

**IN THE EMPLOYMENT TRIBUNAL (SCOTLAND) AT EDINBURGH**

5 **Judgment of the Tribunal in Case No: S/4100294/2017 Issued Following Open Preliminary Hearing Held at Edinburgh on 2<sup>nd</sup> June 2017 at 2.30 pm**

10 **Employment Judge: J G d’Inverno, QVRM, TD, VR, WS (Sitting Alone)**

15 Mr B Mycyk

Claimant  
Not appearing and not  
represented

20 G4S Secure Solutions (UK) Ltd

Respondent  
Represented by:-  
Ms Owusu-Akyaw  
In-House Employment  
Counsel, G4S Secure  
Solutions (UK) Ltd

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**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

30 The Judgment of the Employment Tribunal is:-

35 **(First)** That the claimant’s unspecified complaint of discrimination because of the protected characteristic of sex has little reasonable prospect of success and that an Order be made, in terms of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, Schedule 1 paragraph 39(1) requiring the claimant to pay a deposit not exceeding £1,000 as a condition of continuing to advance the complaint; and,

40 **(Second)** That the claimant shall furnish the Tribunal, within ten days of the date of issue of this Judgment, with a full disclosure of his financial

circumstances together with vouching thereof including as a minimum specification of the following:-

- 5                     • His residential circumstances to include confirmation of the basis upon which he occupies his current residence 22 Holyrood Road, Edinburgh.
- The weekly amount of any rent or mortgage payment paid by him.
- 10                   • The weekly amount and source of all income received by him whether earned, unearned or benefits received (the same to be vouched by copy wage slips and bank and or benefit statements).
- The weekly outgoings paid by him specified by category and vouched by bills/receipts.
- 15                   • Specification of any movable property (for example motor car or other motor vehicle) owned by him and any immovable property (for example house or other property) owned by him or in which, either solely or jointly, he has an interest.
- 20                   • Details of any savings held by him, or jointly by him with any other person, (the same to be vouched by copy bank statement).

25                   In order that in terms of Rule of Procedure 39(2) the Tribunal may have regard to that information and the claimant's associated ability to pay, when deciding the amount of the deposit.

30                   **(Third)** That in the event that the claimant does not provide the directed information to the Tribunal or, in the event that the Tribunal is not satisfied that the information provided is complete information or is sufficiently vouched, the Tribunal will proceed, upon the expiry of 10 days from the date upon which this Judgment is intimated to the parties, to determine the

amount of and to make the Deposit Order without further reference to the claimant.

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## REASONS

1.1 This case called at Edinburgh for Open Preliminary Hearing at 2 pm on 2<sup>nd</sup> June 2017. Following consideration and refusal of an unintimated written Application for Postponement, belatedly submitted by the claimant at 10 2.07 pm, the Open Preliminary Hearing proceeded at 2.40.

1.2 The date, time and purpose of the Open Preliminary Hearing had been set down, with the consent of the claimant, at a Closed Preliminary Hearing (Case Management Discussion) which proceeded in the case before Judge 15 Kearns, at Edinburgh on the 21<sup>st</sup> of April 2017 and at which the claimant was present.

1.3 Reference is made to the Tribunal's Determination of the Opposed 20 Application to Postpone made on 2<sup>nd</sup> June 17 together with the Note of Reasons attached thereto which Note should be read in conjunction with this Note of Reasons.

2.0 Following the refusal of the Application for Postponement, the Open 25 Preliminary Hearing proceeded in the claimant's absence. The respondent was represented by Ms Owusu-Akyaw of Counsel. A bundle of 14 documents, comprising pages 1 to 62 and which the claimant's Counsel advised had been agreed between the parties before Judge Kearns on 21<sup>st</sup> April 2017, was lodged and to some of which reference was made in 30 the course of evidence.

3.0 The Tribunal heard evidence on oath, on behalf of the respondent, from Ms Colleen Burns, Line Managing Supervisor who had responsibility for monitoring the contract, an extract of the relevant contractual term of which 35 is produced at document 9 page 45 of the Bundle, and in respect of the

performance of duties under which, the advertisement to which the claimant replied was placed.

## **The Issues**

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4.0 The Issues requiring investigation and determination by the Tribunal at Open Preliminary Hearing were:-

### **Strike Out**

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4.1 **(First)** Whether the claimant's unspecified complaint of discrimination because of the protected characteristic of sex should be struck out in terms of Rule of Procedure 37(1)(a) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, Schedule 1 ("Rule 37(1)(a)"), on the grounds that the claim is vexatious and, separately, enjoys no reasonable prospect of success; and failing strike out,

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### **Deposit Order**

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4.2 **(Second)** Whether the Tribunal should make an Order, in terms of Rule of Procedure 39(1), requiring the claimant to pay a deposit not exceeding £1,000 as a condition of continuing to advance his unspecified complaint of discrimination because of the protected characteristic of sex, on the ground that the complaint has little reasonable prospect of success.

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## Findings in Fact

5.0 On the documentary and oral evidence led and upon the submissions presented the Tribunal made the following essential Findings in Fact, restricted to those necessary for consideration and determination of the Application.

6.0 The respondent, G4S Secure Solutions (UK) Ltd, is a security guarding business. The Respondent Company is contracted to the Department of Justice in Northern Ireland for the provision of monitoring and reporting services in respect of amongst others children/young people, vulnerable adults and females who are subject to monitoring including electronic. The contracted duties involve, amongst other matters, the carrying out of visits to female subjects to check upon the location of the subject and the condition and functionality of the remote monitoring device worn by the subject.

7.0 The contract between the Department of Justice and the respondent includes the following provision, extracted and copied at page 45 of the Bundle in the following terms:-

***“Special provision for children/young people/vulnerable adults/females***

*All visits to female subjects will be carried out with a female member of staff or trained female chaperone. If a female Supervising Officer is to be present then a male officer may make the visit. Single male officers may not enter alone if the subject is female.”*

The fulfillment of that contractual obligation requires that the respondent employ a minimum number of female monitoring support officers.

9.0 In or around December of 2016 the respondent, due to staffing turnover, required to recruit and train a minimum of three replacement female Monitoring Support Officers.

- 5 10.0 The essential duties of the female Monitoring Support Officers whom the respondent required and sought to recruit namely visiting female subjects or, in the capacity of a “female Supervising Officer” chaperoning a visit to a female subject made by a male Monitoring Support Officer, can only be carried out by a female. Those essential duties of a female Monitoring Support Officer cannot be carried out by a male.
- 10 11.0 The requirement to employ females in the role of “Female Monitoring Support Officers” constitutes a genuine occupational requirement that the role be reserved for a female.
- 15 12.0 In or around December 2015 the respondent placed an advertisement (copied and produced at page 49 of the Bundle) for a “Female Monitoring Support Officer” which set out the essential duties of the job.
- 20 13.0 The respondent’s records show that the claimant made an Application using the respondent’s online application system for the advertised role which was for the Female Monitoring Support Officer role (“MSO”), on 31<sup>st</sup> December 2016.
- 25 14.0 An automatic acknowledgement of receipt of the application was issued to the claimant by the respondent’s computer system.
- 30 15.0 The respondent did not reject the claimant’s application in relation to the role.
- 16.0 The respondent has no record of the claimant ever contacting the respondent by telephone. The copy at pages 53 to 62 of the Bundle does not meet the advertised criteria for the female MSO as, in the application the claimant identifies himself as a man.

- 17.0 In the circumstances pertaining there is a genuine occupational requirement that the essential duties of a Female Monitoring Support Officer be carried out only by females.
- 5 18.0 Separately, given the contractual requirements imposed upon the monitoring of female subjects which the role of MSO is designed to service, the requirement that female MSOs be female is, in the circumstances, a proportionate means of achieving a legitimate aim which is to ensure, in accordance with the respondent's contract for monitoring services, that  
10 there is a female MSO available to directly deal with monitoring and tagging issues in relation to female subjects, or alternatively to supervise and chaperone female officers carrying out the task.
- 19.0 By initiating Application, stamped as received by the Employment Tribunal  
15 (Scotland) on 1<sup>st</sup> February 2017, the claimant presented a complaint to the Employment Tribunal.
- 20.0 At section 8.1 of the claim form the claimant has ticked two boxes adopting, by that mechanism, the pre-printed words "*I was discriminated against on  
20 the grounds of sex (including equal pay)*".
- 21.0 At section 8.2 under the heading "*Please set out the background and details of your claim in the space below*" there appear inserted the following words:-  
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- "I saw note about job as Female Monitoring Support Officer in G4S. I sent CV. I got confirmation, that this company got my CV. I called to this company and their explanation were unclear."*
- 30 22.0 Beyond the figure of £10,000, which is inserted at box 9.2 under the heading "What compensation or remedy are you seeking?", the claim form nowhere contains any further specification of the nature or detail of the claim being advanced.

23.0 In the Case Management Discussion Agenda return made by the claimant in advance of the Case Management Discussion of 21<sup>st</sup> April the claimant had filled in the box for direct discrimination and stated in answer to the question “*What did he complain of?*” “*I am a male. That is why I am discriminated*”. And when asked at paragraph s.5 of the Form “*Why do you consider this treatment to have been because of a protected characteristic?*” the claimant states “*Yes being man (male) I never can get this job*”.

24.0 At the Open Preliminary Hearing which proceeded before Judge Kearns on 21<sup>st</sup> April 2017 the claimant was asked to explain the basis on which he made a complaint and the nature of the complaint which he advanced. Such explanation as was provided by him and the respondent’s response thereto were recorded by Judge Kearns at the final paragraph of the Note of Output, dated 25<sup>th</sup> April 2017 attached to her Case Management Orders, made at the Case Management Discussion and in terms of which she fixed the Open Preliminary Hearing. For completeness sake the terms of that last paragraph, which are herein incorporated, are set out as follows:-

“*The claimant who is male, applied online for the job of female monitoring support officer advertised by the respondent. He did not hear further regarding his application. He alleges sex discrimination but does not specify what the alleged discriminatory act is. The nature of the work requires that male operatives fitting a tag on a female offender or entering a female’s home cannot do so without a female member of staff being present under the respondent’s contract to provide monitoring services. Owing to resignations and long term sick leave, at the time of advertising the post, the respondent did not have any active female MSOs on their staff and they urgently needed to recruit a female. Ms Owusu-Akyaw submitted that the claimant’s claim had no reasonable prospect of success and ought to be struck out. Alternatively a deposit order ought to be made. Parties exchanged relevant documentation and a hearing was fixed to determine these issues.*”



25.0 In the six week period which has elapsed between the Case Management Discussion of 21<sup>st</sup> April and today's Hearing, no attempt has been made by the claimant to provide any further specification of the claim including any specification of an alleged discriminatory act.

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### **The Applicable Law**

26.0 The applications which are before the Tribunal proceed respectively in terms of the following provisions:-

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### **Strike Out No Reasonable Prospect of Success/Vexatious ???**

“Rule 37(1)(a) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 Schedule 1:-

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*“(1) At an 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 –*

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

*and*

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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 a party, at a hearing.*

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*(3) Where a response is struck out, the effect shall be as if no response had been presented, as set out in Rule 21 above.”*

### **The Making of a Deposit Order on the Grounds of Little Prospect of Success**

Rule 39(1) provides:-

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

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

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

27.0 In addition jurisprudential guidance is to be found in decisions of the Higher Courts of Record, to four of which the respondent’s representative helpfully referred the Tribunal as follows:-

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- (1) **Hassan v Tesco Stores Limited UKEAT/0098/1**
- (2) **Anyanwu v Southbank Students Union and Southbank University [2001] UK HL 14**
- (3) **ABN Amro Management Services Limited and another v Hoben UKEAT/0266/09**
- (4) **Van Rensburg v Royal Borough of Kingston-Upon-Thames UKEAT/0095/07**

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**Submissions for the Respondent**

28.0 Under reference to Hassan v Tesco Stores Limited the respondent's Counsel reminded the Tribunal that the approach to considering strike out applications, endorsed by Lady Wise in the EAT was:-

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- To consider whether any of the grounds set out in Rule 37(1)(a) to (e) have been established (first stage).

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- Having identified any established ground(s), the Tribunal must then decide whether to exercise its discretion to strike out, given the permissive nature of the Rule (second stage).

29.0 She went on to submit that while it was accepted on the authority of Anyanwu v Southbank Students Union that:-

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*“Discrimination claims should not be struck out as an abusive process accepted the most obvious and plainest cases. Discrimination cases are generally fact sensitive and their proper determination is vital in a pluralistic society.”,*

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the present case was one in which no factual dispute relating to the issues was focused. It was, submitted the respondent's Counsel the plainest and most obvious case for strike out.

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30.0 Under reference to ABN Amro Management Services Limited:-

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- that, as in that case, where a claim was struck out on the basis that the Tribunal considered it “*prima facie implausible to the point of absurdity*” for the claimant to allege that he had not been offered an alternative position during a redundancy consultation because the successful candidate was 9 months older than him, it was in this case *prima facie* implausible on the basis of the only facts which the claimant had offered to prove in his ET1 or

otherwise given notice of either in the CMD Agenda or as summarised by Judge Kearns at the Case Management Discussion, for the claimant to allege that he had been discriminated against.

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31.0 She invited the Tribunal to strike out the claim upon the ground of its enjoying no reasonable prospect of success. Ms Owusu-Akyaw separately submitted that the claim should be struck out on the ground that it was vexatious that being, in her submission, the only reasonable inference arising from the fact that the claimant not only failed to give notice of the nature or detail of any discriminatory act but, notwithstanding his presence at and participation in the Case Management Discussion of 21<sup>st</sup> April he had persisted to make no effort to provide any further specification in the face of the Application for Strike Out made on that day.

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32.0 In the alternative, failing strike out, the respondent's Counsel submitted that the case was one which, as pled and taken at its highest enjoyed little reasonable prospect of success and that accordingly a Deposit Order should be made to afford the respondent some protection against the costs which it must inevitably incur if the claimant were allowed to persist in the complaint beyond today's date.

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33.0 Under reference to **Van Rensburg v Royal Borough of Kingston-Upon-Thames** Ms Owusu-Akyaw reminded the Tribunal that in determining whether to make a Deposit Order it is not restricted to a consideration of purely legal issues but is entitled to "peer over the fence" as it were and to have regard to the likelihood of the party, the claimant in this case, being able to establish facts essential to his case.

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34.0 In this regard and while recognising that on a question of strike out the matter had to be determined upon the claimant's pleadings rather than upon any consideration of the likelihood of the respondent successfully defending the action, she submitted that on a question of determining whether a Deposit Order should be made the Tribunal was entitled to take account of

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the evidence which it had heard, notwithstanding the absence of the claimant and the fact that it had not been subject to cross examination, that being evidence which went to the existence of a genuine occupational requirement that the role in question be one performed by a female.

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35.0 She submitted that although the claimant had neither specified the discriminatory act nor made any response by way of further specification to the respondent's assertion, set out in response form ET3, that there was in existence a genuine occupational requirement, on any view and, let it be assumed that the Tribunal was prepared to infer some unspecified discriminatory act, in order to succeed the claimant would have, in effect, to disprove i.e. provide evidence to counter the respondent's evidence both oral and before the Tribunal separately and notwithstanding today's Hearing documentary, of a contractual requirement that they provide female chaperones and that there was thus no genuine occupational requirement. In her submission it could be readily seen that there was little reasonable prospect of the claimant being able to do so, even had he been present at today's Hearing, as he gave no notice of maintaining a contrary state of facts or of any basis upon which he would be entitled to challenge in cross examination, the oral and or documentary evidence of the respondents which was before the Tribunal and which, in her submission was not evidence which fell to be seen as being disputed.

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36.0 Neither, she pointed out, had the claimant identified nor made any reference to having suffered any detriment.

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37.0 In these circumstances, and in the alternative and while accepting that if a Deposit Order were to be made the Tribunal would require to make reasonable enquiry into the claimant's ability to pay before fixing the amount of such an Order, Ms Owusu-Akyaw submitted that the threshold for making an Order had been met by the circumstances of the present case and she invited the Tribunal to do so.

### **Consideration and Determination**

5 38.0 I am satisfied that the notice given by the claimant in terms of his initiating Application ET1 when read as supplemented by his CMD Agenda return form and the summary of his position as confirmed on 21<sup>st</sup> April 17 set out and recorded by Judge Kearns in the last paragraph of her Note, even taken together and at its highest fails, as currently pled, to expressly disclose a relevant complaint of discrimination, of any type.

10 39.0 Separately, and viewing the case of which notice is given as generously as possible, I do not consider it possible to infer such a complaint from the combined notice given across the three sources of the ET1, the CMD Agenda Return, and the claimant's oral clarification made on 21<sup>st</sup> April before Judge Kearns.

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40.0 Rather, if inference is to be employed all that which might be inferred is that the apparent claim is erected upon an erroneous belief on the part of the claimant that the mere mentioning of the gender requirement in the advert, placed by the respondents in December 2016, of itself constitutes an act of discrimination.

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41.0 In relation to the principal Application for Strike Out, however, the fact that I am so satisfied does no more than awaken my discretion to strike out.

25 42.0 In determining whether I should strike out, in the particular circumstances, a number of factors relevantly fall to be taken account of. These include:-

- The fact that the claimant is a party litigant.
  - The fact that English is not his first language.
  - Notwithstanding the fact that an adverse inference as to there existing any factual basis upon which he might competently do so either by way of written specification, or at the bar, may be said to
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5 arise from the fact that the claimant has failed to make any attempt to further specify his claim in the three months which has elapsed since he first had notice of the Strike Out Application, that Application is one in respect of which, in terms of procedural requirement, the claimant must be afforded a reasonable opportunity to be heard.

10 • While I understand, of course, that the essence of Ms Osusu-Akyaw's submission is that today's Open Preliminary Hearing, at which the claimant has failed to appear, constitutes such a reasonable opportunity, the claimant has given notice, albeit belatedly and on an unspecific and wholly unvouched basis that the reason for his non attendance is one of ill health. Should it transpire that the claimant subsequently establishes to the satisfaction of the Tribunal that he was medically unfit to attend today's Hearing that descriptor of today's Hearing, as one  
15 constituting a reasonable opportunity to be heard, would fall away.

20 43.0 The claim, albeit wholly unspecified, of which the claimant asserts he gives notice is one of discrimination which, on the authority of Anyanwu, the Tribunal should be slow to strike out without first hearing the evidence (by which is meant all relevant evidence) relating to matter of factual dispute. On the other hand, on the present pleadings it's difficult to see what factual  
25 dispute arises or indeed what evidence, at all or evidence in addition to that already placed before the Tribunal by the respondent and which relates to factual matters not in dispute, might be brought forward by the claimant. Having weighed these factors in the balance against the undoubted prejudice accruing to the respondent, which prejudice is potentially capable  
30 of being addressed at least in part by the making of a Deposit Order, I have determined, in the exercise of my discretion that the case should not be struck out at this juncture in proceedings on the ground asserted which is that "even taking all that the claimant avers as proven, it fails to disclose a relevant case of discrimination."

44.0 I accept the contention that persisting (for the claimant's Application to Postpone today's Open Preliminary Hearing is properly construed as such) in convening the respondent to the expense of defending what on its face appears to be an irrelevant complaint and absent an exculpatory explanation, is capable of characterising an action as "vexatious" for the purposes of Rule 39(1)(a), I cannot conclude, at this juncture in proceedings however and in the absence of hearing the claimant respond squarely to that proposition, that the claim should be struck out on that separate ground; and I decline to do so.

#### **Application For A Deposit Order**

45.0 Having refused the primary application I turn to consider the alternative namely, the Application for the making of a Deposit Order. For the reasons which I have set out above I am satisfied that the claim is one which enjoys little reasonable prospect of success. The view in that regard is strengthened by the evidence, documentary and oral, which has been placed before me at Hearing today; that is to say, evidence which goes to show on the balance of probabilities the existence of a "Genuine Occupational Requirement" in respect that the role of female Monitoring Officer be one performed by females. "Peering over the fence" to a potential Hearing on the Merits, as I am entitled to do on the authority of **Van Rensburg**, I accept the respondent's representative's submission and assessment that there can be little reasonable prospect of the claimant establishing, at a full evidential Hearing, facts upon which a complaint of discrimination, as yet unspecified, could succeed.

46.0 I have so concluded notwithstanding the fact that the claimant was not present at nor participated in today's Open Preliminary Hearing albeit, that his absence, depending on the actual circumstances underpinning it, may be a factor to be relevantly considered in any subsequent Application for Review.



47.0 Thus I am satisfied that the threshold, at which my discretion to make such an Order is awakened, is met by the circumstances disclosed before me. I am further satisfied, on a consideration on the one hand of the factors already referred to above in relation to the Application for Strike Out and of the undoubted prejudice accruing to the respondent and associated with their being required to continue to participate in proceedings beyond this stage, on the other, that a Deposit Order should be made in an amount not exceeding £1,000; and I so determine in terms of Rule of Procedure 39(1).

10 **Ability to Pay**

48.0 In fixing the amount of the Order, I am required, in terms of Rule 39(2) to make reasonable enquiries into the claimant's ability to pay. I have accordingly directed;

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- that the claimant furnish the Tribunal with vouched information as to his means in order that consideration of the same may inform my decision as to amount,

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- that the claimant do so within a timescale which extends beyond the 9<sup>th</sup> of June, the date by which the Fit Note referred to in his email associated with his unsuccessful Application for Postponement of today's Hearing is sent by him to expire.

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49.0 In the event that the claimant does not obtemper the Order to provide information as to his means the amount of the Deposit Order will be fixed without further reference to him; and the file if not previously referred to me for other reasons should be brought up before me on the expiry of 11 days from the date of promulgation of this Judgment, for that purpose.

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Employment Judge: Joseph d'Inverno

Date of Judgment: 23 June 2017

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Entered in register and copied to parties: 26 June 2017