



## EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4103004/2022 (V)

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Held in Glasgow on 27 January 2023  
(Preliminary Hearing in public and conducted remotely  
by Cloud Video Platform)

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Employment Judge Ian McPherson

Mr Walter Gardner

Claimant  
Represented by:  
Ms Laura Nicol -  
Student Advisor  
[Strathclyde University  
Law Clinic]

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Bavarian Bakehouse Ltd

Respondents  
Represented by:  
Ms Louise Bain  
Solicitor

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### JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The reserved judgment of the Employment Tribunal, having refused the claimant's  
25 representative's opposed application to postpone the Preliminary Hearing, to allow  
the claimant to submit an application to amend his claim, and having then heard  
submissions from both parties in Preliminary Hearing, on the respondents' opposed  
application to Strike Out the unfair constructive dismissal and holiday pay heads of  
claim, which failing to make a Deposit Order in respect of each of those allegations,  
30 and thereafter continued consideration of that opposed application to private  
deliberation in chambers, and having regard to both parties' oral and written  
submissions to the Tribunal, is to:

- (1) refuse the respondents' opposed application to strike out each of the unfair  
constructive dismissal, and holiday pay, heads of claim, under **Rule 37 of the**  
35 **Employment Tribunal Rules of Procedure 2013;**

- (2) refuse the respondents' opposed application for the claimant to be ordered to pay a deposit, under **Rule 39 of the Employment Tribunal Rules of Procedure 2013**, as a condition of continuing to advance those allegations;
- (3) order that the claimant's opposed application, dated 1 March 2023, for leave to amend his ET1 claim form, to add additional claims of disability discrimination under **Sections 20 and 26 of the Equality Act 2010**, shall proceed to be determined by an Employment Judge sitting alone, in chambers, at an unattended Preliminary Hearing on a date to be hereinafter assigned by the Tribunal, and intimated to both parties' representatives, for information only, for that Judge to make a written ruling on that opposed application to amend, taking into account parties' written representations already intimated to the Tribunal; and
- (4) order that the claimant's existing complaints against the respondents of unfair constructive dismissal and failure to pay holiday pay shall proceed to a Final Hearing in person before a full Tribunal at Glasgow Tribunal Centre on dates to be hereinafter assigned by the Tribunal, having regard to parties' availability, in the proposed listing period of **July, August or September 2023**, and instruct the Tribunal clerk to issue date listing letters to both parties for completion and return to the Tribunal.

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## REASONS

### Introduction

1. Firstly, I apologise sincerely to both parties for the delay in finalising this Judgment, due to the pressures of other judicial business. A written apology has previously been sent, on my behalf, to both parties.
- 25 2. This case called again before me, as an Employment Judge sitting alone, on Friday, 27 January 2023, for a public Preliminary Hearing previously ordered by me at an earlier stage in proceedings. The case had first called before Employment Judge Hosie, on 1 September 2022, for an earlier telephone conference call Case Management Preliminary Hearing. His written PH Note & Orders dated 6 September 2022 was sent to both parties on 9 September
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2022. The claimant was ordered to provide further and better particulars of his claim, which he duly did, as a then unrepresented, party litigant.

3. Having heard from claimant in person, and Ms Bain, the respondents' solicitor, at a telephone conference call Case Management Preliminary Hearing, held before me, on 11 November 2022, I noted that the claimant wished to proceed with his complaint of unfair constructive dismissal, and failure to pay holiday pay, brought against the respondents, as per his ET1 claim form, as presented to the Tribunal on 30 May 2022, as augmented by his further and better particulars intimated on 29 September 2022, and 9 November 2022, and, in the event of success with his claim, he sought an award of compensation against the respondents.
4. Further, I also noted that the claimant then confirmed that he did not seek leave of the Tribunal to amend his ET1 claim form to bring a complaint, in terms of the **Equality Act 2010**, of alleged unlawful discrimination on the grounds of disability against the respondents.
5. Having then heard from the respondents' solicitor in reply, I noted that the respondents continued to defend the claim, on the basis of the grounds of resistance stated in their ET3 response, presented on 29 June 2022, and their response of 17 October 2022 to the claimant's further and better particulars, and, as per their email response of 17 October 2022, the respondents did not feel that sufficient specification has been provided by the claimant, in terms of the alleged constructive dismissal claim.
6. As such, the respondents considered that the claim of unfair constructive dismissal has no reasonable prospect of success, and accordingly they sought to have the case proceed to a discreet public Preliminary Hearing on Strike Out, which failing Deposit Order, rather than listing the case for a Final Hearing on its merits.
7. Accordingly, in those circumstances, I decided that it was necessary, at that stage, to list the case for a public Preliminary Hearing on Strike Out of the unfair constructive dismissal claim, in terms of **Rule 37**, which failing a Deposit

Order, in terms of **Rule 39**, to be held remotely by CVP, the Tribunal's video conferencing platform.

8. In particular, I made various case management orders, on 11 November 2022, ordering that a Strike Out Preliminary Hearing be listed to determine whether the unfair constructive dismissal claim made by the claimant should be struck out, under **Rule 37 of the Employment Tribunals Rules of Procedure 2013**, which failing a Deposit Order, in terms of **Rule 39**. My written PH Note and Orders dated 14 November 2022 was sent to both parties, under cover of a letter from the Tribunal, on 15 November 2022.

10 **Skeleton Written Arguments**

9. Further, to put the claimant on an equal footing with the respondents' solicitor, in terms of **Rule 2 of the Employment Tribunals Rules of Procedure 2013** (the Tribunal's overriding objective), I ordered the respondents' solicitor, on 11 November 2022, to prepare and intimate to the Tribunal, by no later than 7 days before the start of the Preliminary Hearing, i.e., by no later than 10:00am on Friday, 20 January 2023, a skeleton written argument for the respondents.

10. Specifically, I ordered that that skeleton written argument should set out the factual and legal basis of the respondents' application for Strike Out of the unfair constructive dismissal claim under **Rule 37** as having no reasonable prospect of success, which failing a Deposit Order, in terms of **Rule 39**, and to provide hyperlinks to any case law to be relied upon by the respondents.

11. The respondents' skeleton written argument was timeously emailed to Glasgow ET, with copy to the claimant, by the respondents' solicitor, on 20 January 2023. It comprised 14 typewritten pages, with 32 separate paragraphs, and it had hyperlinks to 6 case law authorities, being:

- **Western Excavating (ECC) Ltd v Sharp [1978] IRLR 27, CA**
- **Tolson v Governing Body of Mixenden Community School [2003] UKEAT0124\_03\_1609**

- **London Borough of Waltham Forest v Folu Omilaju [2005] IRLR 35, CA**
- **Malik v Bank of Credit and Commerce International SA [1998] AC 20**
- 5       • **Cox v Adecco [2021] ICR 1307**
- **Van Rensburg v Royal Borough of Kingston-Upon-Thames UKEAT/0096/07**

12. In the lead up to this Preliminary Hearing, the claimant secured representation from the Strathclyde University Law Clinic, to which pro bono voluntary agency I had signposted him, as an unrepresented, party litigant, in the course  
10 of the Preliminary Hearing held by telephone on 11 November 2022, and contact details for the Law Clinic and its website were provided in my written PH Note and Orders.

13. By email to Glasgow ET on 23 January 2023, copied to Ms Bain as the  
15 respondents' solicitor, the Student Advisors at Strathclyde University Law Clinic (being Laura Nicol, Cat Glen, and Molly Watt) notified the Tribunal that the Law Clinic was now representing Mr Gardner, as the claimant, and their email stated that:

20 *"We are writing to notify you that we, the University of Strathclyde Law Clinic, are now representing Mr Gardner, the claimant, in the above noted case.*

*We intend to send in written submissions to the tribunal within the next day or two. We understand that as per the order set out in paragraph 6 of the case management hearing on 11th November 2022, the respondent was expected to send a skeleton argument to the claimant detailing the legal basis for the  
25 strike out hearing, and copies of all case law and statutory law which is to be relied on by the respondents. The claimant has still not received this.*

*We wonder if this will be sent in the next day or so to the claimant, or even now to the Law Clinic, now that we have notified the tribunal and the respondent's representatives that we are representing the client in this case.*

*If we can receive this in the next day or so, we would be able to respond to the arguments set out in the skeleton argument as advised by the case management note.”*

14. It would appear that Ms Bain’s email of 20 January 2023 to the claimant had not been received by him, or, if received, not forwarded by him to the Law Clinic. On my instructions, an email was sent by the Tribunal clerk to the Law Clinic, copied to Ms Bain, on 25 January 2023, copying them into the respondents’ solicitor’s correspondence of 20 January 2023, and advising them to submit their written reply to the respondents’ skeletal argument as soon as possible, before the start of the CVP Open Preliminary Hearing on Friday 27 January. They were informed that I would hear oral submissions from the respondents’ representative, then the claimant’s representative in reply, then a final reply by the respondents’ representative.

15. As the respondents’ representative was seeking a Deposit Order, if the unfair constructive dismissal head of claim was not struck out, the Law Clinic were further advised that the Judge would wish to hear oral evidence from the claimant regarding his financial means, and ability to pay, if the Tribunal decided to make a Deposit Order. If any supporting documents were to be produced, regarding the claimant’s income, expenditure, and capital / savings (if any) then they were informed that such documents should be provided, with copy to the respondents’ representative, along with the claimant’s representative’s skeletal argument.

16. The Law Clinic provided the claimant’s written submission on 26 January 2023 to the Tribunal, with copy to Ms Bain. It opposed both Strike Out, and Deposit Order, and set out detailed grounds of opposition. It comprised nine typewritten pages, with 47 separate paragraphs, and it had hyperlinks to 5 case law authorities, being:

- **Western Excavating (ECC) Ltd v Sharp [1978] IRLR 27, CA**
- **Malik v Bank of Credit and Commerce International SA [1998] AC**

- **James v Blockbuster Entertainment Ltd [2006] EWCA Civ 684**
- **Balls v Downham Market High School & College 2011 IRLR 217**
- **Ezsias v North Glamorgan NHS Trust [2007] EWCA Civ 330**

17. Further, the Law Clinic intimated 5 pages of additional documents, duly  
5 indexed and paginated, being copy text messages from a Kathleen McShane  
(the respondents' director) to the claimant; copy of the claimant's TSB current  
account statement dated 24.01.23; claimant's joint Virgin Money saving  
account statement dated 09.01.23; and claimant's wife's payslip (Anna  
Gardner) as an example of spouse's variable monthly income dated 07.12.22.  
10 These documents related to the claimant's financial means, and his ability to  
pay, if the Tribunal decided to make a Deposit Order.

#### **Preliminary Hearing before this Tribunal**

18. This public Preliminary Hearing took place remotely, and it was conducted by  
videoconferencing using the Tribunal's CVP facility. I heard it in my chambers  
15 at Glasgow Tribunal Centre. The claimant attended the morning session  
remotely by CVP, from his home address, while his 3 representatives, from  
the Law Clinic, attended remotely from the University,

19. Ms Bain attended, on her own, from her office, and there were also present,  
instructing her, the respondents' directors, Kathleen and Martin McShane, as  
20 observers. Only Ms Nicol from the Law Clinic actively participated as the  
claimant's nominated representative, although her 2 colleagues (Molly Watt  
and Catriona Glen) were present, off screen, in the same room as her, as  
observers.

20. Although a public Hearing and listed as such by the Tribunal on the  
25 **CourtServe** website, no members of the public attended this Hearing. There  
were some issues with use of the CVP in the morning session, and, in  
particular, there were difficulties connecting the claimant. As a result, the  
Hearing listed to start at 10:00am was delayed by about 15 minutes.

21. The CVP clerk had to contact him as he was not accessing the CVP successfully, although with the clerk's assistance, the claimant did join the CVP Hearing. Eventually, for the afternoon session, at my request, the claimant attended at the Law Clinic, and he used their video facilities, rather than his home internet connection.
22. While only listed for 3 hours in the morning, by co-operation between parties and the Tribunal, we were able to continue in an afternoon session, rather than having to adjourn part-heard to another, later date. As I had an afternoon, in chambers Preliminary Hearing in another case, to determine matters on the papers only, and not an attended Hearing, that was re-allocated to another date.
23. At the start of this Hearing, it was agreed with both parties' representatives that I would allocate 30 minutes for evidence from the claimant on his financial means, and ability to pay any Deposit Order, if made by the Tribunal ; one hour maximum for Ms Bain to address the Tribunal for the respondents, and any cross-examination by Ms Bain; one hour maximum for Ms Nicol to address the Tribunal for the claimant; and a final 15 minutes for a right of reply by Ms Bain.
24. In both the morning and afternoon sessions, I was able to receive oral submissions from both parties' representatives, augmenting their previously submitted written submissions. There were connection difficulties, and when Ms Bain became disconnected from CVP, with perseverance and patience, she was re-connected.
25. Both parties were able to see and hear each other, and me, except during adjournments where, rather than disconnect and re-connect parties, we adopted a practice of cameras off and microphones muted. Observers were muted during the public sessions, so that only Ms Bain and Ms Nicol could speak.
26. I had pre-read and considered the papers from the Tribunal's casefile, and parties' respective written skeleton arguments. As a full copy of both written submissions is held on the Tribunal's casefile, and I had access to them



during the Hearing, and in my subsequent private deliberations in chambers, where I read them again fully and carefully over several occasions, it is not necessary to repeat here their full terms verbatim.

27. That is neither appropriate, nor proportionate. Instead, in my Discussion and  
5 Deliberation section later in these Reasons, I refer to salient points from both parties' submissions to the Tribunal.

### **Claimant's Proposed Amendment Application**

28. In the Law Clinic's written submissions for the claimant, intimated on 26  
10 January 2023, it was indicated that, as their client was now represented and able to obtain additional advice, it was their intention to seek leave to amend the ET1 claim form to include a disability discrimination claim.

29. Accordingly, I raised this matter with Ms Nicol, the claimant's representative,  
15 as a preliminary matter at the start of this Preliminary Hearing. She stated that she was looking to amend the claim as soon as possible after this Preliminary Hearing, as the Law Clinic had only recently been able to fully review the case and agreed to represent the claimant, as she had explained in her written submissions, at paragraphs 35, 42, 43 and 47.

30. Upon reviewing the case, Ms Nicol advised me that the Law Clinic believes  
20 that the claimant has a disability discrimination claim, and they intend to apply for leave to add in this additional claim. This additional claim would also give further reason for the case not to be struck out, or a Deposit Order to be made, as there is now even more opportunity for reasonable prospects of success of Mr Gardner's claim.

31. Specifically, as per paragraph 43, it is stated that:

25 ***“Further, we wonder how the client should approach a situation if the current claim was struck out. We are concerned that this would mean Mr Gardner would have to start from the beginning and raise an entirely new claim. This not only would be disappointing considering the time and effort Mr Gardner has put into the claim thus far, but would also be***

*a significant and avoidable use of Clinic, respondent's solicitor, and Employment Tribunal resources."*

32. Further, at paragraph 47, Ms Nicol's written submissions stated that:

5 *"Finally, Mr Gardner has now been able to obtain representation and seek further advice. Due to this, we plan to seek leave to amend the ET1 to include a disability discrimination claim. This means that this case is even less likely to meet the high threshold of 'no reasonable prospects of success' associated with applications to strike out, and the 'little prospects of success' test associated with deposit orders. This also*  
10 *means that it may be beneficial to resources for this case not to be struck out because it would mean that a completely new case would have to be raised."*

33. Having heard Ms Nicol's submission, I asked her when an application to amend was likely to be made, and from the menu of possible options for  
15 discrimination, which types of disability discrimination were going to be raised as additional claims on behalf of the claimant. She stated that the application would be made as soon as possible, but as student advisors, they would need to speak to the solicitor supervisor at the Law Clinic first.

34. That said, Ms Nicol further stated that they were looking at harassment, failure  
20 to make reasonable adjustments, and discrimination arising from disability. She confirmed that the claimant was resisting the respondents' applications for Strike Out, which failing Deposit Order, and that she thought this Preliminary Hearing was going ahead regardless of their intention to seek leave to amend, as she was not aware that the claimant could seek to stop  
25 this Hearing going ahead.

35. I drew Ms Nicol's attention to the judgment of His Honour Judge Serota QC, the EAT judge, in **Prakash v Wolverhampton City Council [2006] UKEAT/40/06** and asked her if she was familiar with it. I also referred her to **Rule 2** and the Tribunal's overriding objective to deal with the case fairly and  
30 justly to both parties, and how parties and representatives should seek to assist the Tribunal in achieving that objective.

36. In **Prakash**, the EAT had ruled that an employment tribunal has discretion to allow a claim to be amended to permit a further claim to be included if the events giving rise to the further claim took place after the original claim had been made, thus avoiding the need to issue a separate claim and then apply for the two to be heard together.
37. Ms Nicol stated that she was not familiar with **Prakash**, and I asked Ms Bain, the respondents' solicitor, for her comments on further procedure before the Tribunal. In the circumstances, she stated that she did not consider it reasonable that the Tribunal should be asked to consider a potential amendment application when there was no notice of that amendment.
38. Whilst recognising that the claimant had been an unrepresented, party litigant before Judge Hosie and then Judge McPherson, Ms Bain added that the claimant had stated to them that he had got advice, and he had provided further and better particulars of his claim. She submitted that there was a need for fair notice of any amendment application by the claimant.
39. I noted Ms Bain's submission and stated that I agreed there was a need for fair notice. Specifically, I mentioned to Ms Nicol the EAT judgment by Lady Smith in **Ladbroke's Racing Ltd v Traynor [2007] UKEATS/0067/07**. It is detailed in chapter 8 of the **IDS Handbook on Employment Tribunal Practice and Procedure**, at section **8.50**.
40. The EAT in **Traynor** gave guidance as to how tribunals should deal with applications to amend: in particular, the other party should be given notice of the actual wording of the proposed amendment and given the opportunity to respond.
41. I also mentioned the **Selkent factors** (being the nature of the amendment; the applicability of time limits; the timing and manner of the application to amend; and the relative injustice and hardship involved in refusing or granting an amendment) which a Tribunal would require to consider in any amendment application: **Selkent Bus Company Ltd v Moore [1996] IRLR 661**.

42. Ms Nicol stated that she was not familiar with **Traynor**. Ms Bain stated that it was in the interests of justice that this Preliminary Hearing go ahead, and she invited me to proceed and determine the Strike Out / Deposit Order applications before the Tribunal. In reply, Ms Nicol stated that the claimant had had two half-hour slots with volunteer solicitors, who may not have been employment lawyers, but general advice solicitors, and so only brief advice about disability discrimination.
43. When Ms Nicol indicated that her solicitor supervisor at the Law Clinic was contactable, I granted her an adjournment to seek guidance, and take instructions. I posted a hyperlink to the **Prakash** and **Traynor** judgments in the CVP chat room facility, so she and Ms Bain could access them. Proceedings were adjourned for a quarter hour, but Ms Nicol was unable to contact her supervisor, and so she asked for a postponement of this Preliminary Hearing.
44. She referred to Lady Smith's judgment in **Traynor**, at paragraph 33, stating that where a claimant does seek to amend, then the Tribunal requires to enquire as to the precise terms of the amendment proposed. If it does not do that, then it cannot begin to consider the principles that apply when considering an application to amend.
45. Ms Nicol submitted that to allow the Law Clinic to draft precise terms for an amendment application, it was fairness for both parties if she provided a specified text of the proposed amendment, before continuing with the Strike Out Hearing, and so prevent Ms Bain proceeding with her application at this Hearing, and Ms Nicol would expedite matters about the amendment application.

#### **Claimant's Postponement application refused by the Tribunal**

46. As no Final Hearing had been listed in this case, Ms Nicol asked for postponement of this Preliminary Hearing, and for around 4 weeks to relist this Hearing, candidly acknowledging that she was not familiar with how long it might take to put in an amendment application, and for the Tribunal to decide whether or not to accept it. She asked me for guidance.

47. In reply, as the presiding Judge, while stating that it was not for me to advise either party, which must seek its own independent advice and representation, I could state, consistent with the **Rule 2** overriding objective to ensure parties were on an equal footing, that while an amendment application could be made at any time, one of the **Selkent factors** is the manner and timing of an amendment application, and that factor has to be considered by the Tribunal along with all of the other circumstances of the case.
48. I then referred Ms Nicol to the very sage advice given by His Honour Judge James Tayler, in the EAT, in paragraphs 21 to 28 of his judgment in **Vaughan v Modality Partnership [2021] ICR 535**, about amendment applications.
49. Thereafter, Ms Bain, the respondents' solicitor, stated that they were keen to progress with the case at this Hearing, as there had already been two earlier Case Management PHs, and in her view the claimant had had ample opportunity to progress matters with his case.
50. She was grateful to the Judge for highlighting the **Prakash** and **Traynor** judgments, but there was no amendment application as yet, and the claimant requires to put in an amendment application on paper, and it was not sufficient to say there is an intention to amend, but not clarify the basis of the proposed amendment.
51. Developing her opposition to Ms Nicol's application for a postponement, Ms Bain added that while the claimant was not legally represented at this Preliminary Hearing, he had had access to earlier legal advice, and he had lodged further and better particulars.
52. While accepting that it was open to a party to seek leave to amend at any time, Ms Bain further stated that there was currently no amendment application before this Tribunal, and while not critical of my enquiry of Ms Nicol, the respondents were keen to progress matters at this Hearing.
53. Having heard both parties' representatives, I delivered an oral ruling, refusing the postponement, and stating:

5           *“Having considered both parties’ representations and their submissions, I have decided, having regard to the Tribunal’s overriding objective, under **Rule 2 of the Employment Tribunal Rules of Procedure 2013**, to proceed with this listed Preliminary Hearing on Strike Out, which failing Deposit Order. There is, as Ms Bain highlights, no pending application before the Tribunal to seek leave to amend the ET1 claim form. As such, I do not consider it is appropriate to postpone to another date, when parties and the Judge are here today, and ready to consider both parties’ written submissions on Strike Out, which failing Deposit Order. As such, we will proceed and I will now address procedure to be adopted at this Hearing. The claimant’s representative’s application to postpone is refused.”*

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54. During delivery of that oral ruling, the claimant disconnected, but he successfully reconnected, but when he did so, his picture was on the CVP screen, but he could not be heard on audio, even though he was not muted. Ms Nicol telephoned him to discover he could not hear others on the CVP call, so he left the call, and attempted to reconnect again, with success. As he did not have a paper copy of the Bundle, Ms Nicol emailed him a copy, before he was sworn in to give his evidence.

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**Findings in Fact: Claimant’s financial circumstances and ability to pay any Deposit Order**

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55. In opening this Preliminary Hearing, after initial discussion with both parties’ representatives, I stated that as the respondents were seeking Strike Out of the unfair constructive dismissal head of claim, which failing a Deposit Order, then the Tribunal would start by taking information about the claimant’s financial means, and his ability to pay a Deposit Order, if the Tribunal decided to so order.

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56. I then heard sworn evidence (elicited by Ms Nicol) from the claimant about his financial means, and ability to pay, being the information required by the Tribunal, in making reasonable enquiries in terms of **Rule 39(2)**. During this period, the claimant stated that he could not hear, so he disconnected, but

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when he returned, we could see him on the video screen, but we could not hear him.

57. In those circumstances, with significant technical issues impacting on the claimant's participation in the Hearing, I stated, at 11:36am, that it was in the interests of justice to adjourn, and reconvene later, suggesting that it might be best if the claimant could attend at the Law Clinic to give his evidence. He duly did so, and when proceedings resumed at 2:00pm that afternoon, the claimant was able to give his sworn evidence to the Tribunal. Ms Bain was afforded the usual opportunity to cross-examine the claimant on his oral evidence to this Tribunal, and she duly did so.

58. The claimant spoke to the supporting documents, produced on his behalf, and answered Ms Nicol's questions. He did so in a straightforward way, as also when cross-examined by Ms Bain. I had no issue with the credibility of his evidence on this matter, although there was perhaps an issue about its reliability, given there was limited supporting documentation produced, and he gave answers to some questions (e.g. the estimated capital value of his house) based on recollection, rather than reference to supporting and vouching documentation.

59. On the basis of the claimant's evidence, and the supporting documents produced on his behalf in this regard, I have made the following findings in fact:

(a) The claimant, who is aged 55, was formerly employed by the respondents as a baker between 4 November 2002 and 27 February 2022, when his employment ended, when the respondents say that he resigned.

(b) As at the date of this Preliminary Hearing, the claimant advised the Tribunal that he was unemployed, and in receipt of income from Universal Credit at the rate of £21.45 per month. He further advised that his Universal Credit was due to end on 10 February 2023.

- 5 (c) The claimant further advised the Tribunal that his Universal Credit varies because his wife (Mrs Anna Gardner) works as a cleaner, employed by East Renfrewshire Council, so his Universal Credit in December 2022 had been £33.05, rather than £21.45, and he had received £113.27 in November 2022.
- (d) By way of further explanation, the claimant also advised the Tribunal that his wife was paid by the Council at the rate of £11.25 per hour, giving her net monthly pay of £878.97, as per the copy of her payslip produced to the Tribunal, dated 7 December 2022.
- 10 (e) He further explained that she had worked overtime in December 2022, but she had not yet received her payslip for the wages paid in January 2023. He explained that she usually earned about £700 per month. Further, he stated, that January 2023 payslip was not in the Bundle of Documents produced by the Law Clinic, but he had brought it in, hard copy, to the Law Clinic.
- 15 (f) The claimant also referred to the copy bank statements produced to the Tribunal in his Bundle. The TSB account showed his Universal Credit payments in November and December 2022, and January 2023. The balance of £0.00 shown, as at 24 January 2023, was, he stated, still the situation as at the date of this Preliminary Hearing.
- 20 (g) As far as the Virgin Money savings account statement, dated 9 January 2023, was concerned, the claimant advised the Tribunal that it is a joint account with his wife, and it has a current credit balance of about £50. He further stated that the TSB and Virgin Money accounts are the only bank accounts in his name.
- 25 (h) Finally, the claimant advised the Tribunal that, as regards capital and other assets, his house is owned and paid for, with no outstanding mortgage due, and he further stated that its value was about £87,000, and he owns no other properties. By way of outgoings, the claimant stated that there are payments for car insurance, fuel, and house and life insurance.
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- 5 (i) In cross-examination by Ms Bain, the claimant accepted that he had produced no evidence of any outgoings paid from his bank account, explaining that faster payments outwards were made to his wife from his TSB account to allow her to pay household outgoings. He stated that he understood, contrary to the Tribunal's direction about vouching for income and expenditure, that he was only asked for vouching of income.
- 10 (j) Under further cross-examination, the claimant stated that the statements produced were not fully reflective of the household's income and expenditure, but he had a 55p deduction from his Universal Credit for every £1 his wife earns, and while he has tried to get alternative, new employment, so far he has been unsuccessful. He confirmed that the family home is a jointly owned property, with his wife.
- 15 (k) Asked about his wife's money, the claimant advised, in reply to Ms Bain's further cross-amination, that his wife's money is not accessible to him, and she transfers money to him to pay for things. He further stated that he had not produced a copy of his wife's bank account statement, although he added that it was a quarterly statement, and he had given the Law Clinic a copy, and that she is next due to be paid on 20 1<sup>st</sup> February 2023.
- (l) Under re-examination by Ms Nicol, the claimant clarified that, as regards his TSB account, Mrs Gardner makes payments in, as and when he needs them, to pay household bills.
- 25 (m) On the basis of the evidence presented to the Tribunal, the Tribunal finds that the claimant is a man with limited free income, and thus a person with limited ability to pay any Deposit Order.

### **Respondents' Submissions**

60. Once the claimant's evidence was concluded, at 2:26pm, I invited Ms Bain, the respondents' solicitor, to address the Tribunal first. She did so with 30 reference to her detailed written submissions, stating that she was grateful to

Ms Nicol for the claimant's written submissions. However, she maintained the respondents' application for Strike Out of the unfair constructive dismissal head of claim, which failing a Deposit Order. She submitted that that head of claim lacks specification, and so it has no reasonable prospect of success, and accordingly it should be struck out.

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61. Ms Bain detailed the background to the claim's journey through the Tribunal so far, under reference to the copy documents (ET1, ET3, claimant's further and better particulars, and respondents' response) included in her respondents' Bundle, previously lodged with the Tribunal. She stated that the claimant had been asked to provide further and better particulars at the first Preliminary Hearing before Judge Hosie, but while he had provided further information, she submitted that it is not accepted by the respondents that the claimant is entitled to consider himself as constructively dismissed.

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62. Further, Ms Bain stated that it is the respondents' position that the claimant has failed to provide sufficient specification of his unfair constructive dismissal claim. The respondents seek to have the claimant's claim struck out on the basis that the claim has no reasonable prospect of success, failing which a Deposit Order should be granted on the grounds that the claim has little prospect of success.

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63. Ms Bain then addressed the legal position about a constructive dismissal claim and referred to **Section 95(1)(c) of the Employment Rights Act 1996**, and extracts from relevant case law authorities cited by her, being **Western Excavating, Tolson, Omilaju, and Malik**.

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64. Applying the relevant case law to the claimant's case, Ms Bain detailed the respondents' position, as per paragraphs 13 and 19 of her written submission, as follows:

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***"13... it is the Respondent's position that the Claimant has failed to specify the details of his claim to allow him to establish any breach of contract carried out by the Respondent which is sufficiently serious to justify his decision to resign. Further it is the Respondent's position that the Claimant has not identified a***

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*series of acts, such that the last act is the “last straw” which would be sufficiently serious to allow the Claimant to resign and claim constructive dismissal. It is the Respondent’s position that the Claimant’s claim lacks the required specification and that the Claimant cannot demonstrate any breaches carried out by the Respondent which go to the root of his contract and means that he can no longer continue to work for them.”*

**19.** *The burden of proof is on the Claimant to prove that the legal tests for the constructive dismissal claims have been met for him to be able to pursue the claim. It is the Respondent’s position that they consider that the Claimant’s claim does not have reasonable prospects of success as he has failed to meet the relevant tests required by the case law. The Claimant has failed to establish that the employer’s actions constituted a fundamental breach of contract entitling him to resign. The Claimant has failed to specify the acts he seeks to rely upon and how he considers that they any or all of these amount to a repudiatory breach of his contract of employment by the Respondent which would entitle him to resign and consider himself constructively dismissed.”*

65. While the respondents had not previously sought Strike Out of the holiday pay part of the claimant’s ET1 claim form, as this Preliminary Hearing was listed for Strike Out only of the unfair constructive dismissal head of claim, Ms Bain sought to do so at this Hearing. In her oral submission, she specifically asked for Strike Out of both heads of claim and, in the alternative, as per **Rule 39**, for a deposit of up to £1,000 per allegation.

66. Ms Bain addressed the holiday pay part of the case at her paragraphs 20 to 23. Specifically, as per her paragraphs 22 and 23, it was stated there that:

**“22.** *It is the Respondent’s position that the Claimant has failed to provide specific details of his claim for holiday pay. The Claimant has failed to provide the sum he is claiming by way of holiday pay and he has further failed to provide an explanation of how the*

*sum claimed for is calculated. The Claimant failed to provide this information in his Employment Tribunal claim form and further has failed to provide same when ordered to do so by the Employment Tribunal as per the Order dated 6 September 2022.*

5           **23.    The Respondent is entitled to fair notice of any claim that has been raised against them. The Claimant has failed to provide sufficient details of his claim. It is the Respondent's position that the Claimant's holiday pay claim as no reasonable prospects of success due to lack of specification and it is their position that**  
10           **the Claimant has been paid all sums due to him."**

67.    In addressing me on the relevant law on Strike Out, Ms Bain, in her paragraph 24, included a reference to paragraph 30 of His Honour Judge James Tayler's judgment in **Cox v Adecco**. I will return to that judgment in my own review of the relevant law later on in these Reasons.

15    68.    Meantime, I note that the basis of Ms Bain's application for Strike Out was set out in her paragraphs 25 and 26, as follows:

20           **"25.    It is acknowledged that the Claimant has been unrepresented. The Claimant lodged his Employment Tribunal Claim form. After the Preliminary Hearing for Case Management on 1 September 2022, the Claimant was given the opportunity to further specify his claims. It is the Respondent's position that reasonable attempts have been made to identify the claims and the issues before the Employment Tribunal but the Claimant has failed to provide the detail required to proceed with claims for constructive dismissal and holiday pay. To confirm the Claimant was ordered to provide further specification and it is the Claimant's position that he has failed to provide the necessary specification to allow him to proceed with his claim. It is the Respondent's position that the Claimant cannot show that the Respondent behaved in a manner which meant that he could not**  
25           **reasonably be expected to continue to work for them.**  
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26. ***Upon a strike out application, the Claimant's case should be taken at its reasonable highest. It is the Respondent's position that even if the Tribunal takes the Claimant's case at its highest level, it cannot be found that the Claimant's decision to resign was on account of any fundamental breach of contract carried out by the Respondent. The Claimant has failed to specify any breaches of contract carried out by the Respondent despite being given the opportunity to do so.***

69. Ms Bain set out her alternative argument for a Deposit Order, at her paragraphs 29 to 32, as follows:

“29. ***In order to consider that a deposit order is appropriate, the tribunal must be satisfied that the Claimant will not be able to establish the facts essential to his claim. It is the Respondent's position that due to the lack of specification of his claim, the Claimant will not be able to establish the facts for him to be successful at his claims for constructive dismissal and holiday pay.***

30. ***If the Tribunal is minded to grant a Deposit Order then as per Rule 39 as detailed in the note from the most recent Preliminary Hearing, the Tribunal must consider the Claimant's means when deciding on how much it requires the Claimant to pay. It is a matter for the Claimant to provide this information to the Tribunal for their consideration as the Respondent has no knowledge of the Claimant's financial position.***

31. ***The Respondent would therefore ask the Tribunal to strike out the Claimant's claims for constructive dismissal and holiday pay in their entirety as they consider that both claims have no reasonable prospect of success in terms of Rule 37.***

32. ***If however the Tribunal does not consider strike out the appropriate course of action then the Respondent would ask that***

***the Tribunal order that the Claimant pay a deposit to be allowed to continue with his claim as per Rule 39.”***

70. When I was discussing relevant law on Deposit Orders with Ms Bain, she having cited only **Van Rensburg**, and the reference there to **Ezsias**, at her paragraphs 27 to 32, I specifically mentioned what I then referred to as the **Hasan** case relating to the amount of any deposit, and it not being a barrier to justice.

71. When I asked Ms Bain about what she felt might be an appropriate figure for any Deposit Order, if I decided to make such an Order, she stated that while the claimant had provided some financial information, he had not provided full information, and there was no full view of the Gardner household accounts, and all that to claimant had said was that his wife transfers him money, their house is mortgage free, and his wife’s salary changes monthly, while he is on Universal Credit.

72. While Ms Bain acknowledged that she could not suggest that the claimant could pay £1,000 per claim, she asked that I make an order for a “**sufficient amount**”, without specifying any specific sum. While accepting that any deposit set should not be a barrier to justice, Ms Bain stated that the claimant had not made full disclosure of his financial circumstances, and he could pay more than what is shown in a very limited set of documents in the claimant’s Bundle.

Later in the Hearing, I apologised to both parties that I inadvertently misnamed the relevant case as **Hasan** – the case that I meant to refer to was paragraphs 16 and 17 from the judgment of Mrs Justice Simler, then President of the EAT, in **Hemdan v Ishmail & Another [2017] ICR 486 ; [2017] IRLR 228**, and not Lady Wise in **Hasan v Tesco Stores [2016] UKEAT/0098/16**.

73. This error on my part emerged when, as Ms Nicol was not familiar with the **Hasan** case, I posted a hyperlink to it on the CVP chatroom facility, posting Lady Wise’s judgment, and Ms Nicol, in reading it, during an adjournment that

I allowed her, during her own submissions for the claimant, raised the point of the wrong citation.

74. Commenting on the claimant's detailed written submissions intimated on 26 January 2023, which she obviously did not have before her, when drafting the respondents' submissions on 20 January 2023, Ms Bain denied that there had been any fundamental breach of trust and confidence by the respondents, as now alleged by the claimant, at his paragraphs 18 and 20, specifying the acts which he says accumulated to the alleged "**final straw**".
75. Ms Bain noted how the claimant's submissions says he was preparing on 27 February 2022 for his shift that day, and he "**snapped**", having allegedly reached a point of mental and physical exhaustion from the cumulative acts, long shifts, and hostile atmosphere of the respondents.
76. If, however, that date is not considered as the final straw by the Tribunal, then the claimant says it was on 17 January 2022, when he met with Martin McShane, the respondents' director, in which Mr McShane is alleged to have brought up Gil McLean, the claimant's long-term friend and work colleague, who had suffered a heart attack in the bakery, and soon after passed away. Further, Ms Bain stated that if it was that earlier date, then the claimant did not resign until 27 February 2022.
77. In response to paragraphs 25 and 26 of the claimant's written submission, about his holiday pay claim, where it was stated that Mr Gardner has not been paid the correct holiday pay throughout his employment with the respondents, and that this is something the Law Clinic will review more closely after this Hearing, as they required payslips from the respondents before providing further specification of the claim, Ms Bain commented that the claimant had already been given sufficient time and opportunity to give fuller specification before now.
78. On the fact that paragraph 35 of the claimant's submission gave notice that the Law Clinic intended to apply for leave to amend the ET1 claim form to include an additional claim of disability discrimination, Ms Bain stated this had been discussed earlier at this Hearing, when the claimant's application for

postponement had been refused, and while the claimant's representative, Ms Nicol, had stated that various types of discrimination might be made, so far there was no fair notice of any proposed amendment.

5 79. In Ms Bain's view, the Tribunal cannot take into account a potential amendment application when considering Strike Out / Deposit Order for the existing, pled heads of claim, and she gave advance notice that, if and when the claimant seeks leave to amend, then the respondents will oppose any amendment application.

10 80. In closing, Ms Bain invited the Tribunal, if not Striking Out the unfair constructive dismissal and holiday pay heads of claim, to make Deposit Orders at an appropriate level, not as a barrier to justice for the claimant, but to reflect that, in her view, both heads of claim have little prospects of success.

### **Claimant's submissions**

15 81. Ms Bain's submissions for the respondents having concluded at 2:57pm, I invited Ms Nicol to address the Tribunal on behalf of the claimant. She did so with reference to her written submissions for the claimant. She stated that she was opposed to both Strike Out, and any Deposit Order. Her principal position was that the case should not be struck out, and to do so would be "*draconian*", and she cited from some of her stated case law authorities, specifically **Blockbuster**, **Balls** and **Ezsias**, three familiar case law authorities often cited to the Tribunal.

25 82. Ms Nicol then addressed me on the claimant's claim of unfair constructive dismissal, citing from **Section 95 of the Employment Rights Act 1996**, and the well known test from **Western Excavating**, at her paragraphs 6 to 24 of her written submission. At her paragraphs 9 and 10, she highlighted that the term going to the root of the contract which Mr Gardner considers has been breached, is the implied term of trust and confidence, which implied employment contract term was officially recognised in the case of **Malik v BCCI**.



83. She noted from the respondents' skeleton argument that their main line of argument is that the claimant has no reasonable prospects of success due to lack of specification, and answered that, at her paragraph 14, stating that the duty on the claimant, at this stage of proceedings, is to provide the respondent sufficient specification to allow it to respond to the claims pled, which, she submitted, the claimant has done, despite being unrepresented. In her oral submissions, Ms Nicol commented that "**full specification is not required before a full Hearing is set.**"
84. As per her paragraph 15, Ms Nicol went on to submit that despite Mr Gardner being, until now, unrepresented he has set out a stateable case and has provided sufficient specification to amount to a prima facie case in terms of constructive dismissal, as constituted through a series of acts amounting to a fundamental breach of trust and confidence.
85. To persuade the Tribunal, she indicated that she would like to highlight some of these acts that the claimant has specified thus far, although this is by no means an exhaustive list, and she did so at her paragraphs 15a, b, and c, and, at her paragraph 16, Ms Nicol stated that Mr Gardner has specified more events within his ET1 and further particulars, showing that, despite the respondents' view set out in paragraph 13 of Ms Bain's skeleton argument, Mr Gardner has in fact specified several occasions and events which could be reasonably seen to cumulate to a breach of the key contract term of trust and confidence.
86. Ms Nicol added that she recognised that Mr Gardner has not before used the term "**breach of trust and confidence**" but this has been due to Mr Gardner not being familiar with the correct legal terms. However, the fact that the respondents' solicitor had set out the case law for breach of trust and confidence and the last straw doctrine, at paragraph 12 of their skeleton argument, does seem to suggest that the respondents were able to recognise that this was the basis for Mr Gardner's claim for constructive dismissal from his ET1 and further particulars alone.

87. Further, while Ms Bain in her oral submissions had commented upon the two different dates for the alleged final straw, at the Law Clinic's paragraphs 18 and 20, Ms Nicol stated that a claimant does not need to resign immediately, and there can be time for reflection on what to do.

5 88. At her paragraphs 22 and 23, Ms Nicol asked the Tribunal to keep in mind that breach of trust and confidence is usually evidenced by witnesses from both the claimant and the respondents, and that evidence such as this is not able to be reviewed unless the case proceeds to a full substantive Hearing. Taking into consideration the high threshold of no reasonable prospects of success and the fact that Mr Gardner's evidence largely relies on witness evidence which cannot be tested without a full hearing, Ms Nicol submitted that it would be inappropriate for the Tribunal to make an order to strike out this claim.

15 89. In her closing paragraph, on this section of her written submissions, Ms Nicol put it like this:

20 ***"24. We would also like to again remind the tribunal and reiterate, that the test is if there are no reasonable prospects of success, then the claim should be struck out. It is not to be struck if the tribunal feels that there are low prospects of success, and the claim is unlikely to succeed. Nor is a procedural hearing to strike out an appropriate time to conduct something like a "mini hearing", where the evidence can be viewed and tested. The fact that evidence needs to be closer looked at and tested is just another reason why this case should not be struck out."***

25 90. Referring to Lady Smith's EAT judgment in **Balls**, Ms Nicol invited me to give the claim a "**green light**" to go forward for a Final Hearing.

30 91. On the matter of the claim for holiday pay, and further to what she had stated in her paragraphs 25 and 26, Ms Nicol explained that the claimant did not fully understand how to calculate his holiday pay, and that the Law Clinic would require further payslips to quantify his claim for holiday pay. She hoped that

the Tribunal understands how the Law Clinic operates, and that they can provide further and better specification before any full merits Hearing.

92. Next, Ms Nicol addressed me, as per her paragraphs 27 to 30, on the “**facts in dispute**” in this case, and her submission that the facts should go to be determined by the Tribunal at a Final Hearing, and that the Law Clinic has not agreed the welfare meeting notes referred to by Ms Bain at her paragraphs 15 to 17, said to have been held with the claimant on 1 July 2021, and 6 November 2021.

93. Specifically, I note and record here the full terms of her submission from those paragraphs 27 to 30, reading as follows:

**“27. It is clear from the Respondent’s ET3, response to further particulars, and skeleton argument, that it contends that many of the acts and events Mr Gardner’s speaks of either did not happen or happened in a different way. This corresponds to Mr Gardner’s view of Respondent’s version of events as well. This is not unusual for a hearing of this nature and highlights the evidence needs to be tested at full hearing.**

**28. In particular, Mr Gardner disagrees with the transcripts from the welfare hearings on 1st July 2021, and 6th November 2021 lodged in the respondents productions. He notes that these meetings were not attended by a transcriber and to his knowledge, they were not recorded. He notes that Mr and Mrs McShane were taking notes during the meeting, but not to the extent that they could have noted word for word what was being said. Mr Gardner does not agree that these transcripts are an accurate representation of what happened in these meetings and many things are missing from them.**

**29. Nevertheless, we would again like to refer the tribunal to paragraph 4 of these submissions and note that, it is only in very exceptional circumstances that a claim should be struck out where the facts are in dispute without the evidence being tested.**

30. ***Further, we remind the tribunal that a procedural hearing is not an appropriate time to test this evidence, so the claim should continue to a full hearing, and it would be inappropriate to strike out this claim.***

5 94. Ms Nicol made no specific admission or denial to the allegation, at Ms Bain's paragraph 18, that the claimant had failed to attend a catch up meeting with Martin McShane, on 15 January 2022, and that he did not respond to the respondents' letter (at page 70 of their Bundle) as regards his decision to resign.

10 95. Further, Ms Nicol then addressed me on Deposit Orders, at her paragraphs 31 to 34, as follows:

15 31. ***With regards to the submissions above, the claimant has reasonable prospects of success. Not only does this mean it would be inappropriate for the claim to be struck out, but it also means that a deposit order is not appropriate as the Claimant has more than little prospects of success. Only if there are little prospects of success can a deposit order be ordered as highlighted in paragraph 27 of the respondent's skeleton argument.***

20 32. ***We note that the respondent refers to the case of Van Rensburg in paragraph 27-28 of their skeleton argument. This is to support their argument that the tribunal should make a deposit order through application of the "little reasonable prospects test", if the claim is not struck out. However, the example highlighted in Van Rensburg of when it would be appropriate to Order a deposit order is not applicable to this case. This example was 'where the facts as asserted by the applicant were totally inconsistent with the undisputed contemporaneous documentation' (as seen in***  
25 ***paragraph 25 of the quote, quoted at paragraph 27).***

30 33. ***In the current case, some of the documentation expressly supports the Claimant's version of events, such as the text***



99. Ms Nicol closed by referring me to her “**summing up**” points, which it is appropriate to note and record here, as follows:

5           **“44. We submit that it would be inappropriate for this case to be struck out for the reasons highlighted above. We also submit that it would be inappropriate for a deposit order to be made as the Claimant’s case has more than little prospects of success. This can be seen through setting out the acts that could cumulatively amount to breach of trust and confidence as discussed in paragraph 12-20 of these submissions.**

10          **45. We remind the tribunal of the high threshold attached to “no reasonable prospect of success” (set out in paragraph 3 of these submissions). Considering the facts of this case we submit that this case does not meet this threshold and should be allowed to continue.**

15          **46. Further, we remind the tribunal that a strike out hearing is not the correct forum to consider evidence or test facts of a case, and to do this the case must go to a full hearing. Mr Gardner’s case requires this as constructive dismissal claims usually rely on witness evidence to a material extent, most of the evidence can only be understood in cumulation with each other, and many of the facts are clearly in dispute. We refer to the case law in paragraph 4 which highlights those cases should only be struck out “very exceptionally” where facts are in dispute and the evidence has not been tested.**

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25          **47. Finally, Mr Gardner has now been able to obtain representation and seek further advice. Due to this, we plan to seek leave to amend the ET1 to include a disability discrimination claim. This means that this case is even less likely to meet the high threshold of ‘no reasonable prospects of success’ associated with applications to strike out, and the ‘little prospects of success’ test associated with deposit orders. This also means that it may**

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***be beneficial to resources for this case not to be struck out because it would mean that a completely new case would have to be raised.”***

100. Ms Nichol stated that sufficient specification of the claimant’s case had been  
5 given by the claimant, and his case should not be struck out. It then being  
3:30pm, I allowed her an adjournment of 15 minutes, to comment upon the  
**Hasan** case, and make any further submissions on case law, when she stated  
that she relied upon the cases cited in her written submission, and  
emphasised her view that it was not for this Tribunal to conduct an  
10 ***“impromptu trial”***.
101. I commented that the reference to ***“impromptu trial”*** I recognised from the  
Lord Justice Clerk’s judgment in **Tayside Public Transport Co Ltd (t/a  
Travel Dundee) v Reilly [2012] CSIH 46**, at paragraph 30, about which I say  
more in my narration of the relevant law on Strike Out, later in these Reasons  
15 as, surprisingly, neither party’s representative referred to it in their own case  
law citations as per their respective written submissions to the Tribunal.
102. It was, at this stage of the proceedings that, as detailed earlier in these  
Reasons, at paragraphs 70 to 74 above, that it emerged that I had wrongly  
attributed judicial comments about the amount of any deposit not being a  
20 barrier to justice to Lady Wise in **Hasan v Tesco Stores [2016]  
UKEAT/0098/16**, when those comments were actually made by Mrs Justice  
Simler, then President of the EAT, in **Hemdan v Ishmail & Another [2017]  
ICR 486 ; [2017] IRLR 228**, at paragraphs 16 and 17 of her judgment.
103. In a short reply, on behalf of the respondents, Ms Bain stated that she was  
25 grateful to Ms Nicol for her submissions, and the additional case law citations  
provided by the Judge, and she had noted, from paragraph 17 in **Hemdan**,  
that it contained the reference to deposits not being a barrier to justice.
104. The Preliminary Hearing concluded at 3:55pm, having lasted a full day, when  
I thanked both parties for their attendance and contribution, as also for their  
30 patience and forbearance, in dealing with the various IT connectivity issues

that day associated with use of the CVP facility. I reserved judgment to be issued in writing in due course.

105. Only recently have I managed to complete my private deliberation in chambers, and progress to issue of this my finalised Judgment, and for the resultant delay, I again apologise to both parties, further to the written apology previously issued by the Tribunal, on my behalf.

**Relevant Law: Strike Out**

106. As far as the statutory provisions are concerned, for present purposes, I need only refer to the terms of **Rule 2**, and **Rules 37(1) and (2) of the Employment Tribunal Rules of Procedure 2013**, as follows:

***Overriding objective***

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

- (a) ensuring that the parties are on an equal footing;***
- (b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;***
- (c) avoiding unnecessary formality and seeking flexibility in the proceedings;***
- (d) avoiding delay, so far as compatible with proper consideration of the issues; and***
- (e) saving expense.***

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



**Striking out**

**37.—(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—**

5           **(a) that it is scandalous or vexatious or has no reasonable prospect of success;**

**(b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;**

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**(c) for non-compliance with any of these Rules or with an order of the Tribunal;**

**(d) that it has not been actively pursued;**

**(e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).**

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**(2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.**

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107. The power to strike out a claim has been described by the Court of Appeal as a **'draconic power not to be readily exercised'** (**James v Blockbuster Entertainment Ltd [2006] EWCA Civ 684**, Lord Justice Sedley, para 5). Ms Nicol referred to Blockbuster at paragraph 2 of her written submissions for the claimant.

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108. It is described as such because it can stop the claimant from proceeding with their claim without having their case considered and evidence reviewed fully at a full hearing. Hence, the power should be used sparingly. As the Court of Session held, in **Tayside Public Transport Co Ltd (t/a Travel Dundee) v**

Reilly [2012] CSIH 46 ; [2012] IRLR 755, the power to strike out should only be exercised in rare circumstances.

109. A Tribunal can exercise its power to strike out a claim (or part of a claim) '**at any stage of the proceedings**' - Rule 37(1). However, the power must be exercised in accordance with "**reason, relevance, principle and justice**": Williams v Real Care Agency Ltd [2012] UKEATS/0051/11, [2012] ICR D27, per Mr Justice Langstaff at paragraph 18.

110. In directing myself to the relevant law, I have recalled **H M Prison Service v Dolby [2003] IRLR 694**, at paragraph 14 of Mr. Recorder Bower' QC's judgment, with Strike Out being described by counsel as the "**red card**.", and a Deposit Order is the "**yellow card**" option.

111. While **Dolby** reviewed the options for the Employment Tribunal, under the then 2001 Rules of Procedure, Mr Recorder Bower's judgment, at his paragraphs 14 and 15, is still worthy of consideration today, reading as it does, as follows:

**"14. We thus think that the position is that the Employment Tribunal has a range of options after the Rule amendments made in 2001 where a case is regarded as one which has no reasonable prospect of success. Essentially there are four. The first and most draconian is to strike the application out under Rule 15 (described by Mr Swift as "the red card"); but Tribunals need to be convinced that that is the proper remedy in the particular case. Secondly, the Tribunal may order an amendment to be made to the pleadings under Rule 15. Thirdly, they may order a deposit to be made under Rule 7 (as Mr Swift put it, "the yellow card"). Fourthly, they may decide at the end of the case that the application was misconceived, and that the Applicant should pay costs.**

**15. Clearly the approach to be taken in a particular case depends on the stage at which the matter is raised and the proper material to take into account. We think that the Tribunal must adopt a two-**

*stage approach; firstly, to decide whether the application is misconceived and, secondly, if the answer to that question is yes, to decide whether as a matter of discretion to order the application be struck out, amended or, if there is an application for one, that a pre-hearing deposit be given. The Tribunal must give reasons for the decision in each case, although of course they only need go as far as to say why one side won and one side lost on this point.”*

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112. In **Abertawe Bro Morgannwg University Health Board v Ferguson UKEAT/0044/13, [2014] IRLR 14**, the then learned EAT President, Mr Justice Langstaff, at paragraph 33 of the judgment, remarked in the course of giving judgment that, in suitable cases, applications for strike-out may save time, expense and anxiety.

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113. However, in cases that are likely to be heavily fact-sensitive, such as those involving discrimination or public interest disclosures, the circumstances in which a claim will be struck out are likely to be rare. In general it is better to proceed to determine a case on the evidence in light of all the facts. At the conclusion of the evidence gathering it is likely to be much clearer whether there is truly a point of law in issue or not.

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114. Special considerations arise if a Tribunal is asked to strike out a claim of discrimination on the ground that it has no reasonable prospect of success. In **Anyanwu and anor v South Bank Students' Union and anor 2001 ICR 391**, the House of Lords highlighted the importance of not striking out discrimination claims except in the most obvious cases as they are generally fact-sensitive and require full examination to make a proper determination.

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115. In **Ezsias v North Glamorgan NHS Trust 2007 ICR 1126**, the Court of Appeal held that the same or a similar approach should generally inform whistleblowing cases, which have much in common with discrimination cases, in that they involve an investigation into why an employer took a particular step. It stressed that it will only be in an exceptional case that an application will be struck out as having no reasonable prospect of success when the

central facts are in dispute. An example might be where the facts sought to be established by the claimant are totally and inexplicably inconsistent with the undisputed contemporaneous documentation.

5 116. Lady Smith in the Employment Appeal Tribunal expanded on the guidance given in **Ezsias** in **Balls v Downham Market High School and College [2011] IRLR 217**, stating that where strike-out is sought or contemplated on the ground that the claim has no reasonable prospect of success, the Tribunal must first consider whether, on a careful consideration of all the available material, it can properly conclude that the claim has no reasonable prospect  
10 of success.

117. The test is not whether the claim is likely to fail; nor is it a matter of asking whether it is possible that the claim will fail. It is not a test that can be satisfied by considering what is put forward by the respondent either in the ET3 or in submissions and deciding whether their written or oral assertions regarding  
15 disputed matters are likely to be established as facts. It is a high test.

118. In **Balls**, at paragraph 4, Lady Smith emphasised the need for caution in exercising the power, as follows:

20 ***“...to state the obvious, if a Claimant's claim is struck out, that is an end of it. He cannot take it any further forward. From an employee Claimant's perspective, his employer '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. If his claim had proceeded to a hearing on the merits, it might have been shown to be well founded and he may feel, whatever the circumstances, that he has been deprived of a fair chance to achieve that. It is for such reasons that 'strike-out' is often referred to as a draconian power. It is. There are of course, cases where fairness as between parties and the proper regulation of access to Employment Tribunals justify the use of this important weapon in an Employment Judge's available armoury but its application must be very carefully considered and the facts of the***  
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***particular case properly analysed and understood before any decision is reached.”***

119. Ms Nicol referred to each of **Balls** and **Ezsias** at paragraphs 3 and 4 of her written submissions for the claimant. Ms Bain, for the respondents, at her paragraph 24 referred me only to **Cox v Adecco**. Neither party's representative referred me to the EAT judgment in **Mechkarov v Citibank NA [2016] ICR 1121**, where, paraphrasing its terms, it was stated that the approach to be followed by a tribunal, when faced with an application to strike out a discrimination claim, was as follows:

10           **1       Only in the clearest case should a discrimination claim be struck out.**

**2       Where there are core issues of fact that turn to any extent on oral evidence, they should not be decided without hearing oral evidence.**

15           **3       The claimant's case must ordinarily be taken at its highest.**

**4       If the claimant's case is "conclusively disproved by" or is "totally and inexplicably inconsistent" with undisputed contemporaneous documents, it may be struck out.**

**5       A tribunal should not conduct an impromptu mini trial of oral evidence to resolve core disputed facts.”**

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120. In giving myself a self-direction on the relevant law, it is appropriate to look more closely at exactly what the EAT Judge, in **Mechkarov**, actually stated, by reference to paragraphs 11 to 18 of the judgment by Mr Justice Mitting, reading as follows:

25           **“11. The approach to striking out applications in discrimination cases is not, with one reservation, controversial. The starting point is the observation of Lord Steyn in Anyanwu v South Bank Students' Union [2001] UKHL 14; [2001] IRLR 305 at paragraph 24:**

5                    ***“24. ... For my part such vagaries in discrimination jurisprudence underline the importance of not striking out such claims as an abuse of the process except in the most obvious and plainest cases. Discrimination cases are generally fact-sensitive, and their proper determination is always vital in our pluralistic society. In this field perhaps more than any other the bias in favour of a claim being examined on the merits or demerits of its particular facts is a matter of high public interest. ...”***

10            **12. Maurice Kay LJ emphasised the point in paragraph 29 of his Judgment in *Ezsias v North Glamorgan NHS Trust* [2007] ICR 1126:**

15                    ***“29. It seems to me that on any basis there is a crucial core of disputed facts in this case that is not susceptible to determination otherwise than by hearing and evaluating the evidence. It was an error of law for the employment tribunal to decide otherwise. In essence that is what Elias J held. I do not consider that he put an unwarranted gloss on the words “no reasonable prospect of success”. It would only be in an exceptional case that an application to an employment tribunal will be struck out as having no reasonable prospect of success when the central facts are in dispute. An example might be where the facts sought to be established by the claimant were totally and inexplicably inconsistent with the undisputed contemporaneous documentation. The present case does not approach that level.”***

25                    **13. To these statements of principle must be added the observations of the Lord Justice Clerk in the Court of Session in *Tayside Public Transport Company Ltd v Reilly* [2012] CSIH 46 at paragraph 30.**

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

10 **conduct an impromptu trial of the facts (ED & F Mann Liquid Products Ltd v Patel [2003] CP Rep 51, Potter LJ at para 10). There may be cases where it is instantly demonstrable that the central facts in the claim are untrue; for example, where the alleged facts are conclusively**

15 **disproved by the productions (ED & F Mann ...; Ezsias ...). But in the normal case where there is a “crucial core of disputed facts”, it is an error of law for the Tribunal to preempt the determination of a full hearing by striking out (Ezsias ..., Maurice Kay LJ, at para 29).”**

20 **14. On the basis of those authorities, the approach that should be taken in a strike out application in a discrimination case is as follows: (1) only in the clearest case should a discrimination claim be struck out; (2) where there are core issues of fact that turn to any extent on oral evidence, they should not be decided**

25 **without hearing oral evidence; (3) the Claimant’s case must ordinarily be taken at its highest; (4) if the Claimant’s case is “conclusively disproved by” or is “totally and inexplicably inconsistent” with undisputed contemporaneous documents, it may be struck out; and (5) a Tribunal should not conduct an**

30 **impromptu mini trial of oral evidence to resolve core disputed facts. I would treat the approval of the course taken by an Employment Judge in Eastman v Tesco Stores Ltd [2012] UKEAT/0143/12 by HHJ Peter Clark, sitting in this Tribunal, of**

5 *hearing oral evidence on critical disputed questions of fact with reserve, because Tayside, which was decided before Eastman, was not cited to him or by him in his Judgment. In any event, it cannot determine the approach that the Employment Tribunal should take in a case such as this, in which an analysis of contemporaneous documents is required to permit a secure conclusion to be reached.*

- 10 15. *In his self directions of law the Employment Judge correctly in paragraph 35 of his Judgment cited the conclusions to be drawn from Anyanwu and Ezsias:*

15 *“35. ... Guidance given there was that only in rare cases should a tribunal strike out a discrimination claim without hearing evidence, where the central facts are in dispute. If facts are not in dispute, one should take the Claimant’s case at its highest and only then, if there are no prospects of success, should a claim be struck out.”*

16. *After two further citations, at paragraph 37 he summarised the approach he would take:*

20 *“37. ... The long and the short of it as I see it is that I should take the Claimant’s case at its highest on undisputed facts and if on that basis, he has no prospects of success, I should strike it out. If there are disputed facts, unless they could be very shortly and simply dealt with within the PHR [pre-hearing review], the case should be allowed to proceed to a hearing. In this case I did hear some evidence and have been able to make findings on some disputed facts.”*

- 25 30 17. *He was not referred to and did not cite Tayside. The oral evidence that he heard was from the Claimant, Ms Pierre and Mr Pannu. He made the following findings of fact at paragraphs 43 and 47 of his Judgment:*



5           ***“43. As to the investigation into [the Claimant’s] complaint, the compelling evidence of Mr Pannu, which I accept, was that he had been instructed to investigate allegations which [the Claimant] had made, or rather concerns which he had raised and brought to their attention, about financial transaction processes that have nothing to do with this case whatsoever. He was also instructed to investigate and take appropriate action arising out of Ms Pierre’s report that she had felt threatened by [the Claimant]. [The***

10           ***Claimant] complains that the Respondent did not report back to him on the outcome of their investigation. There was no obligation upon them to do so.***

...

15           ***47. As to the victimisation claim, as I have mentioned above, we established during the hearing that the alleged protected act was that [the Claimant] told Mr Pannu that everything which had happened to him was because he was Bulgarian and therefore he had made a complaint of discrimination. That in any event would mean that nothing with regard to Ms Pierre could be said to be an act of victimisation and only anything which happened after the***

20           ***8 December 2014 could have been. However, I heard evidence from Mr Pannu and [the Claimant] about this. I unhesitatingly accept the evidence of Mr Pannu, whose evidence was straightforward and consistent. I have***

25           ***already explained my criticisms of [the Claimant’s] evidence. I find that [the Claimant] did not make an allegation of discrimination in the meeting with Mr Pannu on 8 December 2014. I am reminded that in cross-***

30           ***examination at its conclusion, [the Claimant] agreed that he had not mentioned discrimination until he issued these proceedings. I therefore find on that basis, the complaint***

*of victimisation has no reasonable prospects of success and is also struck out.*

5 **18. In determining the application on the basis of the oral evidence to which I have referred, the Employment Judge did indeed conduct a “mini trial” on core issues of fact. He should not have done so, for two reasons:**

**(1) Tayside precludes that option.**

10 **(2) In any event, whether or not the Claimant’s case was well founded on either issue, discrimination or victimisation, turned at least to a significant extent on contemporaneous documents that were not produced to the Employment Tribunal, including notes of any interaction between Mr Pannu and persons interviewed by him and his report and, if they exist, internal emails dealing with the acts of**  
15 **discrimination alleged by the Claimant, the imposition of a “firewall” between him and his ex-colleagues, the reason for the imposition of the “firewall” and, if it be the case, the discouragement of ex-colleagues from speaking to him. The documents actually provided to the Tribunal are**  
20 **anodyne and may be incomplete.”**

121. It is surprising to me that neither party’s representative included in their own list of case law authorities the opinion of the Lord Justice Clerk in the Court of Session in **Tayside Public Transport Company Ltd v Reilly [2012] CSIH 46** at paragraph 30, the terms of which are reproduced above in **Mechkarov**,  
25 at paragraph 13.

122. That judgment from the Inner House of the Court of Session is, after all, the familiar authority on Striking Out (exercise of ET’s powers) at paragraph 25 of the **Employment Appeal Tribunal’s Practice Statement in relation to Familiar Authorities** re-issued on 17 March 2016. That is why I expressly  
30 cited it to both Ms Bain and Ms Nicol sat the Preliminary Hearing on 27 January 2023.

123. I recognise, of course, that the second stage exercise of discretion under **Rule 37(1)** is important, as commented upon by the then EAT Judge, Lady Wise, in **Hasan v Tesco Stores Ltd [2016] UKEAT/0098/16**, an unreported Judgment of 22 June 2016, where at paragraph 19, the learned EAT Judge refers to **“a fundamental cross-check to avoid the bringing to an end of a claim that may yet have merit.”**

124. Finally, and while not cited by either party’s representative, I have also reminded myself of the judicial guidance from the Employment Appeal Tribunal, in the judgment of the then Her Honour Judge Eady QC, now the High Court judge, Mrs Justice Eady, current President of the EAT, in **Mbuisa v Cygnet Healthcare Limited [2019] UKEAT/0119/18**, at paragraphs 19 to 21 as follows:

**19. The ET’s power to strike out a claim for having no reasonable prospect of success derives from Rule 37 Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (“the ET Rules”). The striking out of the claim amounts to the summary determination of the case. It is a draconian step that should only be taken in exceptional cases. It would be wrong to make such an order where there is a dispute on the facts that needs to be determined at trial. As the learned authors of Harvey on Industrial Relations and Employment Law explain (see P1 [633]):**

**“It has been held that the power to strike out a claim under SI2013/1237 Schedule 1 Rule 37(1)(a) on the ground that it has no reasonable prospect of success should only be exercised in rare circumstances (Tayside Public Transport Co Limited (trading as Travel Dundee) v Reilly [2012] CSIH 46 [2012] IRLR 755 at para 30) or specifically cases should not as a general principle be struck out on this ground when the central facts are in dispute (see Ezsias v North Glamorgan NHS Trust [2007] EWCA Civ 330 [2007] IRLR 603 [2017] ICR 1126; Tayside Public Transport Co Limited (trading as Travel Dundee) v Reilly [2012] CSIH 46 [2012] IRLR**

5 *755; Romanowska v Aspirations Care Limited UKEAT/0015/14 25 June 2014 unreported). The reason for this is that on a striking out application, as opposed to a Hearing on the merits, the Tribunal is in no position to conduct a mini trial with the result that it is only an exceptional case that it would be appropriate to strike out a claim on this ground where the issue to be decided is dependent on conflicting evidence..."*

10 **20. Such an exceptional case might arise where it is instantly demonstrable that the central facts in the claim are untrue or there is no real substance in the factual assertions being made, but the ET should take the Claimant's case, as it is set out in the claim, at its highest, unless contradicted by plainly inconsistent documents, see Ukegheson v London Borough of Haringey [2015] ICR 1285 at para 21 per Langstaff J at para 4.**

15 **21. Particular caution should be exercised if a case is badly pleaded, for example, by a litigant in person, especially in the case of a complainant whose first language is not English: taking the case at its highest, the ET may still ignore the possibility that it could have a reasonable prospect of success if properly pleaded,**  
20 **see Hassan v Tesco Stores Ltd UKEAT/0098/16 at para 15. An ET should not, of course, be deterred from striking out a claim where it is appropriate to do so but real caution should always be exercised, in particular where there is some confusion as to how a case is being put by a litigant in person; all the more so where**  
25 **- as Langstaff J observed in Hassan - the litigant's first language is not English or, I would suggest, where the litigant does not come from a background such that they would be familiar with having to articulate complex arguments in written form.**

30 125. Finally, when considering whether a claim can be struck out on the grounds that the case has no reasonable prospects of success, I have also reminded myself that the Tribunal should carefully consider the more recent judicial

guidance provided in the judgment from the case of **Cox v Adecco [2021] UKEAT/0339/19; [2021] ICR 1307.**

126. While cited by Ms Bain, at paragraph 24 of her own written submission to the Tribunal, she cited myopically only from paragraph 30, yet it is an important judgment from His Honour Judge Tayler in the Employment Appeal Tribunal, and it bears close and more fulsome reading of its whole terms. In addition to the summary of the current state of the law on strike out, Judge Tayler considered that the judgment of the former President, Mr Justice Choudhury, in **Malik v Birmingham City Council [2019] UKEAT/0027/19**, which helpfully summarised the current, and well-settled, state of the law on strike out, and that judgment was important because of the consideration the then President gave to dealing with strike out of claims made by litigants in person.
127. I have specifically taken into account what Judge Tayler stated in that **Cox** judgment, namely at his paragraphs 24 to 26, as follows:

24. ***Guidance for considering claims brought by litigants in person is given in the Equal Treatment Bench Book (“ETBB”). In the introduction to Chapter 1 it is noted, in a very well-known passage:***

***“Litigants in person may be stressed and worried: they are operating in an alien environment in what is for them effectively a foreign language. They are trying to grasp concepts of law and procedure, about which they may have no knowledge. They may be experiencing feelings of fear, ignorance, frustration, anger, bewilderment and disadvantage, especially if appearing against a represented party.***

***The outcome of the case may have a profound effect and long-term consequences upon their life. They may have agonised over whether the case was worth the risk to their health and finances, and therefore feel passionately about their situation.***

***Subject to the law relating to vexatious litigants, everybody of full age and capacity is entitled to be heard in person by any court or tribunal.***

5 ***All too often, litigants in person are regarded as the problem. On the contrary, they are not in themselves ‘a problem’; the problem lies with a system which has not developed with a focus on unrepresented litigants.”***

10 ***25. At para. 26 of Chapter 1 ETBB, consideration is given to the difficulties that litigants in person may face in pleading their cases:***

***“Litigants in person may make basic errors in the preparation of civil cases in courts or tribunals by:***

- ***Failing to choose the best cause of action or defence.***
- 15 • ***Failing to put the salient points into their statement of case.***
- ***Describing their case clearly in non-legal terms, but failing to apply the correct legal label or any legal label at all. Sometimes they gain more assistance and leeway from a court in identifying the correct legal label when they have not applied any legal label, than when they have made a wrong guess. [emphasis added]***

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25 ***26. I consider that the ETBB provides context to the statement by the President of the EAT in Malik about the importance of not expecting a litigant in person to explain their case and take the employment judge to any relevant materials; but for the judge also to consider the pleadings and any other core documents that explain the case the litigant in person wishes to advance:...”***

128. Further, I have also taken into account Judge Tayler's further sage guidance at his paragraphs 27 to 34 in **Cox**, as follows:

5 **27. Because the material that explains the case may be in documents other than the claim form, whereas the employment tribunal is limited to determining the claims in the claim form (Chapman v Simon [1994] IRLR 124), consideration may need to be given to whether an amendment should be permitted, especially if this would result in the correct legal labels being applied to facts that have been pleaded, or are apparent from other documents in which the claimant seeks to explain the claim. The fact that a claim as pleaded has no reasonable prospect of success gives an employment judge a discretion to exercise as to whether the claim should be struck out: HM Prison Service v Dolby [2003] IRLR 694; Hasan v Tesco Stores Ltd UKEAT/0098/16. Part of the exercise of that discretion may involve consideration of whether an amendment should be permitted should the balance of justice in allowing or refusing the amendment permit if it would result in there being an arguable claim that the claimant should be permitted to advance. In Mbuisa v Cygnet Healthcare Ltd UKEAT/0119/18, HHJ Eady QC held at para. 21:**

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25 **“Particular caution should be exercised if a case is badly pleaded, for example, by a litigant in person, especially in the case of a complainant whose first language is not English: taking the case at its highest, the ET may still ignore the possibility that it could have a reasonable prospect of success if properly pleaded, see Hassan v Tesco Stores Ltd UKEAT/0098/16 at para 15. An ET should not, of course, be deterred from striking out a claim where it is appropriate to do so but real caution should always be exercised, in particular where there is some confusion as to how a case is being put by a litigant in person; all the more so where**

30 **- as Langstaff J observed in Hassan - the litigant's first language is not English or, I would suggest, where the litigant does not**

*come from a background such that they would be familiar with having to articulate complex arguments in written form.”*

**28. From these cases a number of general propositions emerge, some generally well-understood, some not so much:**

- 5           **(1) No-one gains by truly hopeless cases being pursued to a hearing;**
- (2) Strike out is not prohibited in discrimination or whistleblowing cases; but especial care must be taken in such cases as it is very rarely appropriate;**
- 10           **(3) If the question of whether a claim has reasonable prospect of success turns on factual issues that are disputed, it is highly unlikely that strike out will be appropriate;**
- (4) The Claimant’s case must ordinarily be taken at its highest;**
- (5) It is necessary to consider, in reasonable detail, what the claims and issues are. Put bluntly, you can’t decide whether a claim has reasonable prospects of success if you don’t know what it is;**
- 15           **(6) This does not necessarily require the agreement of a formal list of issues, although that may assist greatly, but does require a fair assessment of the claims and issues on the basis of the pleadings and any other documents in which the claimant seeks to set out the claim;**
- 20           **(7) In the case of a litigant in person, the claim should not be ascertained only by requiring the claimant to explain it while under the stresses of a hearing; reasonable care must be taken to read the pleadings (including additional information) and any key documents in which the claimant sets out the case. When pushed by a judge to explain the claim, a litigant in person may become like a rabbit in the**
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***headlights and fail to explain the case they have set out in writing;***

5 ***(8) Respondents, particularly if legally represented, in accordance with their duties to assist the tribunal to comply with the overriding objective and not to take procedural advantage of litigants in person, should assist the tribunal to identify the documents in which the claim is set out, even if it may not be explicitly pleaded in a manner that would be expected of a lawyer;***

10 ***(9) If the claim would have reasonable prospects of success had it been properly pleaded, consideration should be given to the possibility of an amendment, subject to the usual test of balancing the justice of permitting or refusing the amendment, taking account of the relevant***  
15 ***circumstances.***

20 ***29. If a litigant in person has pleaded a case poorly, strike out may seem like a short cut to deal with a case that would otherwise require a great deal of case management. A common scenario is that at a preliminary hearing for case management it proves difficult to identify the claims and issues within the relatively limited time available; the claimant is ordered to provide additional information and a preliminary hearing is fixed at which another employment judge will, amongst other things, have to consider whether to strike out the claim, or make a deposit order. The litigant in person, who struggled to plead the claim initially, unsurprisingly, struggles to provide the additional information and, in trying to produce what has been requested, under increasing pressure, produces a document that makes up for in quantity what it lacks in clarity. The employment judge at the***  
25 ***preliminary hearing is now faced with determining strike out in a claim that is even less clear than it was before. This is a real problem. How can the judge assess whether the claim has no, or***  
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*little, reasonable prospects of success if she/he does not really understand it?*

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**30.** *There has to be a reasonable attempt at identifying the claims and the issues before considering strike out or making a deposit order. In some cases, a proper analysis of the pleadings, and any core documents in which the claimant seeks to identify the claims, may show that there really is no claim, and there are no issues to be identified; but more often there will be a claim if one reads the documents carefully, even if it might require an amendment. Strike out is not a way of avoiding rolling up one's sleeves and identifying, in reasonable detail, the claims and issues; doing so is a prerequisite of considering whether the claim has reasonable prospects of success. Often it is argued that a claim is bound to fail because there is one issue that is hopeless. For example, in the protected disclosure context, it might be argued that the claimant will not be able to establish a reasonable belief in wrongdoing; however, it is generally not possible to analyse the issue of wrongdoing without considering what information the claimant contends has been disclosed and what type of wrongdoing the claimant contends the information tended to show.*

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**31.** *Respondents seeking strike out should not see it as a way of avoiding having to get to grips with the claim. They need to assist the employment tribunal in identifying what, on a fair reading of the pleadings and other key documents in which the claimant sets out the case, the claims and issues are. Respondents, particularly if legally represented, in accordance with their duties to assist the tribunal to comply with the overriding objective and not to take procedural advantage of litigants in person, should assist the tribunal to identify the documents, and key passages of the documents, in which the claim appears to be set out, even if it may not be explicitly pleaded in a manner that would be*

*expected of a lawyer, and take particular care if a litigant in person has applied the wrong legal label to a factual claim that, if properly pleaded, would be arguable. In applying for strike out, it is as well to take care in what you wish for, as you may get it, but then find that an appeal is being resisted with a losing hand.*

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**32.** *This does not mean that litigants in person have no responsibilities. So far as they can, they should seek to explain their claims clearly even though they may not know the correct legal terms. They should focus on their core claims rather than trying to argue every conceivable point. The more prolix and convoluted the claim is, the less a litigant in person can criticise an employment tribunal for failing to get to grips with all the possible claims and issues. Litigants in person should appreciate that, usually, when a tribunal requires additional information it is with the aim of clarifying, and where possible simplifying, the claim, so that the focus is on the core contentions. The overriding objective also applies to litigants in person, who should do all they can to help the employment tribunal clarify the claim. The employment tribunal can only be expected to take reasonable steps to identify the claims and issues. But respondents, and tribunals, should remember that repeatedly asking for additional information and particularisation rarely assists a litigant in person to clarify the claim. Requests for additional information should be as limited and clearly focussed as possible.*

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**33.** *I have referred to strike out of claimants' cases, as that is the most common application, but the same points apply to an application to strike out a response, particularly where the respondent is a litigant in person.*

**34.** *In many cases an application for a deposit order may be a more proportionate way forward."*

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**Relevant Law: Deposit Orders**

129. Ms Bain's written submissions for the respondents recited the statutory provision from **Rule 39(1) of the Employment Tribunal Rules of Procedure 2013**. Further, at her paragraph 27, she cited from Mr Justice Elias's judgment, paragraphs 24 to 27, in **Van Rensburg**. It, of course, referred to the Court of Appeal's earlier judgment, by Lord Justice Maurice Kay, in **Ezsias**, as cited by Ms Nicol, for the claimant, at paragraph 4 of her own submission for the claimant.
130. Neither party's representative made any reference whatsoever to any other relevant case law authority. As such, I have had to give myself a self-direction on the relevant law in that regard.
131. Under **Rule 39(1)**, at a Preliminary Hearing, if an Employment Judge considers that any specific allegation or argument in a claim or response has "**little reasonable prospect of success**", the Judge can make an order requiring the party to pay a deposit to the Tribunal, as a condition of being permitted to continue to advance that allegation or argument.
132. In **H M Prison Service v Dolby [2003] IRLR 694**, at paragraph 14 of Mr. Recorder Bower' QC's judgment, a Deposit Order is the "**yellow card**" option, with Strike Out being described by counsel as the "**red card**."
133. The test for a Deposit Order is not as rigorous as the "**no reasonable prospect of success**" test under **Rule 37(1) (a)**, under which the Tribunal can strike out a party's case.
134. This was confirmed by the then President of the Employment Appeal Tribunal, Mr. Justice Elias, in **Van Rensburg v Royal Borough of Kingston upon Thames [2007] UKEAT/0096/07**, who concluded it followed that "**a Tribunal has a greater leeway when considering whether or not to order a deposit**" than when deciding whether or not to strike out.
135. Where a Tribunal considers that a specific allegation or argument has little reasonable prospect of success, it may order a party to pay a deposit not

exceeding £1,000 as a condition of continuing to advance that allegation or argument.

136. **Rule 39(1)** allows a Tribunal to use a Deposit Order as a less draconian alternative to Strike Out where a claim (or part) is perceived to be weak but could not necessarily be described by a Tribunal as having no reasonable prospect of success.

137. In fact, it is fairly commonplace before the Tribunal for a party making an application for Strike Out on the basis that the other party's case has “**no reasonable prospect of success**” to also make an application for a Deposit Order to be made in the alternative if the ‘**little reasonable prospect**’ test is satisfied.

138. The test of ‘**little prospect of success**’ is plainly not as rigorous as the test of ‘**no reasonable prospect**’. It follows that a Tribunal accordingly has a greater leeway when considering whether or not to order a deposit. But it must still have a proper basis for doubting the likelihood of the party being able to establish the facts essential to the claim – **Van Rensburg**, cited above.

139. Prior to making any decision relating to the Deposit Order, the Tribunal must, under **Rule 39(2)**, make reasonable enquiries into the paying party's ability to pay the deposit, and it must take this into account in fixing the level of the deposit. It was, in terms of this **Rule 39(2)** requirement, that I took sworn evidence from the claimant at this Preliminary Hearing.

140. In **Jilley v Birmingham and Solihull Mental Health NHS Trust [2007] UKEAT/0584/06**, His Honour Judge Richardson confirmed that there is no 'absolute duty' on a Tribunal to take ability to pay into account, but he commented that it would in many cases be desirable to take means into account before making an Order, as the ability of a party to pay may affect the exercise of an overall discretion.

141. Insofar as it does have regard to the claimant's ability to pay, the Tribunal should have regard to the “**whole means**” of the potential “**paying party**” –

per the Employment Appeal Tribunal's judgment, by Lady Smith, in **Shields Automotive Ltd –v- Greig [2011] UKEATS/0024/10**.

142. This includes considering capital within a person's means, which will often be represented by property or other investments which are not as accessible as cash, but which should not be ignored. Affordability is not the only criterion for the exercise of the discretion and the Tribunal is not required to make a precise estimate of what the claimant can afford.

143. What Lady Smith, the EAT Judge, stated, at paragraph 47 in **Shields**, was as follows:

*“Assessing a person’s ability to pay involves considering their whole means. Capital is a highly relevant aspect of anyone’s means. To look only at income where a person also has capital is to ignore a relevant factor. We would add that we reject Mr Woolfson’s submission to the effect that capital is not relevant if it is not in immediately accessible form; a person’s capital will often be represented by property or other investments which are not as accessible as cash but that is not to say that it should be ignored. In any event, no case was made to the Tribunal that the Claimant would have difficulty in realising his interest in the house or using its value in some other way so as to meet his liability for expenses. We, accordingly, uphold the appeal on this ground also.”*

144. As stated by Lady Smith, in the unreported EAT judgment given by her in **Simpson v Strathclyde Police & another [2012] UKEATS/0030/11**, at paragraph 40, there are no statutory rules requiring an Employment Judge to calculate a Deposit Order in any particular way; the only requirement is that the figure be a reasonable one.

145. Further, at paragraph 42 of her judgment in **Simpson**, Lady Smith also stated that:

*“It is to be assumed that claimants will not readily part with money that they are likely to lose – particularly where it may pave the way to adding to that loss a liability for expenses or a preparation time order (see rule*

47(1)). **Both of those risks are spelt out to a claimant in the order itself (see rule 20(2)). The issuing of a deposit order should, accordingly, make a claimant stop and think carefully before proceeding with an evidently weak case and only do so if, notwithstanding the Employment Tribunal's assessment of its prospects, there is good reason to believe that the case may, nonetheless succeed. It is not an unreasonable requirement to impose given a claimant's responsibility to assist the tribunal to further the overriding objective which includes dealing with cases so as to save expense and ensure expeditious disposal (rule 3(1)(2) and (4))."**

146. Lady Smith's judgment referred to the then 2004 Rules. Further, at paragraph 49, she also stated that: "**it is not enough for a claimant to show that it will be difficult to pay a deposit order; it is not, in general, expected that it will be easy for claimants to do so.**"

147. Further, I wish to note and record that in the EAT's judgment in **Wright v Nipponkoa Insurance (Europe) Ltd [2014] UKEAT/0113/14**, dealing with the *quantum* of Deposit Orders, it was held that separate Deposit Orders can be made in respect of individual arguments or allegations, and that if making a Deposit Order, a Tribunal should have regard to the question of proportionality in terms of the total award made.

148. Her Honour Judge Eady QC, as she then was, now Mrs Justice Eady, the current EAT President, discussed the relevant legislation and legal principles, at paragraphs 29 to 31, and in particular I would refer here to the summary of HHJ Eady QC's judgment at paragraph 3, on the *quantum* of Deposit Orders, stating that the Tribunal Rules 2013 permit the making of separate Deposit Orders in respect of individual arguments or allegations, and that if making a number of Deposit Orders, an Employment Judge should have regard to the question of proportionality in terms of the total award made. Paragraphs 77 to 79 of the **Wright** judgment refer.

149. In the present case, while the claimants' complaints in the ET1 claim form are currently registered by the Tribunal's administration under two administrative

jurisdictional codes, for unfair dismissal, and failure to pay holiday pay, being “UDL” and “WTR(AL)”, the claimant’s representative has confirmed that the claimant wishes to pursue both heads of claim to a Final Hearing. As such, there are two separate allegations before the Tribunal, and so the Tribunal has the power to consider making separate Deposit Orders in respect of each of those two allegations.

150. Finally, although I was not referred to it by either party’s representative, I am also aware, from judicial experience in other such Hearings, that there is also the more recent guidance from Her Honour Judge Eady QC, in **Tree v South East Coastal Ambulance Service NHS Foundation Trust [2017] UKEAT/0043/17**, referring to Mrs Justice Simler, then President of the EAT, in **Hemdan v Ishmail & Another [2017] ICR 486 ; [2017] IRLR 228**, and Judge Eady QC holding that, when making a Deposit Order, an Employment Tribunal needs to have a proper basis for doubting the likelihood of a claimant being able to establish the facts essential to make good their claim.

151. **Hemdan** is also of interest because the learned EAT President, at paragraph 10, characterised a Deposit Order as being “*rather like a sword of Damocles hanging over the paying party*”, and she then observed, at paragraph 16, that: “*Such orders have the potential to restrict rights of access to a fair trial.*”

152. Mrs Justice Simler’s judgment from the EAT in **Hemdan**, at paragraphs 10 to 17, addresses the relevant legal principles about Deposit Orders, and I gratefully adopt it as a helpful and informative summary of the relevant law, as follows:

“10. *A deposit order has two consequences. First, a sum of money must be paid by the paying party as a condition of pursuing or defending a claim. Secondly, if the money is paid and the claim pursued, it operates as a warning, rather like a sword of Damocles hanging over the paying party, that costs might be ordered against that paying party (with a presumption in particular circumstances that costs will be ordered) where the*



*allegation is pursued and the party loses. There can accordingly be little doubt in our collective minds that the purpose of a deposit order is to identify at an early stage claims with little prospect of success and to discourage the pursuit of those claims by requiring a sum to be paid and by creating a risk of costs ultimately if the claim fails. That, in our judgment, is legitimate, because claims or defences with little prospect cause costs to be incurred and time to be spent by the opposing party which is unlikely to be necessary. They are likely to cause both wasted time and resource, and unnecessary anxiety. They also occupy the limited time and resource of courts and tribunals that would otherwise be available to other litigants and do so for limited purpose or benefit.*

*11. The purpose is emphatically not, in our view, and as both parties agree, to make it difficult to access justice or to effect a strike out through the back door. The requirement to consider a party's means in determining the amount of a deposit order is inconsistent with that being the purpose, as Mr Milsom submitted. Likewise, the cap of £1,000 is also inconsistent with any view that the object of a deposit order is to make it difficult for a party to pursue a claim to a Full Hearing and thereby access justice. There are many litigants, albeit not the majority, who are unlikely to find it difficult to raise £1,000 by way of a deposit order in our collective experience.*

*12. The approach to making a deposit order is also not in dispute on this appeal save in some small respects. The test for ordering payment of a deposit order by a party is that the party has little reasonable prospect of success in relation to a specific allegation, argument or response, in contrast to the test for a strike out which requires a tribunal to be satisfied that there is no reasonable prospect of success. The test, therefore, is less rigorous in that sense, but nevertheless there must be a proper*

*basis for doubting the likelihood of a party being able to establish facts essential to the claim or the defence. The fact that a tribunal is required to give reasons for reaching such a conclusion serves to emphasise the fact that there must be such a proper basis.*

5           13. *The assessment of the likelihood of a party being able to*  
*establish facts essential to his or her case is a summary*  
*assessment intended to avoid cost and delay. Having regard to*  
*the purpose of a deposit order, namely to avoid the opposing*  
*party incurring cost, time and anxiety in dealing with a point on*  
10 *its merits that has little reasonable prospect of success, a mini-*  
*trial of the facts is to be avoided, just as it is to be avoided on a*  
*strike out application, because it defeats the object of the*  
*exercise. Where, for example as in this case, the Preliminary*  
*Hearing to consider whether deposit orders should be made was*  
15 *listed for three days, we question how consistent that is with the*  
*overriding objective. If there is a core factual conflict it should*  
*properly be resolved at a Full Merits Hearing where evidence is*  
*heard and tested.*

20           14. *We also consider that in evaluating the prospects of a particular*  
*allegation, tribunals should be alive to the possibility of*  
*communication difficulties that might affect or compromise*  
*understanding of the allegation or claim. For example where, as*  
*here, a party communicates through an interpreter, there may be*  
*misunderstandings based on badly expressed or translated*  
25 *expressions. We say that having regard in particular to the fact*  
*that in this case the wording of the three allegations in the claim*  
*form, drafted by the Claimant acting in person, was scrutinised*  
*by reference to extracts from the several thousand pages of*  
*transcript of the earlier criminal trials to which we have referred,*  
30 *where the Claimant was giving evidence through an*  
*interpreter. Whilst on a literal reading of the three allegations*  
*there were inconsistencies between those allegations and the*

evidence she gave, minor amendments to the wording of the allegations may well have addressed the inconsistencies without significantly altering their substance. In those circumstances, we would have expected some leeway to have been afforded, and unless there was good reason not to do so, the allegation in slightly amended form should have been considered when assessing the prospects of success.

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15. *Once a tribunal concludes that a claim or allegation has little reasonable prospect of success, the making of a deposit order is a matter of discretion and does not follow automatically. It is a power to be exercised in accordance with the overriding objective, having regard to all of the circumstances of the particular case. That means that regard should be had for example, to the need for case management and for parties to focus on the real issues in the case. The extent to which costs are likely to be saved, and the case is likely to be allocated a fair share of limited tribunal resources, are also relevant factors. It may also be relevant in a particular case to consider the importance of the case in the context of the wider public interest.*
  16. *If a tribunal decides that a deposit order should be made in exercise of the discretion pursuant to Rule 39, sub-paragraph (2) requires tribunals to make reasonable enquiries into the paying party's ability to pay any deposit ordered and further requires tribunals to have regard to that information when deciding the amount of the deposit order. Those, accordingly, are mandatory relevant considerations. The fact they are mandatory considerations makes the exercise different to that carried out when deciding whether or not to consider means and ability to pay at the stage of making a cost order. The difference is significant and explained, in our view, by timing. Deposit orders are necessarily made before the claim has been considered on its merits and in most cases at a relatively early stage in*

5 *proceedings. Such orders have the potential to restrict rights of access to a fair trial. Although a case is assessed as having little prospects of success, it may nevertheless succeed at trial, and the mere fact that a deposit order is considered appropriate or justified does not necessarily or inevitably mean that the party will fail at trial. Accordingly, it is essential that when such an order is deemed appropriate it does not operate to restrict disproportionately the fair trial rights of the paying party or to impair access to justice. That means that a deposit order must*

10 *both pursue a legitimate aim and demonstrate a reasonable degree of proportionality between the means used and the aim pursued (see, for example, the cases to which we were referred in writing by Mr Milsom, namely Ait-Mouhoub v France [2000] 30 EHR 382 at paragraph 52 and Weissman and Ors v Romania 63945/2000 (ECtHR)). In the latter case the Court said the following:-*

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20 *“36. Notwithstanding the margin of appreciation enjoyed by the State in this area, the Court emphasises that a restriction on access to a court is only compatible with Article 6(1) if it pursues a legitimate aim and if there is a reasonable degree of proportionality between the means used and the aim pursued.*

25 *37. In particular, bearing in mind the principle that the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective, the Court reiterates that the amount of the fees, assessed in the light of the particular circumstances of a given case, including the applicant’s ability to pay them and the phase of the proceedings at which that restriction has*

30 *been imposed, are factors which are material in determining whether or not a person enjoyed his or her right of access to a court or whether, on account of the amount of fees*

*payable, the very essence of the right of access to a court has been impaired ...*

5 *42. Having regard to the circumstances of the case, and particularly to the fact that this restriction was imposed at an initial stage of the proceedings, the Court considers that it was disproportionate and thus impaired the very essence of the right of access to a court ...”*

10 *17. An order to pay a deposit must accordingly be one that is capable of being complied with. A party without the means or ability to pay should not therefore be ordered to pay a sum he or she is unlikely to be able to raise. The proportionality exercise must be carried out in relation to a single deposit order or, where such is imposed, a series of deposit orders. If a deposit order is set at a level at which the paying party cannot afford to pay it, the order will operate to impair access to justice. The position, accordingly, is very different to the position that applies where a case has been heard and determined on its merits or struck out because it has no reasonable prospects of success, when the parties have had access to a fair trial and the tribunal is engaged in determining whether costs should be ordered.”*

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153. For the purposes of this Judgment, in the present case, I do not need to address the differing approaches identified by Lady Smith in **Simpson**, and Mrs Justice Simler in **Hemdan**. I suspect, however, that it will only be a matter of time before another Employment Judge somewhere else, in another case,

25 will have to wrestle with the competing views of these two learned EAT Judges, and decide what is the correct approach under the current 2013 Rules.

154. It is not necessary for me to do so in the present case. For any future case, however, I note from the ICR law report, and the list of cases cited in argument before Mrs Justice Simler in **Hemdan**, as listed at **[2017] ICR 487 C/F**, that Lady Smith’s unreported judgment in **Simpson** was not cited,

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although various other unreported EAT judgments were cited in argument before her, and **Simpson** is not referred to in the EAT's reported Judgment in **Hemdan**.

### **Discussion and Deliberation**

- 5 155. Having now carefully considered both parties' written and oral submissions, along with my own obligations under **Rule 2 of the Employment Tribunals Rules of Procedure 2013**, being the Tribunal's overriding objective to deal with the case fairly and justly, I consider that, in terms of **Rule 37(2)**, the claimant has been given a reasonable opportunity at this Preliminary Hearing
- 10 to make, via his Law Clinic representative, his own representations opposing the respondents' written application for Strike Out, which failing Deposit Order.
156. **Rule 37** entitles an Employment Tribunal to strike out a claim in certain defined circumstances, (a) to (e). Here, the respondents' submissions focus
- 15 their application for Strike Out of the claim under **Rule 37(1)(a)** on the basis that the claim has no reasonable prospect of success.
157. After the most careful and anxious consideration of the competing arguments, taking into account the relevant law, as ascertained in the legal authorities referred to earlier in these Reasons, I am not satisfied that this is one of those
- 20 cases where it is appropriate to Strike Out the claim, which should accordingly proceed to be determined on its merits at a Final Hearing.
158. I am not satisfied that it is in the interests of justice to Strike Out the claim, without hearing evidence, when the respondents' solicitor, Ms Bain, in her submissions on their behalf, has not satisfied me that the claims of unfair
- 25 constructive dismissal and failure to pay holiday pay have no reasonable prospects of success.
159. The claimant's representative's submissions, written and oral, as set forth earlier in these Reasons, have persuaded me that, in the exercise of my judicial discretion, I should not Strike Out the claim, but allow it to go forward
- 30 to a Final Hearing, where evidence from both parties can be tried and tested.

I regard as well-founded the claimant's representative's arguments against a Strike Out.

160. Further, it seems to me to be not in the interests of justice, and thus inconsistent with Tribunal's overriding objective to deal with the case fairly and justly, that this case is brought to an end, and brought to an end now, and that is why I have decided to refuse the respondents' application for Strike Out, and instead decided to list the case for a full merits Hearing in due course.
161. To have struck out the claim now would have been draconian, and a barrier to justice for the claimant, where he has persistently argued that there is an arguable case against these respondents, and the claimant offers to prove that case, with a view to obtaining Judgment against these respondents.
162. While Ms Bain identified, in her written and oral submissions for the respondents, that there are certain aspects of the claim as previously pled by the claimant, as an unrepresented, party litigant, which suggest to her that the claim has no reasonable prospects of success, those matters are best addressed by the leading of witness evidence in the case, from both parties, being tried and tested at an evidential enquiry conducted at a Final Hearing of the claim and response.
163. In these circumstances, there being significant disputed facts as between the parties, I take the view that the case should proceed to a Final Hearing. I am satisfied that there being a core factual dispute, the dispute between the parties in this Tribunal is best resolved at a full Merits Hearing where evidence is tried and tested.
164. As per paragraph 30 of **Tayside v Reilly**, a Tribunal should not conduct an impromptu mini trial of oral evidence to resolve core disputed facts. This case, in my view, is clearly a matter for proof, where the claimant can give his evidence as to why he believes he suffered an unfair constructive dismissal, and the respondents can lead whatever evidence they feel is appropriate to resist that claim brought against them. In my view, this is not an issue that can be resolved on the papers and it is one which requires oral evidence to enable

a proper judicial determination to be made, after hearing evidence led from both parties.

- 5 165. There are many factors to be taken into account, and, as such, a factual enquiry being for another day, at a Final Hearing to be fixed sometime in the proposed listing period of **July, August or September 2023**, I am of the view that the unfair constructive dismissal head of claim is best addressed by both parties leading evidence, from relevant and necessary witnesses, at that Final Hearing.
- 10 166. By convening a Final Hearing, I consider that that Hearing will allow a full Tribunal to come to a judicial determination, with the benefit of evidence led by both parties, tried and tested through cross-examination in the usual way, any necessary clarifications of that evidence by the Tribunal, and both parties' representatives then making closing submissions to the Tribunal on the basis of the evidence as led, and their submissions on the factual and legal issues  
15 arising in this claim of unfair constructive dismissal.
- 20 167. In light of some of the points raised by Ms Bain , I did consider whether there was any scope for finding that the case as pled has little reasonable prospects of success and, if so, deciding whether or not there is any scope for making a Deposit Order against the claimant on the basis that the unfair constructive dismissal claim, as currently pled, has little reasonable prospects of success.
- 25 168. In the same way as Ms Bain's primary submissions have failed to convince me that she has crossed the high threshold of showing that there are no reasonable prospects of success, so too do I consider that, on the information available to me at this stage, I can make a finding that the unfair constructive dismissal claim has little reasonable prospects of success. While it appears a weak claim to the respondents, I cannot hold that it is a fanciful claim.
- 30 169. Further, even if I had come to that view, I would have then required to decide whether or not it is appropriate to grant any Deposit Order in this case. After carefully considering parties' competing views on that matter, I would not have done so.



170. I agree with the claimant's representative, in light of the claimant's current financial circumstances, as spoken to in evidence from him, that even a modest figure by way of a deposit for each allegation made against the respondents would, in effect, have been a barrier to justice, as the evidence  
5 led at this Hearing shows he has no disposable income, nor any capital or savings, easily realisable, from which to pay a deposit. Had I made such an Order, I would have done so at £25 per head of claim, having regard to the claimant's limited financial means.

171. It seems to me that if the case proceeds to Final Hearing, and the claimant is  
10 ultimately unsuccessful, then the respondents are not prejudiced by me not making a Deposit Order, because they still have the right, to seek an award of expenses against the claimant, in terms of **Rules 74 to 84**.

172. If, on the other hand, I were to have made a Deposit Order now, even in a modest amount of £25 per head of claim, and that total sum of £50 was not  
15 paid by the claimant, as seems likely given his dire financial straits, then his case would come to an end without being heard on its merits, and the respondents would obtain Strike Out of his claim, not based upon their successful defence of that claim, but based on the claimant's inability to pay that deposit. I do not consider that to be satisfactory, nor in the interests of  
20 justice.

**Claimant's Proposed Application to amend his Claim to add Disability Discrimination**

173. On 1 March 2023, the claimant's representative, the 3 Student Advisors from Strathclyde University Law Clinic, wrote to the Glasgow ET, with copy to the  
25 respondents' solicitor, by letter attaching an application on his behalf for leave to amend the ET1 claim form to, as explained in the covering letter, "**to amend the ET1 so the facts and events that the Claimant has already set out in his ET1 and further particulars, with regards to constructive dismissal and holiday pay, are amalgamated and better set out**", and "**to lodge additional claims of disability discrimination under the Equality**  
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***Act 2010. These would be the claims of harassment (section 26) and failure to make reasonable adjustments (section 20).”***

174. Thereafter, on 10 March 2023, the respondents’ solicitor, Ms Bain, forwarded to Glasgow ET, with copy to the Law Clinic, the respondents’ comments on the claimant’s application to amend, lodging her client’s objections to the claimant’s application to amend his ET1. In reply to that correspondence, both parties were advised, by letter from the Tribunal on 13 March 2023, that further procedure on the opposed amendment application would be decided once the Judgment following on the Preliminary Hearing on 27 January 2023 had been issued.

175. As neither party’s representative has requested an oral Hearing to determine the opposed amendment application, I propose to deal with it as soon as possible, on the papers only, and without an attended Hearing, by way of considering both parties’ written representations, in chambers, and thereafter giving a written ruling. I have asked the Tribunal administration to fix a 3-hour in chambers Preliminary Hearing for that purpose, and parties will be advised of the date fixed for information only.

### **Further Procedure**

176. The claimant’s existing complaints of unfair constructive dismissal by the respondents, and failure to pay holiday pay, remain. Those heads of claim shall proceed to be listed in due course for an in-person Final Hearing before a full Tribunal of a Judge and two lay members, as there is a likelihood of a dispute arising on the facts which makes it desirable for the case to be heard by a full Tribunal.

177. If the holiday pay part of the claim is to be insisted upon by the claimant, following the Law Clinic’s proposed review of the claimant’s payslips from the respondents, then the claimant must provide fair notice to the respondents of the amount of holiday pay that he believes is due to him, together with an explanation of how that sum has been calculated, as also the factual and legal basis on which he says he is still owed unpaid holiday pay.

178. Continued failure to do so, given the Tribunal's previous Order of 6 September 2022, is likely to lead to the respondents seeking Strike Out of that part of the claim for failure to actively pursue, and / or failure to comply with a Tribunal Order.
- 5 179. If the claimant's amendment application is allowed, then any discrimination head of claim would be for a full Tribunal too, and it would be appropriate to allow the respondents the right to provide revised grounds of resistance to their ET3 response, to deal with any additional heads of claim, if allowed in by amendment being granted.
- 10 180. On that basis, I will instruct the Tribunal clerk to issue date listing letters to both parties for completion and return to the Tribunal for the proposed listing period of **July, August or September 2023**, as that listing period allows sufficient time to determine the opposed amendment application and, if it were to be allowed, for the respondents to reply to any additional heads of claim  
15 allowed in by the Tribunal.
181. Once date listing letters are received back, I have instructed the Tribunal clerk that the case file will be referred back me to give specific listing instructions, having regard to both parties' stated availability, witness lists, and their estimates for the duration of evidence from the various witnesses to be led by  
20 each of them at that Final Hearing. At that time, I will also consider what case management orders and directions might be necessary for the good and orderly conduct of that Final Hearing.
182. I have not ordered that there should be a Case Management Preliminary Hearing, arranged before the Final Hearing, as I presently consider that  
25 unnecessary. It seems to me that the case should proceed to Final Hearing as soon as can be arranged, but, of course, I recognise that in any case things can emerge, where a Case Management Preliminary Hearing might be appropriate.
183. Accordingly, should any other matters arise between now and the start of the  
30 Final Hearing, on dates to be hereinafter assigned by the Tribunal, then written case management application by either party should be intimated, in

the normal way to the Tribunal, by e-mail, with copy to the other party's representative, sent at the same time, and evidencing compliance with **Rule 92**, for comment / objection within seven days.

- 5 184. Dependent upon subject matter, and any objection / comment by the other party's representative, any such case management application may be dealt with on paper by me as the allocated Employment Judge, or a Case Management Preliminary Hearing fixed, either in person, or by telephone conference call, or CVP, as might be most appropriate.

10 **Employment Judge: I McPherson**  
**Date of Judgment: 25 April 2023**  
**Entered in register: 26 April 2023**  
**and copied to parties**

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