

EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No S/4100484/2017

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Held in Glasgow on 11 August 2017

Employment Judge: Ms Rosie Sorrell

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Miss Laura Docherty

**Claimant
Not Present and
Not Represented**

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The Olympia Chip Shop

**Respondent
Represented by:
**Mr P Santoni –
Solicitor****

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PRELIMINARY HEARING

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that the respondent's application for the claims of pregnancy and maternity discrimination, sex discrimination, holiday pay, redundancy pay and notice pay to be struck out is dismissed.

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ORDER OF THE EMPLOYMENT TRIBUNAL

35 The following Order has been made:-

1. Within 14 days of the date of this judgment, the claimant shall provide the following information:-

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- (i) The details of when you contacted ACAS and what you contacted ACAS about?
- (ii) Whether you contacted ACAS before the termination of your employment and if so, the reason for that?

(iii) Do you agree that as indicated in the ET1 claim form, you had less than two years' service in order to make a claim for a redundancy payment?

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(iv) If so, do you accept that you cannot proceed with a claim for a redundancy payment?

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REASONS

Introduction

1. The claimant did not appear at the Hearing. The Clerk attempted to contact the claimant on both her landline and mobile telephone numbers without success. Upon consideration of the case file, the claimant was served a valid Notice of this Hearing on 3 July 2017.

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2. At the outset of the Hearing, Mr Santoni for the respondent referred me to Rule 47 of the Employment Tribunal Constitution and Rules of Procedure Regulations 2013 ("*Employment Tribunal Regulations 2013*"). On the basis that this was the respondent's application, that the claimant had been served a valid Notice of this Hearing and that enquiries were made as to her absence, I decided that the Hearing should proceed in the absence of the claimant.

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3. At 1.20p.m after the conclusion of the Hearing, the Tribunal office took a telephone call from the claimant who said that she had been unable to attend the Hearing as she had recently been in hospital for a gall bladder operation. She was advised that the Hearing had proceeded in her absence and that a decision would follow.

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Respondent's Submissions

4. Mr Santoni for the respondent submitted that a Preliminary Hearing (“PH”) was held on 18 May 2017 following which Employment Judge Wiseman issued a helpful Note setting out questions for the claimant to answer in response to her claim. These questions are detailed at pages 2 to 5 of the
5 Note and are set out in respect of the claims that the claimant has made of pregnancy and maternity discrimination, sex discrimination, holiday pay, redundancy pay and notice pay. The last section where questions are sought relate to early conciliation. The claimant’s response to these questions were received by the Tribunal on 5 June 2017. Her response is
10 as follows:-

*“I am making a complaint about removal of chairs as these were removed due to myself and another employee who was pregnant wouldn’t be able to sit. The chairs were removed in the February of
15 2016. I believe the chairs were removed because I was pregnant and the other employee as Aldo has stated this.*

*I am also making a complaint about the comment from the hospital as I was told of Aldo if I had to go to hospital again I hadn’t to come
20 back. I had to go on early maternity. The comment was made on the 11th April by Aldo.*

*I spoke to Aldo about maternity leave. I told him I would maybe take it in June at the end or work on until July. Then on the 27th June I
25 had finished my shift and at the end of the night, Aldo said that was me finished. I told him no I haven’t put it in writing yet am going to work on until the 22nd July but he said Salvatio told him that was my night to finish up.*

I had told Aldo I would be returning to work on the 6 March 2017 and he said he didn’t think there was a job for me to go back to. I then contacted him myself as I started working there on the 29 April 2015 and had always been told that we didn’t get holiday pay. He then contacted myself on the 18 July after me writing a letter which ACAS

5 told me to do. He then told me to come up for holiday which I did with my friend and he gave me the some money of £645.00 for April 2015 to April 2016. I also had my friend as a witness. I also asked him about my job and his answer was there will be no job now that you have took holiday pay. This was Aldo. I then contacted him with a letter in November 2016 to let him know I would be returning and no answer.

10 ACAS then contacted him in January through to February but didn't answer. This is when ACAS granted the certificate. I only heard from Aldo about my job on the 29th of March telling me there had been a misunderstanding that my job was there if I wanted it but we had heard from yourselves then stating there would be a hearing. I believe there is sex discrimination as had I not fell pregnant and left
15 to have my baby I would still be working as a counter staff at Olympia Chip Shop. I am asking for holiday pay from April 2016 until March 2017. The holiday I believe is £545.00 as I am just short of a year of work.

20 The redundancy pay I should receive is £100 as yourself has already explained this.

I accept that I am entitled to one week's notice of £100."

25 5. In reply, the respondent wrote to the Tribunal on 12 June 2017 as follows:-

30 "Thank you for your letter of 9 June in relation to this matter. We write to confirm that we require to have a further preliminary hearing in relation to this case. That is because we do not consider that the Orders granted by the Tribunal have been properly adhered to. In addition to which we consider the following points should be resolved at a preliminary hearing:-

1. *The claimant makes complaints of alleged sexual discrimination towards her in February 2016. That complaint would be timebarred.*

- 5 2. *The claimant makes allegations of an incident in April 2016 regarding sexual discrimination in regard to attending a hospital appointment. That claim would be time barred.*

- 10 3. *The claimant makes a complaint that at the end of June 2016 she was told her job would not be there. If this is discrimination then it would be time barred. Separately and additionally it would appear that if the claimant was told her job was no longer there this would appear to terminate her employment and therefore the claim is time barred both*
15 *pursuing a claim for maternity in regard to these allegations and in regard to a claim for unfair dismissal.*

- 20 4. *The claimant said that she met the respondents on 18 July and received "her holiday pay." The holiday pay was apparently for a period of a year from April 2016 to April 2017. Having regard to the sum the claimant claimed she was paid, that holiday pay calculation may be inaccurate.*

- 25 5. *Separately and additionally in regard to the meeting on 18 July she was again told there was no job available for her. Accordingly her employment would have terminated on 18 July had it not terminated at the end of June. Both points appear to reinforce that she was told there was no job available to her. Accordingly her employment terminated in*
30 *June or at the latest 18 July by her own case and consequently the claim is time barred. Separately and additionally if this is a complaint of sexual discrimination due to maternity then any allegations in regard to that would again be time barred.*

5 6. *The claimant has failed to properly explain and clarify the issue to do with the ACAS Certificate. The ACAS Certificate could only be issued or ACAS instructed if the claimant's employment had already been terminated. This appears to go back to the earlier point that the claimant has failed to clarify and explain this matter and appears to be choosing numerous potential dates of termination of her employment which may suit her purposes.*

10 7. *Separately and additionally the Claimant appears to suggest that she was offered her employment but appears to have refused to accept that offer. Had her claim been that she had been unfairly dismissed there is no proper explanation as to why and in what circumstances her employment is now deemed to be terminated.*

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8. *The claimant has claimed for redundancy payment. She has already been told by the Tribunal that no redundancy payment was payable and appeared to have accepted it but has now added that back into her claim for the redundancy payment.*

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We consider that the claim as presently stated and framed has no realistic prospects of success. We would ask the Tribunal to consider making a Deposit Order of £1,000 to allow this claim to proceed.

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At the first preliminary hearing the claimant said that she had already taken legal advice. She claimed that she had, as stated in this letter, she had taken advice from ACAS in regard to the claim.

30 *All of that being so presumably therefore she has had the opportunity of considering these matters in detail or had the facility for taking advice and would know that the claim as presently framed has no realistic prospects of success and that what is contained here is a mishmash of allegations, dates and claims, which in some respects*

5 *are mutually contradictory. It is not in the interests of justice that the respondents require to face this type of case in particular as the claim as originally framed does not and did not contain some of the detail apparently now contained which potentially could be generated having regard to the response issued by the respondents in relation to this matter. That is clearly of some concern.”*

6. On 21 July 2017 the claimant was ordered to provide steps that she has taken to secure alternative employment and details of all jobs applied for including the date and nature of the employment applied for. She was also ordered to provide copies of applications for jobs or correspondence back from prospective employers regarding employment for the date of commencement of any new employment or any other form of employment or since the date of termination of employment or alternatively since 1 March 2017 and a schedule of income received from all employments whether formal or casual since 1 March 2017.

7. The claimant responded to these Orders on 1 August 2017 as follows:-

20 *“I worked for the 1st March for a cleaning company called Clean Scot. I worked from March till the end of April as the hours didn’t suit. I then got another job working for Minster cleaning company from May till July until I had to go into hospital to get gall stones and my gall bladder removed. I know I can’t work for up until 16 weeks so I had to give up my job. I have sent copies of my two recent wage slips.”*

8. The claimant attached two payslips from her employment with “Minster Cleaning Services” dated 31 May 2017 and 30 June 2017 with her response.

9. Mr Santoni submitted that in terms of the claimant’s position as to the termination date of her employment, there is a complete lack of clarity. The claimant contacted ACAS on 10 February 2017 and the certificate was issued on 6 March 2017. Although the claimant contends in her ET1 that

the date of dismissal was 27 February 2017, she states in her response to the Order that she was told she had no job now that she had taken her holiday pay. She also states *"I spoke to Aldo about maternity leave. I told him I would maybe take it in June at the end or work on until July."* The respondent's submit that this conversation took place on 27 June 2016 and consider that this is the when the claimant terminated her employment as there was no indication from the claimant that she would be returning to work.

10 10. Furthermore, the claimant has not complied with point 6 of Employment Judge Wiseman's Note in respect of the ACAS certificate, which asks the claimant to set out the details of when she contacted ACAS, what she contacted them about and whether she contacted them before the termination of her employment. It is not for the respondent to guess when the claimant's employment terminated. There is an issue with the ACAS Certificate as it cannot be issued if the employment is still continuing. In the claimant's letter of 1 August 2017 regarding the mitigation of her losses, she has indicated that she had a new job on 1 March 2017 which pre-dates the issue of the ACAS Certificate.

20 11. The respondent's position is that there was no letter of November 2016 referred to by the claimant in her response. The next contact the respondent was aware of was early March 2017 when the claimant asked if there were any shifts available. She then phoned about 2 weeks later asking for her P45 in March 2017. She was told there were shifts available to her. The last contact with the claimant was on 24 March 2017. It is not accepted that the terms of the conversation were those set out in the claimant's response letter. The respondent told the claimant she could start work on the Friday. The claimant did not confirm. Further attempts were made to contact the claimant starting back but she did not respond.

30 12. The respondent gave the claimant holiday pay from April 2015 to June 2016 of £645 which was paid in July 2016.

13. The respondent's principal position is that it is not for the respondent or the Tribunal to fill in the critical date of the termination of the claimant's employment. In the absence of such clarity the claim can have no reasonable prospect of success as it brings the issue of the time bar of the claims to the forefront.
14. It is the respondent's position that the application made for strike out of the claim on the grounds of no reasonable prospects of success encompasses time bar issues in respect of the pregnancy and maternity and sex discrimination allegations as well as specification of the case. To have reasonable prospects of success the respondent needs to know when the claimant was actually dismissed and 27 February 2017 has nothing to do with this case.
15. 15. The respondent submits that Rule 37(a),(b),(c) and (d) of the "*Employment Tribunal Regulations 2013*" all apply in this case. There are no reasonable prospects of success as there is no clear date of dismissal. The claimant has given the dates of 27 June and 18 July 2016 as other possible termination dates so it is unclear why she has stated 27 February 2017 as the date of termination of her employment.
16. The claims for sex discrimination and pregnancy and maternity discrimination are time barred. The manner in which the claimant has conducted herself is unreasonable. She has taken advice from the Citizens Advice Bureau and the Tribunal has encouraged her to do that but there is still no clarity of the issues. The claimant has failed to comply with point 6 of Employment Judge Wiseman's Note and the claim has not been actively pursued because the claimant is not here today. Accordingly the Tribunal is invited to strike out the claim for these reasons. The Tribunal can also make a decision to dismiss the claim on its own initiative in accordance with Rule 37.
17. In respect to the responses made by the claimant received on 5 June 2017, all of the points under (a) to (f) under the "*Pregnancy and maternity*

discrimination” heading set out in Employment Judge Wiseman’s Note of 18 May 2017 are time barred. The claimant has attempted specification under points (g) to (i). However, no information has been provided in relation to points (j) to (m). In terms of the second heading of “Sex discrimination,” point (a) appears to have been complied with at page 4 of the claimant’s letter where she states: “*there is sex discrimination as had I not fell pregnant and left to have my baby, I would still be working as a counter staff at Olympia Chip shop.*” As regards the third heading “*Holiday pay,*” if the contract of employment had terminated, the claimant would not have any further entitlement to holiday pay. Under the fourth heading “*Redundancy pay,*” there cannot be any redundancy pay, but the claimant is still asking for it. Under the fifth heading of “*Notice,*” this appears to be time barred.

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In the event the Tribunal considers that the case should not be struck out, the respondent also makes an application under Rule 39 of the “*Employment Tribunal Regulations 2013*” that the claimant should be ordered to make a deposit order of £1000.00 for the proceedings to continue. The respondent submits there would be little reasonable prospects of success as the discrimination allegations are time barred.

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The potential value of the claim is also an issue. If the Tribunal were to make an Expenses Order there would be no prospect of obtaining monies from the claimant. The cost of proceeding to a Hearing for the respondent would be about £7,000. If the claimant reviews the decision made today, further costs will be incurred. Furthermore the claimant is not here today to give evidence as to whether or not she has the ability to pay for a deposit order of the amount of £1,000.

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Relevant Law

Striking out a claim or response

- 5 20. Rule 37(1)(a) of the Employment Tribunal (Constitution & Rules of Procedure) Regulations 2013 (“*Employment Tribunal Regulations 2013*”) provides that a Tribunal may strike out all or part of a claim or response if it is scandalous, or vexatious or has no reasonable prospect of success.
- 10 21. The case of ***Ezias –v- North Glamorgan NHS Trust [2007] IRLR 603*** held that it would only be in an exceptional case that a strike out application for no reasonable prospects of success would succeed when the central facts are in dispute and no evidence has been heard in respect of those facts in order to be considered. In ***Balls v Downham Market High School & College UKEAT/0343/10/DM*** Lady Smith identifies it as a high test and that there must be no reasonable prospects after careful consideration of the available material. Furthermore, in ***Anyanwu and anor v South Bank Student Union and anor 2001 ICR 391***, the House of Lords established the general principle that discrimination cases should not be struck out on the grounds that it has no reasonable prospects of success except in the clearest of cases due to the fact-sensitive nature of them.
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22. Rule 37 (1) (b) of the “*Employment Tribunal Regulations 2013*” provides that a Tribunal may strike out all or part of a claim or response if the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent has been scandalous, unreasonable or vexatious. The authority of ***Blockbuster Entertainment Ltd v James 2006 IRLR 630, CA*** held that for a Tribunal to strike out a claim or response or part of for unreasonable conduct, it has to be satisfied that the conduct involved deliberate and persistent disregard of required procedural steps or that it has made a fair trial impossible. In either case, the striking out must be a proportionate response.
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23. Rule 37 (1) (c) of the “*Employment Tribunal Regulations 2013*” provides that a Tribunal may strike out all or part of a claim or response for non-compliance with any of these Rules or with an Order of the Tribunal. **Weirs Valves and Controls (UK) Ltd –v- Armitage 2004 ICR 371, EAT** provides authority that in deciding whether to strike out a party’s case for non-compliance with an Order, a Tribunal will have regard to the Overriding Objective set out in Rule 2 of the “*Employment Tribunal Regulations 2013*” of seeking to deal with cases justly. This requires consideration of a number of relevant factors, including the magnitude of the non-compliance, whether the default was the responsibility of the solicitor or the party, what disruption, unfairness or prejudice has been caused, whether a fair hearing would still be possible and whether striking out or some lesser remedy would be an appropriate response. It must also consider whether a striking out order is a proportionate response to the non-compliance; **Ridsdill and ors –v- Smith and Nephew Medical and ors EAT 0704/05.**
24. In determining whether to strike out a claim (or part of) on any grounds, a Tribunal must give consideration to whether a fair trial is still possible. In **De Keyser Ltd –v- Wilson 2001 IRLR 324 EAT** the EAT made it clear that in ordinary circumstances, neither a claim or a response can be struck out on the basis of a party’s conduct unless a conclusion is reached that a fair trial is no longer possible. This approach was endorsed in **Bolch –v- Chipman 2004 IRLR 140** in which the EAT held that a Tribunal must first find that a party has acted in such a manner and on making that finding, consider whether a fair trial is still possible. If a fair trial is still possible, the case should be permitted to proceed. Even if a fair trial is unachievable, the tribunal will need to consider the appropriate remedy in the circumstances which may be a lesser penalty.
25. Rule 37(1)(d) of the “*Employment Tribunal Regulations 2013*” provides that a Tribunal may strike out all or part of a claim or response on the grounds that it has not been actively pursued:-.

Issues to be Determined

1. Has the claimant complied with the Order of 18 May 2017?
- 5 2. If not, should the claim be struck out under Rule 37(1)(c) of the
“*Employment Tribunal Regulations 2013?*”
3. Does the claim have no reasonable prospects of success?
- 10 4. If not, should the claim be struck out under Rule 37(1)(a) of the
“*Employment Tribunal Regulations 2013?*”
5. Has the manner in which the respondent conducted proceedings
been unreasonable?
- 15 6. If so, should the claim be struck out under Rule 37(1)(b) of the
“*Employment Tribunal Regulations 2013?*”
7. Has the claim not been actively pursued?
- 20 8. If not, should the claim be struck out under Rule 37(1)(d) of the
“*Employment Tribunal Regulations 2013?*”
9. Do further case management issues require to be considered?

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Conclusion

26. Having considered the respondent’s submissions and the claimant’s
response to Employment Judge Wiseman’s Order following the “*PH*” of 18
30 May 2017, I have taken the view that the respondent’s application to strike
out the claim on the grounds of non-compliance of an Order, that it has no
reasonable prospects of success, the unreasonable manner in which the
proceedings have been conducted by the claimant and that the claim has

not been actively pursued should be dismissed. In reaching this decision I have taken account of a range of factors.

5 27. I have considered the respondent's submission that the claimant has not fully complied with the Order following the "PH" of 18 May 2017 and in particular, the points (j) to (m) under the "*Pregnancy and maternity discrimination*" heading or any of the points under the "*Early Conciliation*" heading. Having examined the claimant's response, I am of the view that the claimant has responded to points (j) and (k) under the "*Pregnancy and*
10 *maternity discrimination*" heading which ask if the claimant is making a complaint about not being allowed to return to work and if so, why she believes she was not allowed to return to work.

15 28. This is because in her response the claimant states she had told Aldo she would be returning to work on the 6 March 2017 and he said he didn't think there was a job for her to go back to. Further, that when "Aldo" told her to come and collect her holiday pay on 18 July 2016, she asked about her job and he responded that there will be no job now she has taken her holiday pay. She then goes on to state that she wrote to "Aldo" in November 2016
20 to advise she would be returning to work, but that she did not receive a response and that had she not fell pregnant and left to have a baby, she would still be working as a counter staff for the respondent. As the claimant has not responded to points (l) and (m) regarding whether there are any other pregnancy/maternity claims she wishes to raise and the details of
25 them, this which would indicate that there are no other claims.

30 29. In terms of the questions under the "*Early conciliation*" heading, it is clear that the claimant has not provided a response. However, in applying **Weirs Valves and Controls (UK) Ltd ("*supra*")** and **De Keyser ("*supra*")** I do not consider that non-compliance in this partial respect would make it proportionate to strike out the claim on this ground as a fair trial is still possible. This is because the claimant has complied with the Order in full otherwise, providing the further specification required in respect of the nature and substance of her claim. I am therefore of the view that these

proceedings are still at a relatively early stage and that no unfairness or prejudice has been caused to the respondent as a result of the claimant's partial non-compliance of the Order and accordingly in applying **De Keyser Ltd** ("*supra*"), that a fair hearing is still possible.

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30. However, notwithstanding that, clarification is still required from the claimant as to when she contacted ACAS and the reason for that and whether she contacted ACAS before the termination of her contract. This is particularly in light of the fact that ACAS received the early conciliation notification on 10 February 2017 from the claimant which pre-dates the date of termination of employment of 27 February 2017 given by the claimant and that she has indicated she had a new job on 1 March 2017 which pre-dates the issue of the ACAS Certificate. It is therefore on this basis that I have issued an Order to that effect. Furthermore, in light of the claimant's response to the questions under the heading "*Redundancy Pay*" which it seems the claimant may have confused with the issue of her Notice pay, the claimant is also ordered to confirm her position in respect of that head of claim.

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31. In terms of the respondent's application to strike out the claim as having no reasonable prospects of success, it is clear from the claimant's response to the Order and the respondent's submissions that the central facts are in dispute. Therefore, in applying the authorities of **Anyanwu** ("*supra*"), **Ezias** ("*supra*") and the high test identified by Lady Smith in **Balls** ("*supra*"), I do not consider that this ground has been met.

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32. One of the central facts in dispute is the claimant's date of termination of employment. The respondent submits there is a complete lack of clarity from the claimant as to the termination date of her employment and it is their position that the claimant's employment ended on 27 June 2016 and therefore all of her claims are time-barred. As the claimant is clear in the ET1 claim form that her employment ended on 27 February 2017 when the respondent told her there was no job for her to return to, I am of the view that this issue should be determined as a matter of evidence at a Final Hearing.

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33. As regards the application to strike out the claim on the ground that the claimant has conducted proceedings in an unreasonable manner, I am not persuaded that the claimant's conduct meets the high threshold required in accordance with **Blockbuster Entertainment Ltd ("supra")** in that it involved a deliberate and persistent disregard of required procedural steps. This is because as discussed above, the claimant has largely complied with the Order providing further specification of her claim and although she did not appear at this Hearing to be able to explain why she did not respond to the early conciliation questions, she has since made contact with the Tribunal to advise of the reason for her non-attendance. As I am not persuaded that the claimant has acted in such a manner, in accordance with the steps set out in **Bolch ("supra")**, I am not required to go on to consider whether a fair trial is still possible in terms of **De Keyser Ltd ("supra")**.

34. Furthermore, as the claimant has since given a reason for her non-attendance at this Hearing, I do not consider that the respondent application to strike out the claim on the ground that it has not been actively pursued has been made out.

35. For all these reasons, the respondent's application for strike out of the claim is dismissed.

36. In terms of the alternative application sought by the respondent for the claimant to pay a deposit as a condition of proceeding with her claim on the grounds that the claim has little reasonable prospect of success, I have taken the view that it should be continued at this stage of proceedings. This is because the claimant did not appear at this hearing and therefore the Tribunal was unable to make reasonable enquiries into her ability to pay the deposit as required under Rule 39(2) of the *"Employment Tribunal Regulations 2013."* It will therefore be a matter for the respondent to decide whether to insist on this application once it is in receipt of the claimant's response to the Order. Should the respondent do so, this may be dealt with

by way of written submissions from both parties in order to avoid any further unnecessary procedure.

5 37. Finally, as this claim was lodged on 20 March 2017 it is in the interests of both parties that once the above Order is complied with, that it proceeds to a Final Hearing without further delay. **In this respect date listing stencils for a Final Hearing should be issued to parties for completion and return within 14 days of the date of this Note being issued.**

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20 Employment Judge: Rosie Sorrell
Date of Judgment: 04 September 2017
Entered in register: 05 September 2017
and copied to parties