Neutral Citation Number: [2024] EAT 62

Case No: EA-2023-000063-AS

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 11 April 2024

Before:

THE HONOURABLE MR JUSTICE BOURNE

- -

Between:

MR ALEXANDER BARNETT

Appellant

- and -

(1) H & H GELATO LIMITED

(2) MR OMEAD AWIEZI

(3) MS LIZ ZHOU

Respondents

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- -

Mr Rad Kohanzad & Mr Max Lansman (instructed by **Atkinson Rose LLP**) appeared for the **Appellant**
Mr Vincent Onuegbu (Solicitor/Advocate) appeared for the **Respondents**

Hearing date: 11 April 2024

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JUDGMENT

SUMMARY

Practice and procedure

Whistleblowing, protected disclosures

The reasons given by an Employment Judge did not sufficiently explain the basis for making a Deposit Order in relation to part of this whistleblowing claim.

THE HONOURABLE MR JUSTICE BOURNE:

Introduction and Factual Background

1. This is an appeal by Mr. Barnett, one of two claimants before the ET, against a decision made by EJ Russell at a preliminary hearing on 11th November 2022 requiring him to pay a deposit as a condition of being permitted to continue to advance his claims for protected disclosure detriment under section 47B of the Employment Rights Act 1996, victimisation under section 27 of the Equality Act 2010 and automatic unfair dismissal under section 103A of the Employment Rights Act 1996. The order required him to pay £100 in respect of each of those three claims.

2. Mr. Barnett was employed by the first respondent, H & H Gelato Limited ("H & H") as shift leader. The second respondent, Mr. Awiezi, was the owner and manager of H & H which was a franchise business, the franchisor being Creams Franchising Limited ("Creams").

3. On 7th December 2020, Mr. Barnett made oral allegations to the HR department of Creams about behaviour by Mr. Awiezi, including allegations that offensive comments were made to or about female staff members. Mr. Barnett was asked to put these in writing and did so on 15th December 2020. On that occasion he asked for details of his complaint to be kept confidential from Mr. Awiezi and his manager, a Mr. Dhanili, until "we can agree on further action or when contract law forces you to action".

4. In this claim Mr. Barnett alleges that on or around 21st December 2020, Mr. Dhanili made three comments which suggested that, despite the request for confidentiality, he knew about the complaints to Creams and believed that Creams was going to protect H & H and Mr. Awiezi rather than looking into the allegations. Although he was told on 5th January 2021 that Creams would investigate his allegations, he then heard nothing further. He claims that he

resigned on 4th February 2021 in part because of Mr. Awiezi's behaviour and in part because of Creams' failure to investigate his complaints adequately or at all.

5. Mr. Barnett claims that:

i) His complaint to Creams was a protected disclosure and he was subjected to detriments as a result of it, namely the comments made by Mr. Dhanili on or around 21st December 2020 and a failure to investigate by Creams in the capacity of agent for H & H.

ii) In the alternative, the complaint to Creams was a protected act and the failure to investigate was a detriment resulting from it contrary to section 27 of the Equality Act 2010, and

iii) The conduct of Mr. Awiezi and the failure of Creams to investigate his complaints amounted to constructive dismissal which was automatically unfair because it resulted from a protected disclosure.

6. He also makes a claim that Mr. Awiezi's comments amounted to sexual harassment or sex-related harassment contrary to section 26 of the Equality Act 2010. The deposit order did not relate to that claim, but that claim provides the basis for any section 27 claim.

Legal Framework

7. Rule 39 of the Employment Tribunal's Rules of Procedure 2013 provides:

> "(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".

8. Sections 26 and 27 of the Equality Act 2010 provide:

"**26 Harassment**

(1) A person (A) harasses another (B) if—"

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of—

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(2) A also harasses B if—

(a) A engages in unwanted conduct of a sexual nature, and

(b) the conduct has the purpose or effect referred to in subsection (1)(b).

(3) A also harasses B if—

(a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,

(b) the conduct has the purpose or effect referred to in subsection (1)(b), and

(c) because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect.

(5) The relevant protected characteristics are—

age;

disability;

gender reassignment;

race;

religion or belief;

sex;

sexual orientation.

27 Victimisation

> (1) A person (A) victimises another person (B) if A subjects B to a detriment because—
>
> (a) B does a protected act, or
>
> (b) A believes that B has done, or may do, a protected act.
>
> (2) Each of the following is a protected act—
>
> (a) bringing proceedings under this Act;
>
> (b) giving evidence or information in connection with proceedings under this Act;
>
> (c) doing any other thing for the purposes of or in connection with this Act;
>
> (d) making an allegation (whether or not express) that A or another person has contravened this Act.
>
> (3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.
>
> (4) This section applies only where the person subjected to a detriment is an individual.
>
> (5) The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule."

9. Section 47B of the Employment Rights Act 1996 provides, so far as material:

> "(1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure."
>
> (1A) A worker ("W") has the right not to be subjected to any detriment by any act, or any deliberate failure to act, done—
>
> (a) by another worker of W's employer in the course of that other worker's employment, or
>
> (b) by an agent of W's employer with the employer's authority,
>
> on the ground that W has made a protected disclosure.

> (1B) Where a worker is subjected to detriment by anything done as mentioned in subsection (1A), that thing is treated as also done by the worker's employer.
>
> (1C) For the purposes of subsection (1B), it is immaterial whether the thing is done with the knowledge or approval of the worker's employer."

10. A protected disclosure is defined by sections 43A and 43B of the Employment Rights Act 1996. For present purposes it is not necessary to set those out.

11. For the purposes of a claim under section 37B, a detriment is inflicted "on the ground" of a protected disclosure if the protected disclosure materially influences (in the sense of being more than a trivial influence on) the employer's treatment of the whistle-blower: **NHS Manchester v Fecitt & Ors** [2012] ICR 372.

12. Section 103A of the Employment Rights Act 1996 provides:

> "An employee who is dismissed shall be regarded for the purposes of this part as unfairly dismissed if the reason (or if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure".

The Employment Judge's Decision

13. Having heard argument at the preliminary hearing, the Employment Judge decided:

> "13. Dealing first with the protected disclosure complaints, I am satisfied that Mr Barnett does on the face of it have reasonable prospect of showing that he did disclose information to an appropriate body or entity, namely the franchisor Creams. There are certainly issues of fact as to whether he had the necessary reasonable belief that it was in the public interest, but these are matters of fact to be decided on the evidence. I do not accept that there are little reasonable prospects of Mr Barnett being able to prove that he made a protected disclosure.
>
> 14. However, the Claimant will also need to show that he was subjected to a detriment and/or dismissed as a result of any protected disclosure. The comments made by Mr Dhanili on 21 December 2020 were, on Mr

> Barnett's own case, that Creams were on the side of H & H Gelato Limited and would not be investigating. In other words, that it was Creams who failed to investigate and there is no pleaded assertion or factual basis for an instruction from either Respondent. Having regard to the nature of the complaint, Mr Barnett's initial request for confidentiality and the nature of the detriment I have concluded that there is little reasonable prospect of Mr Barnett showing that Creams breached his confidentiality and/or that H & H Gelato Limited had instructed Creams, the legally more powerful company as franchisor, not to investigate a serious complaint of wrongdoing made to a dedicated whistle-blowing service. Those are assertions which lack plausibility or evidential basis and, therefore, have little reasonable prospects of success.
>
> 15. The same reasons apply to the victimisation claim which significantly overlaps with the protected disclosure detriment claim.
>
> 16. With regard to the automatic unfair dismissal claim, Mr Barnett's case is that the protected disclosure was the sole or principle reason for his resignation. His resignation letter however stands in stark contradiction to that, suggesting as it does that he left in relatively happy circumstances and for the purposes of pursuing a more congenial career. It may well be, as Ms Thom submits, that Mr Barnett will persuade the Tribunal that what he said in his resignation letter was not in fact accurate. However, reaching a provisional view on the evidence before me today, I do not find his position credible. Moreover, any protected disclosure would have to be the sole or principal cause for resignation entitling him to treat himself as dismissed and a very large part of his reasons were Mr Awiezi's conduct which pre-dated any disclosure."

The Grounds of Appeal

14. By his numbered grounds, Mr. Barnett contends that:

i) The ET erroneously assumed that his case in relation to the first detriment (Mr. Dhanili's comments on or around 21st December 2020) was predicated upon an instruction from one of the respondents to Creams, or in the alternative, the ET failed to explain why he has little or reasonable prospect of establishing that Mr. Dhanili said the things alleged. The entirety of the ET's reasoning appears to

focus on the implausibility of an instruction from one of the respondents to Creams, but that relates to the second detriment (a failure by Creams on instruction from H & H to investigate).

ii) If ground 1 succeeds and he does have a reasonable prospect of establishing that Mr. Dhanili said the things alleged on or around 21st December 2020, then the ET erred in deciding that he has little reasonable prospect of establishing that Creams breached his confidentiality, the issue being simply whether the protected disclosure materially influenced (in the sense of being more than a trivial influence on) Creams' failure to investigate. The ET erred by focusing on the need to establish an instruction from either respondent to Creams.

iii) The ET erred in finding that there is little reasonable prospect of the whistle-blowing detriments being the principal reason for dismissal, just because he also resigned because of alleged harassment, where the detriments complained of are inextricably linked to the harassment (i.e. comments made about the investigation into those complaints and failure to investigate them). The ET also erred in reaching that conclusion because of the terms of his resignation letter, given that he has an extant claim for harassment which he claims was one cause of his resignation, which claim was not the subject of the deposit order.

The Parties' Submissions

15. Mr. Barnett was represented by Rad Kohanzad leading Max Lansman of counsel.

16. On ground 1, Mr. Kohanzad contended that it was not his client's case that Creams had necessarily said any of the things stated in Mr. Dhanili's comments. Mr. Dhanili might have misunderstood or assumed or invented any part of what he went on to say. The key issue was simply whether Mr. Dhanili made the comments, as Mr. Barnett alleges, and the EJ did not appear to appreciate this. The assertion that the comments were made was not inherently improbable. The EJ was also wrong to think that the claim based on the first detriment (Mr. Dhanili's comments) was predicated on any instruction not to investigate having been given to Creams by any other respondent.

17. On ground 2, Mr. Kohanzad argued that if ground 1 succeeds and there is therefore a reasonable prospect of proving that Mr. Dhanili made the comments alleged, then it also could not reasonably be said that Mr. Barnett has little reasonable prospect of proving that Creams was guilty of a breach of confidentiality. That in turn would corroborate Mr. Barnett's case on the second detriment, namely that Creams, as agent for and with the authority of H & H, failed to investigate. Again, this was not predicated on any instruction not to investigate having been given to Creams by any other respondent. Instead, an ET could infer that Creams and Mr. Dhanili had a conversation which materially influenced Creams not to investigate Mr. Barnett's allegations, with or without an instruction from Mr. Dhanili.

18. On ground 3, Mr. Kohanzad emphasised that the detriments complained of were inextricably linked with the alleged harassment by Mr. Awiezi. The question of whether the former were the "principal" cause of a constructive dismissal was a question for evidence to be heard at a trial. He further submitted that if the harassment claim itself has a reasonable prospect of success, then it cannot properly be said that a resignation letter which did not refer to the

harassment means that the automatic unfair dismissal claim has little reasonable prospect of success.

19. The respondents were represented by Vincent Onuegbu, Solicitor Advocate. He submitted that the Employment Judge, when making her decision, weighed and balanced all the relevant factors and made a proper exercise of her discretion under rule 39 and that there were ample reasons justifying each part of her decision.

20. Mr. Onuegbu also made a number of other submissions, although all of these, in my judgment, are matters which would have to be decided at any trial of the claim and therefore do not assist me in resolving this appeal. Those other submissions were that:

i) Mr. Dhanili denies making the comments which Mr. Barnett attributes to him;

ii) In any event, the claim was brought out of time;

iii) The alleged disclosure by Mr. Barnett was not a protected disclosure because it was not made in the public interest;

iv) Mr. Barnett's request for confidentiality in effect signalled that the complaint should not be investigated and he never made any effort to progress it himself;

v) The respondents could not investigate a complaint about which they knew nothing, and

vi) Mr. Barnett is not a credible witness, having admitted that a statement in his resignation letter that he was leaving to move to a different job, was not true.

Discussion

21. Under rule 39, the EJ was required to decide first whether Mr. Barnett had "little reasonable prospect of success in proving his relevant allegations". That involved a nuanced judgment. This Tribunal would be slow to interfere with relevant inferences which an Employment Judge draws from conclusions of fact or law when reaching such a decision. However, it is legitimate for this Tribunal to review the logical basis for those conclusions of fact or law. A clear error of logic which undermines a factual or legal conclusion may justify allowing an appeal and also the usual requirements apply to the clarity of the reasons given for the decision.

22. In this case, Mr. Kohanzad challenges the Employment Judge's analysis of the elements of each of the relevant claims by Mr. Barnett.

23. It is necessary, in my judgment, to identify the elements of each discrete relevant claim advanced by Mr. Barnett.

24. In this case the Employment Judge assessed the prospects of success of three claims, i.e. "protected disclosure detriment", victimisation, which can be described as "detriment because of a protected act" and "automatic unfair dismissal".

25. However, the claimant identified two distinct detriments as the basis or a possible basis for each of the first two of those claims. This matters because the Employment Judge's reasoning does not apply in the same way to both detriments.

26. It therefore seems to me that in effect the EJ needed to consider five discrete claims or strands of claim:

i) Mr. Barnett was subjected to a detriment, namely the comments made by Mr. Dhanili on the ground of his having made a protected disclosure;

ii) He was subjected to the same detriment as in (i) above because he had made an allegation protected by section 27 of the 2010 Act;

iii) He was subjected to a detriment, namely a failure by Creams (brought about by H & H and/or Mr. Awiezi) to investigate his complaint on the ground of his having made a protected disclosure;

iv) He was subjected to the same detriment as in (iii) above because he had made an allegation protected by section 27 of the 2010 Act, and

v) His (alleged) protected disclosure was the sole or principal cause of his resignation, which therefore amounted automatically to constructive unfair dismissal.

27. Each of the first two of those claims, which are based on the first alleged detriment, has three elements, namely:

i) that Mr. Dhanili made the comments;

ii) that the comments amounted to a detriment, and

iii) that a protected disclosure by Mr. Barnett had a more than trivial influence on Mr. Dhanili when he made the comments.

28. As Mr. Kohanzad says, the comments in paragraph 14 of the Employment Judge's reasons do not make it entirely clear on which of these elements there was "little reasonable prospect of success". The second element was not discussed and was not identified as posing any problem. The opening words of paragraph 14 suggest that the third element was relevant, but the final two sentences of that paragraph tend to suggest that the perceived problem would be in proving the first element, i.e. the making of the comments. In particular, I focus on the EJ's view that "there is little reasonable prospect of Mr. Barnett showing that Creams breached his confidentiality" and that this was one of two "assertions which lack plausibility or evidential basis". However, I agree with Mr. Kohanzad that the other assertion, that H & H had instructed Creams not to investigate the complaint, was not relevant to this discrete strand of the claim.

29. Mr. Kohanzad submits that the EJ was wrong to assume that any such comments by Mr. Dhanili must have arisen from a breach of confidentiality by Creams, as I have said. The reality, he submits, must await a trial on the evidence.

30. I am unable to accept that submission. If Creams respected Mr. Barnett's confidentiality, then the alleged comments were made at a time when on the face of it, colleagues such as Mr. Dhanili would not have been aware that he had made the complaint about Mr. Awiezi. The Employment Judge was entitled to take the view that in the absence of a breach of confidentiality, Mr. Dhanili's alleged comments would have been inexplicable.

31. It would therefore have been logical to decide that these first two claims had little reasonable prospect of success, if there was a logical basis for the Employment Judge's view that the allegation of a breach of confidentiality lacked plausibility or an evidential basis.

32. However, the reasons do not explain why that allegation (as opposed to the allegation of H & H instructing Creams not to investigate) was implausible. If Mr. Dhanili did make the comments, then, for the reasons I have already explained, that would be *prima facie* evidence that the breach of confidentiality occurred. Such a breach would be reprehensible but as Tribunals are well aware, such occurrences in workplaces, unfortunately, do happen from time to time.

33. It is therefore not entirely clear why the Employment Judge considered it implausible that, on or around 21st December 2020, Mr. Barnett, to his surprise, heard Mr. Dhanili make the alleged comments. It is possible that this problem arises because the case was not debated before her in quite the same detailed way in which it has been addressed before me.

34. I am not in a position to conclude that there should definitely not have been a deposit order in relation to this part of the case. What I have identified is a lack of clarity.

35. Mr. Onuegbu submitted that the Employment Judge's conclusion can be seen to be correct because a rota sheet for 21st December 2020 shows that Mr. Barnett was not on duty that day. However, that document was not before the Employment Judge and I have not had a response to it from Mr. Barnett. In any event, his pleaded case is that the comments were made "on or around" that date.

36. I therefore conclude on ground 1 that there is an insufficiency of reasons in relation to the two claims or strands based on the first detriment.

37. Turning to the third and fourth discrete claims or strands, i.e. those relating to the second detriment, it seems to me that one of the necessary elements was that if and when Creams inflicted on Mr. Barnett the detriment of not having his complaint investigated, it did so as agent for H & H and/or Mr. Awiezi. If that was not the case, then there is no legal basis for holding either respondent responsible for an omission by Creams. See section 47B.1A(b) of the Employment Rights Act 1996.

38. This will, therefore, not simply be a case of showing that a protected disclosure materially influenced the failure to investigate, though that is also a necessary element.

39. As I have said, I agree with Mr. Kohanzad that if there is a prospect of Mr. Barnett proving the comments by Mr. Dhanili, then those would be evidence of a breach of confidentiality by Creams. However, he goes on to say in his skeleton argument that this would corroborate Mr. Barnett's case that Creams "failed to investigate, acting as agent for and with the authority of H & H Gelato". (Emphasis added)

40. I do not agree that a breach of confidentiality by Creams provides a logical basis for inferring that Creams, in failing to investigate, acted as agent for H & H or indeed that Mr. Dhanili in some way materially influenced their failure, even if that were enough to make good the claim.

41. Instead, it seems to me that the Employment Judge was entitled to conclude that that necessary element of these claims lacked plausibility and she gave sufficient reasons for that

conclusion. One of these was the content of Mr. Dhanili's comments as recounted by Mr. Barnett. One particular of his pleaded case was that Mr. Dhanili said that Creams' legal team's "… priority was to protect the franchisee and management" which in my judgment tended to suggest that Creams had of its own volition taken a position adverse to Mr. Barnett. That was combined with the Employment Judge's entirely reasonable observation that Creams was the more powerful party than H & H, again making it less likely that the latter instructed or materially influenced the former.

42. I therefore see no error of law in the deposit order as it concerned the claims or parts of claim based on the second alleged detriment. Ground 2 of the appeal therefore fails.

43. Turning to ground 3, the fifth discrete claim for automatic unfair dismissal is closely related to the detriment claims. Although it was obviously not Mr. Barnett's own protected disclosure which motivated his resignation, he contends that the resignation was motivated solely or, more realistically, "principally", by matters arising directly out of his protected disclosure, i.e. the same matters which are relied on as detriments.

44. By way of further explanation, a dismissal will be automatically unfair where a protected disclosure is "the reason (or if more than one, the principal reason) for the dismissal", as I have said. However, this appears to be a case where there is more than one reason, because Mr. Barnett's pleaded case is as follows:

> "16. The conduct referred to in paragraph 10 [i.e. Mr. Awiezi's behaviour and the failure to investigate the complaint] was a discriminatory repudiatory breach of the claimant's contract of employment, namely the implied term of trust and confidence.

> 17. Further or in the alternative, the conduct set out in paragraphs 3, 4(e), 6 [offensive comments by Mr. Awiezi pre-dating any protected disclosure and further comments by him on 13th December] and 10 [as above] were a series of discriminatory breaches of contract which together amounted to a repudiatory breach of the same term".

45. Only Mr. Barnett knows why he resigned. Having pleaded that the reason included Mr. Awiezi's behaviour, it seems to me that he cannot realistically contend that the "sole" reason was nevertheless the protected disclosure. At most, the protected disclosure could have been the principal reason.

46. The Employment Judge concluded that the automatic unfair dismissal claim had little reasonable prospect of success because:

i) Mr. Barnett's assertion that he resigned for those reasons was contradicted by the terms of his resignation letter, and

ii) a "very large part of his reasons were Mr. Awiezi's conduct which pre-dated any disclosure".

47. The resignation letter said:

> "Thankyou very much for the opportunity head at Creams Morden(sic), however, my circumstances have changed, I've found a different occupation more in line with the career I am looking for and so I must resign from my position here at Creams Morden…I will work for four more weeks, my leaving date being Sunday 28th February…Thankyou for the job in these hard times, and good luck with the future of the business…Stay sweet Creams…Alex"

48. In my judgment, the points made by Mr. Kohanzad do not establish that the automatic unfair dismissal claim has more than a little reasonable prospect of success. Rather, they are a reminder that the claim could succeed despite the two factors on which the Employment Judge

placed weight. However, the pre-condition for a deposit order is not that a claim will definitely fail. The existence of an important competing reason for resignation and of a resignation letter containing no hint that it was the acceptance of a repudiatory breach of contract are powerful factors which weaken the claim. It was open to the Employment Judge to conclude that the claim had little reasonable prospect of success, and therefore I see no error of law in this part of the Employment Judge's decision. Ground 3 therefore fails.

Disposal

49. I have had helpful oral submissions from the advocates on the question of disposal.

50. The insufficiency of reasoning which I have identified affects the deposit order in relation to two of the three claims in respect of which it was made but it does not necessarily mean that there should not be a deposit order in relation to those two claims. I have, nevertheless, made comments in this judgment which could lead to that conclusion. Whichever Employment Tribunal now deals with this will need to consider the question carefully.

51. In my judgement, although Mr. Kohanzad has pointed out, correctly, that any Employment Judge could deal with the matter and that there may always be a natural tendency for a judge to confirm a view previously taken, I am entirely sure that Employment Judge Russell can and will give the necessary careful consideration to the possibility that the outcome may be different on the different strands of the claim. I also consider that Employment Judge Russell will come to the matter with a considerable advantage as a result of the consideration of the case which she has already carried out.

52. I therefore remit the application so that the question of whether to make that part of the deposit order and if so in what terms, and the reasons for that decision, can be resolved.

53. The appeal succeeds to that limited extent.