP. The suggested PCP would apply only to migrant workers, so it was not on its face a neutral criterion that disproportionately disadvantaged some of those to whom it applied when compared with others to whom it applied. Insofar as the claimant says that the PCP should refer to an allegation of rape "because only men would be charged with rape" the claimant's own assertion of the PCP would not be valid because it would not apply to women.*

43.8. *In the circumstances I consider that it is appropriate for the preliminary hearing to consider if the claimants indirect sex discrimination claim has little or no reasonable prospect of success".*

- (8) On 27 November 2020, the Respondent filed Supplementary Grounds of Resistance in order to deal with the claim of indirect discrimination. It denied operating the PCP identified by the Claimant (see paragraph 41 of the judgment of Employment Judge Cookson quoted at paragraph 7 above). It stated that the Respondent did not carry out an investigation into the allegation of rape but that it was advised by the police that the allegation had been made and was under investigation. The Respondent contended that it had noted that fact but took no action in relation to it as the Claimant was already suspended from work for an unrelated reason. The Respondent asserted that the Claimant was subsequently at risk of redundancy following the loss of the contract on which he was employed, and the Respondent elected not offer him an alternative position for a number of reasons, one of

which was that at that time he remained under investigation for a sexual crime. The Respondent asserted that it does not have a specific procedure to deal with allegations of rape made against its employees and because it has care of vulnerable young people, it deals with any and all allegations or convictions relating to sexual misconduct in the same way. The Respondent asserted that this would involve an assessment of the risk the employee in question represents if they continue to work and in assessing that risk the Respondent would have regard to any relevant professional advice it might access, and to relevant facts about the case. The Respondent maintained that it would adopt the same procedure regardless of the sex of the employee concerned and submitted that the Claimant's claim was not made out. In the alternative, the Respondent asserted that if, notwithstanding the above, the Tribunal found that the Respondent did operate the relevant PCP then it would deny that it had disparate impact and no evidence to that effect had ever been produced.

- (9) The applications under Rules 37 and 39 were listed for a preliminary hearing before Employment Judge Hughes on 1 February 2021<sup>2</sup>. The outcome of that hearing was that the Claimant's indirect sex discrimination claim was struck out on the basis that it had no reasonable prospect of success.
- (10) The following is an extract from the judgment issued following the hearing on 1 February 2021:

*"12. I have taken the claimant's indirect sex discrimination case at its highest i.e. that 8.1 and 8.2 are proved correct i.e. that he was not offered redeployment because of the rape allegation. That cannot possibly succeed as an indirect sex discrimination claim because the claimant cannot establish it is a neutral PCP. His case is predicated on the argument that only men can be accused of rape and therefore the alleged PCP places men at a disadvantage, and that he, as a male, was disadvantaged by not being retained. That PCP would not apply to women and is therefore not neutral.*

*13. I have explained this to the claimant, but he did not accept it.*

*14. I have suggested that the claimant's case, as put by him, would be of direct sex discrimination i.e. that not being retained because of the unresolved rape matter, was less favourable treatment because he is a man. Judge Cookson also explored that possibility. A direct sex discrimination claim, in my judgement, is arguable in law, but is not without real evidential difficulties. If that had been the claimant's case, it is likely that I would have ordered a deposit on grounds of little reasonable prospect of success. However, the claimant confirmed three times that he is not claiming direct sex discrimination, but indirect.*

*15. My reasons for concluding that this is not a tenable argument in law are essentially the same as those set out by Judge Cookson when she explained her reasons for listing a strike out/deposit hearing. I infer, from the wording she used, that she did not think the claimant understood the point she was making. I have tried to explain the point again, because indirect discrimination is a very difficult concept,*

---

<sup>2</sup> There is a typographical error in the heading of the judgment issued following that hearing in that it suggests that the hearing took place on 1 February 2020.

*but I fear that I too was unsuccessful. The claimant described the case management discussion as a "breakthrough moment", which rather missed the point.*

*16. Because the claimant is unrepresented, I canvassed an alternative PCP with the respondent and with him. This was, that when an allegation of serious sexual misconduct is made against a member of staff, they are suspended on full pay, pending the outcome of the police investigation, after which consideration is given as to whether further action by the respondent is necessary. Mr Willey was prepared to concede that the respondent might be said to operate such a PCP. He was prepared to concede, for the purposes of the hearing before me, that such a PCP might disadvantage men more than women if, statistically, men are more likely to be accused of a serious sexual offence. Without seeing statistics, and without wishing to make stereotypical assumptions, it seemed to me the latter proposition was tenable. Mr Willey said that if such a PCP were to be established, then it would evidently be justifiable because of the nature of the respondent's business. That is a fair point. Also, given the (agreed) circumstances, it could be argued that suspension on full pay is the least detrimental course of action, and preserves the status quo.*

*17. Whilst not accepting my suggested formulation of a PCP, the claimant conceded that it would be a reasonable PCP and that it would be justifiable to be suspended on full pay, but said it would still be unlawful because it disadvantaged him as a man accused of rape because it resulted in his dismissal. Put another way, the claimant's explanation of why my suggested PCP was unlawful relied on direct, not indirect, sex discrimination.*

*18. The above arguments were canvassed a number of times, with the same result and it is fair to say that the argument became circular.*

*19. Since the claimant expressly confirmed (more than once and on more than one occasion) that his claim is not for direct sex discrimination, I concluded that the indirect sex discrimination argument was untenable in law, and must be struck out as being totally without merit.*

*20. In my judgement, the claimant's claim is more properly viewed as one of unfair dismissal, which the Employment Tribunal has no jurisdiction to hear because he has insufficient service."*

- (11) The Claimant's claim for unlawful deductions was disposed of by agreement at the hearing on 1 February 2021.
- (12) The Claimant appealed against the striking out of his claim of indirect sex discrimination and the matter came before the EAT on 1 February 2023.
- (13) At the EAT, it was argued on behalf of the Claimant that the Employment Tribunal had applied the wrong test when striking out the indirect discrimination claim, in particular in relation to the identification of the particular disadvantage arising from the application of the PCP at paragraphs 16 and 17 of the written reasons. The Claimant contended that the Employment Tribunal had erred in failing to approach the application of the PCP on the basis of the particular disadvantage claimed by the Claimant (ie dismissal) and only in relation to suspension, so that it had not addressed the heart of the Claimant's case which was that he had suffered indirect

discrimination in relation to the decision that he should be dismissed instead of being redeployed.

- (14) The EAT held that it had been permissible for the Employment Tribunal to have identified an alternative PCP as outlined in the second sentence of paragraph 16 of the judgment of Employment Judge Hughes..
- (15) The EAT also noted the Respondent's concession before the Employment Tribunal that, firstly, the Respondent did operate such a PCP and, secondly, that it might disadvantage men more than women on the basis that men were more likely to be accused of serious sexual offences.
- (16) The EAT held that the Employment Tribunal had erroneously found that the way in which the Claimant put his claim that he would be disadvantaged by the application of the PCP was in substance a claim of direct discrimination. It was held that the Employment Judge materially erred in considering that the particular disadvantage relied on by the Claimant, namely dismissal, could only arise in connection with a direct discrimination claim and not by the application of the PCP referred to in paragraph 16 of the reasons. Even though the Claimant may have been emphasising the particular offence of rape in the way he put his case about particular disadvantage, it was clear that the substance of the disadvantage being claimed by him before the Employment Tribunal was dismissal.
- (17) The appeal was allowed. The order striking out the indirect sex discrimination claim was overturned, and that claim was remitted to the Employment Tribunal.
- (18) It is important to note the following:
  - (a) Because the Employment Tribunal did not consider that dismissal was even a potential outcome of the application of the reformulated PCP, it did not address justification. For that very reason, the EAT, likewise, did not consider the issue of justification.
  - (b) The EAT expressly stated that, notwithstanding its acceptance of the submission made on behalf of the Claimant that this PCP was sufficiently broadly worded to encompass the disadvantage of dismissal as a potential consequence, this should not, however, be taken as an indication that the Claimant's claim was likely to succeed if it proceeded to a full hearing, it being noted that it may well face considerable evidential difficulties in relation to the primary factual scenario, the demonstration on those facts of both group and individual disadvantage, and also in relation to the defence of justification.
  - (c) The EAT also noted that the Employment Tribunal had not addressed, because it was unnecessary to do so, the question of whether a deposit order ought to be made in relation to the indirect discrimination claim, and consideration could be given by the Employment Tribunal to the

making of such an order if the Respondent pursued such an application.

- (19) The matter came before Regional Employment Judge Findlay on 9 August 2023. The Respondent intimated its intention to pursue an application pursuant to Rule 39 in relation to the indirect discrimination claim. Directions were given for the conduct of a substantive hearing which is listed for 7 to 10 May 2024. I refer to and need say no more about the procedural timetable set out in REJ Findlay's order starting at paragraph 4, but I will quote in full paragraph 5 because that is definitively informative of the basis upon which the parties appeared before the Tribunal at the preliminary hearing on 8 January 2024<sup>3</sup>:

*"5 The Claimant's sole remaining complaint is of indirect sex discrimination and the issues to be remitted for hearing are as follows:*

- 5.1 The provision, criterion or practice ("PCP") relied upon is "when an allegation of serious sexual misconduct is made against a member of staff, they are suspended on full pay, pending the outcome of the police investigation, after which consideration is given as to whether further action by the Respondent is necessary."*
- 5.2 For the purposes of any final hearing, the Respondent disputes that it had such a PCP or that it applied it to the Claimant or that it would apply it to those with whom the Claimant does not share the protected characteristic (i.e. women).*
- 5.3 The concessions referred to at paragraph 16 of Judge Hughes' original judgment signed on for February 2021 (that the Respondent might be said to operate such a PCP and that such a PCP might disadvantage men more than women) were made for the purposes of the strikeout hearing on 1 February 2021 before Judge Hughes only, when the Claimant's case must be taken at its highest. The Respondent recognises that for the purposes of any deposit hearing, the Claimant's case must also be taken at its highest....*
- 5.4 The Respondent has looked at data for the previous 5 years and has found that only 2 other staff members (who have been accused of serious sexual misconduct in that period, and both were male). As a result, it accepts that if there was such a PCP and it was or would be applied (all of which are denied for the purposes of any final merits hearing in this case) then it would put men at a particular disadvantage when compared with women.*
- 5.5 That particular disadvantage is the risk of dismissal.*
- 5.6 The issue regarding justification under section 19(2)(d) of the Equality Act 2010 are whether the Respondent had a legitimate aim*

---

<sup>3</sup> The directions issued in relation to the hearing listed for 8 January 2024, referred to at paragraph (3) above, were set out at paragraphs 9 to 14 of the order made at the hearing on 9 August 2023.



*of protecting the vulnerable young people in its care and/or of meeting standards laid down by its regulator.*

*5.7 And whether the PCP, if applied was a proportionate means of achieving those aims.”*

- (20) REJ Findlay gave consequential directions, including giving the Respondent permission to file an amended response by no later than 6 September 2023. In its supplementary grounds of resistance, filed on 30 August 2023, the Respondent expanded upon the issue of justification, asserting that whilst the PCP was denied for the purposes of the final hearing, the Respondent contended that if the relevant PCP had been applied, its application was justified in that it amounted to a proportionate means of achieving a legitimate aim, namely the protection of children and young adults in its care and the meeting of its statutory and regulatory requirements.
- (21) The matter came before the Tribunal at the preliminary hearing on 8 January 2024, therefore, on the question of whether under Rule 39, the Claimant has little reasonable prospect of succeeding in dealing with the Respondent’s defence of justification, assuming, for the purposes of the preliminary hearing, that the PCP existed and that it was or would be applied.

### **Rule 39**

- (22) Rule 39 of the Tribunal rules provides as follows:

#### ***“Deposit orders***

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

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

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

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

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

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

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

*otherwise the deposit shall be refunded.*

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

## **Discussion**

- (23) For the purposes of any final hearing, the Respondent disputes that the reformulated PCP was in existence, or that it applied it to the Claimant or that it would apply it to those with whom the Claimant does not share the protected characteristic (ie women). If, however, it is established that the PCP was applied to the Claimant, the Respondent, whilst accepting that it would disadvantage men disproportionately, will contend that the application of the PCP was justified within the meaning of s.19(2)(d) of the EqA, in that it had the legitimate aims of protecting the vulnerable young people in its care and/or of meeting standards laid down by its regulator, and that the PCP, if applied, was a proportionate means of achieving those aims, in other words it was justified within the meaning of the legislation.
- (24) The role of the Tribunal in assessing the defence of justification is to strike a balance between the discriminatory effect of the PCP and the Respondent's need to apply it (*Hampson v DES 1989*] ICR 179 CA). The burden of showing that the operation of the PCP is objectively justified lies with the Respondent.
- (25) The test for making a deposit order is obviously less rigorous than the test under the strike out provisions of Rule 37. It is not for me to conduct a mini-trial of this matter. I have to reach a broad view, assuming that the Claimant succeeds on the issue of the existence and actual or potential application of the PCP, but to look beyond that issue and examine, in those circumstances, whether the Claimant has little reasonable prospects of dealing with the argument put forward by the Respondent on justification, namely whether PCP, if it existed, was in place to achieve by proportionate means a legitimate aim. I have to look at the assessment of the objective justification defence at the time that the PCP was applied and again I am assuming, for today's purposes, that the relevant PCP was applied.
- (26) When considering the issue of justification, a Tribunal cannot reject a legitimate aim simply because there may have been a less discriminatory way of achieving the outcome. If an alternative method existed of dealing with the challenge posed to the Respondent by employees who, like the Claimant, are accused of serious sexual offences and which had a less serious

discriminatory effect, then the Respondent would be expected to utilise it. However, none was put forward by the Claimant.

- (27) The Tribunal should consider the numbers of people likely to be adversely affected by the PCP, and the degree of hurt or disappointment suffered by them, and should have regard to the factual basis upon which the defence is put forward. Here, the Respondent says it is clear that protecting the needs of vulnerable service users and/or of meeting standards laid down by its regulator is likely to be found to be a legitimate aim.
- (28) If I am against the Respondent on the merits of its argument under Rule 39, that is an end to the matter and no order for a deposit can be made. If, however, I am with the Respondent in relation to the merits of its argument under Rule 39, I then have to consider the question of the Claimant's means to satisfy such an order.

### **Conclusion**

- (29) I am satisfied that a deposit order should be made in this case. I am satisfied that under Rule 39, the Claimant's prospects of dealing with the proposed defence of justification under s.19(2)(d) of the EqA are very low.
- (30) I consider it very unlikely that in the event that the Respondent is required to establish the defence of justification, an Employment Tribunal would conclude, on the facts of this case, that protecting the needs of vulnerable service users is not a legitimate aim, or that when an allegation of serious sexual misconduct is made against a member of staff, suspension on full pay, followed by further action, including dismissal, for someone in the Claimant's position, was not a proportionate means of achieving that aim.
- (31) In his submissions, the Claimant relied heavily upon the EAT's decision in his favour, remitting this matter to the Employment Tribunal, but the EAT was dealing with (as it found) a legal error made by the original Tribunal in its treatment of the reformulated PCP. As stated above, the EAT did not deal with the issue of justification, and it is important to note, and it is important in particular for the Claimant to understand, that the EAT did not deal with the issue of justification, or the likelihood of that defence succeeding in this case.
- (32) I am entirely satisfied that the Claimant has very poor prospects of succeeding in his response to the defence of justification, should the Respondent be required to establish that defence. I am not asked to strike this case out under Rule 37. I am asked the question as to whether the lower threshold under Rule 39 is made out. I am satisfied that that threshold is made out. It therefore falls to me to decide what the amount of the deposit should be.
- (33) The Claimant's position is that he is in absolute penury. It is no exaggeration to put matters on that basis. He has provided details of his bank account. He has provided a witness statement in which he talks about his financial predicament. He says he has no savings. He says that he often receives text

messages from his bank saying that he has exceeded his overdraft. He has no assets, such as a car. He travels by bus. Even bus fares are an expense it would appear he has difficulty in meeting. He is on Universal Credit. He says that his only source of income is the £4.50 per week he gets paid for his bus fare by the Citizens Advice Centre where he does voluntary work.

- (34) I have to be fair to both parties. I have to acknowledge, as was urged upon me by Mr Willey, that one of the reasons a deposit order is made is to send a message to the party against whom the order is made as to the view the Tribunal takes of the merits of their case, because what is going to happen if this case proceeds is that the Respondent is going to be put to substantial expense by attending and dealing with a 4 day Employment Tribunal hearing. I am informed that the basis of funding for the Respondent is that it is a member of the organisation Mr Willey is employed by, is the solicitor for, and that the Respondent's legal costs are covered save that when it comes to a contested substantive hearing. Counsel's fees have to be paid for as a disbursement. I cannot imagine that will amount to anything other than several thousand pounds. On the other hand, the Claimant maintains that he literally does not have a pound to spare and that is the reality of his financial predicament.
- (35) It is not possible to reach a conclusion on this issue that will satisfy both parties and I am conscious of the need not to make an order that of itself simply means that the Claimant gives up and does not pursue his claim. I have very much borne that in mind in arriving at the figure which I say must form the basis of a deposit order. I cannot in all conscience make an order for anything less than £400.
- (36) Given that the Claimant has, within the meaning of Rule 39 of the Tribunal rules, "little reasonable prospect of success" in resisting the justification defence, should the need for the Respondent to rely on that defence arise, the Claimant is ordered to pay a deposit of £400 no later than 4.00 pm on 22 January 2024 as a condition of being permitted to continue with this claim.

---

**Employment Judge Gilroy KC**

**Date 9th February 2024**

