Appeal No. UKEAT/0235/18/LA

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON, EC4A 1NL

At the Tribunal
On 3 October 2019
Judgment Handed Down on 11 December 2019

Before

MATHEW GULLICK, DEPUTY JUDGE OF THE HIGH COURT

(SITTING ALONE)

MR WAYNE ADAMS — APPELLANT

KINGDOM SERVICES GROUP LIMITED — RESPONDENT

Transcript of Proceedings

JUDGMENT

(**Appeal and Cross-Appeal**)

APPEARANCES

For the Appellant	MS IJEOMA OMAMBALA (of Counsel) Acting under the Employment Law Advice and Assistance Scheme
For the Respondent	MR TOM GILBART (of Counsel) Instructed by: Berrymans Lace Mawer LLP Kings House 42 King Street West Manchester M3 2NU

SUMMARY

PRACTICE AND PROCEDURE – Striking Out of Claims

PRACTICE AND PROCEDURE – Imposition of Deposit

PRACTICE AND PROCEDURE – Amendment of Notice of Appeal

1. The Employment Tribunal was correct to refuse to strike out the claim of unfair dismissal under s.104 of the **Employment Rights Act 1996**. It was entitled to make a deposit order in respect of that claim on the basis that it had little reasonable prospect of success.

2. The Employment Tribunal erred in law in failing to give reasons for the particular amount of the deposit that was ordered to be paid. The deposit order (and the order striking out the claim for non-payment of the deposit) was set aside and the Employment Appeal Tribunal substituted, at the request of the parties, its own decision as to the appropriate amount of the deposit order.

3. The Employment Appeal Tribunal held that in the unusual circumstances of the case, the Claimant would be permitted to amend the Notice of Appeal to bring an appeal against the operative deposit order, which had been made after the filing of Notice of Appeal following a successful request for reconsideration of the amount of the original deposit order.

MATHEW GULLICK, DEPUTY JUDGE OF THE HIGH COURT

Introduction

1. In this judgment I shall refer to the parties using their titles from the proceedings in the Employment Tribunal, i.e. as "Claimant" and "Respondent".

2. This is an appeal against a deposit order which was made by the Employment Tribunal, sitting at Birmingham, in respect of the Claimant's claim that he had been unfairly dismissed by the Respondent. The Claimant did not pay the sum ordered by way of deposit. As a result, his claim was struck out. The Claimant's appeal was considered on the papers by His Honour David Richardson, who directed that there should be a Preliminary Hearing and that the Respondent should file written submissions. The Preliminary Hearing took place before the same judge on 23 January 2019. The Appellant was by then represented by Ms Omambala, who appeared before me *pro bono* under the terms of the Employment Law Advice and Assistance Scheme (ELAAS). Directions were given for a Full Hearing. The Respondent filed a cross-appeal contending that the claim for unfair dismissal should have been struck out as having no reasonable prospect of success. The cross-appeal was permitted to proceed, on consideration of the papers, by His Honour Judge Shanks. The parties complied with the directions given. They filed a hearing bundle, an authorities bundle and skeleton arguments for the hearing of the appeal.

3. The deposit order was made following a hearing on 30 May 2018 at which the Claimant represented himself and the Respondent was represented by a Solicitor, Mr Parr. The Tribunal's order, requiring the Claimant to pay a deposit of £900.00 as a condition of proceeding with his claim for unfair dismissal under the provisions of Part X of the **Employment Rights Act 1996** ("the ERA 1996"), was sent to the parties on 31 May 2018.

4. The Claimant did not pay any sum by way of deposit, and his claim for unfair dismissal was struck out by order of the Employment Tribunal which was made, and sent to the parties, on 22 August 2018. That order was in the hearing bundle before me. The reasons given by the Employment Tribunal for striking out the unfair dismissal claim were:

> **"1. The claimant was ordered to pay a deposit of £300.00 following a preliminary hearing held on 30 May 2018. The Order was sent to the claimant on 3 August 2018. The claimant has failed to pay this deposit. The complaint of Unfair Dismissal is therefore struck out under rule 39(4) of the Employment Tribunals Rules of Procedure 2013."**

5. The order striking out the claim therefore refers to a requirement to pay a deposit of £300.00 and to the deposit order having been sent to the parties on 3 August 2018. The deposit order which was the subject of the appeal in this case was sent to the parties on 31 May 2018 and required the payment of a deposit of £900.00.

6. At the outset of the hearing of the appeal and cross-appeal, I raised this issue with Counsel. Following a brief adjournment, I was provided with a copy of an application for reconsideration of the deposit order that had been made to the Employment Tribunal by the Claimant. I was also given a copy of an amended deposit order, with reasons, that had been made by the Employment Tribunal as a result of that request. That order reduced the amount of the deposit required from £900.00 to £300.00. The amended deposit order was sent to the parties on 3 August 2018 and required payment of the deposit within 14 days.

7. The Claimant did state in the Notice of Appeal, which was filed on 10 July 2018, that on 13 June he had made a request to the Employment Tribunal for reconsideration of the deposit order – which request had not been determined when the appeal was filed. The Respondent's Answer, filed after the Preliminary Hearing, refers to the amount of the deposit having been "reduced to £300". But neither party appears to have appreciated the significance of the fact that

on 3 August 2018 a new and materially different deposit order had been made by the Employment Tribunal, when the appeal had been brought only against the first deposit order. It was as a result of the Claimant's non-compliance with that later order that his claim was struck out.

8. I shall return later in this judgment to the procedural issues that arose in consequence of this development during the course of the hearing before me, and how they were resolved. I shall now set out the underlying facts.

Background

9. The Claimant was employed as a Business Manager by the Respondent, which is a security and commercial cleaning company. His employment commenced on 20 October 2016 and was concluded by his dismissal, with four weeks' notice, which took effect on 27 August 2017. The Claimant did not have the two years' continuous employment with the Respondent that was necessary for the Employment Tribunal to have jurisdiction to consider his claim for unfair dismissal under section 98 of the **ERA 1996**. The sole ground of his claim for unfair dismissal is that the dismissal was for an automatically unfair reason under section 104 of the **ERA 1996**. The Claimant's argument is that his dismissal was automatically unfair pursuant to section 104, because the principal reason for the dismissal was that he had alleged that the Respondent had infringed a relevant statutory right. A claim of unfair dismissal on this basis does not require any particular period of qualifying service.

10. The notification of the Claimant's dismissal was given on 31 July 2017 in an email sent by Mr Steve Foster, the Respondent's Human Resources, Discipline and Grievance Manager. In that email, Mr Foster stated:

> **"… As you are aware, various concerns have been raised concerning performance and communication. It is noted that you did not turn in for work today, and following further**

investigation it appears you had informed the holiday department that it had been authorised by Lynn Simpson (something which she denies) …

In view of the ongoing issues, along with your current absence (which has caused further client complaints), and your failure to notify us of this absence when given tasks for this week (including tomorrow's originally scheduled hearing), the company has decided we can no longer continue your employment. In respect of your employment with Kingdom Services Group Ltd you have not come up to required our [sic] standard. You are therefore given one month's notice (28 days) and the final day of your employment will be 27 August 2017…"

11. In his ET1 Claim Form, the Claimant asserted that in March 2017 he had been referred to a competency hearing and that in July 2017, approximately a week before he was given notice of dismissal, he had received a written warning. The Claimant complained in the ET1 about the process followed by the Respondent on both occasions, in particular by his line manager, Ms Lynn Simpson, and asserted that the allegations made against him had been unjustified. For present purposes however it is sufficient to note that, on the Claimant's own case, his employer had raised issues about his performance and conduct prior to his dismissal. The Claimant asserted on the face of the ET1 that his dismissal was related to the taking of holiday. He stated that he was on an authorised holiday when he was given notice of dismissal and that "the reason given for my termination was for taking the holiday, I cannot be dismissed for exercising a statutory right." The Claimant also made unrelated claims for breach of contract in respect of unpaid car allowance and expenses.

12. The Claimant's claim of unfair dismissal was struck out by a judgment of the Employment Tribunal sent to the parties on 8 January 2018, apparently on the basis that the Claimant did not have sufficient qualifying service to make a claim for unfair dismissal relying on section 98 of the **ERA 1996**. The Claimant made a request for reconsideration, asserting that he had been dismissed in consequence of asserting a statutory right and that this allegation was contained in the Claim Form. The Claimant's request for reconsideration was initially considered at a hearing on 23 April 2018 and was then determined at the hearing on 30 May 2018 at which the deposit order was made; the Employment Tribunal revoked the earlier strike-out on the basis that the

Claimant was advancing a claim under section 104 of the **ERA 1996**, which does not require a qualifying period of two years' employment – see section 108(3)(g) of the **ERA 1996**. The Employment Tribunal also considered at that hearing an application by the Respondent for the whole of the Claimant's claim to be struck out, or alternatively for a deposit order to be made, on the basis of its lack of prospect of succeeding. At that hearing, the Tribunal had before it the Claimant's statement of means which recorded that he had net income, after living expenses and loan payments, of just under £30 per month. It appears that the Claimant gave oral evidence at the hearing on 30 May 2018, but he had not prepared a written witness statement, the evidence is not referred to in the Tribunal's reasons for making the deposit order and neither party sought to agree a note of that evidence for the purposes of this appeal.

13. Although it revoked the earlier strike-out and reinstated the unfair dismissal claim, the Employment Tribunal nonetheless made a deposit order in respect of the reinstated claim. This order, as I have already noted, required the Claimant to pay a deposit of £900.00 within 14 days of the date on which the order was sent to the parties. After setting out the procedural history in the initial paragraphs of its reasons, the Employment Tribunal stated:

> **"5. I have, by separate judgment granted the claimant's application for the tribunal to reconsider the decision to strike out the unfair dismissal claim under Rules 70-73. I have revoked my judgment of 8 January 2018 and I have reinstated the unfair dismissal claim; but only in so far as it is a claim under s.104, and not requiring qualifying service.**
>
> **6. Mr Parr, the respondent's solicitor, in the light of my reconsideration has made an application to strike out the claim, nevertheless, on the grounds that the s.104 claim has no reasonable prospect of success, or in the alternative, that I make a deposit order as a precondition of the claimant proceeding with the s.104 claim.**
>
> **7. I have decided that I have grounds to issue a deposit order under Rule 39 of the 2013 Rules of Procedure, because I have concluded on the totality of the evidence before me and the submissions of the parties that:**
>
> > **a) A tribunal hearing the substantive case on s.104 dismissal is unlikely to conclude that the claimant's taking of annual leave was the principal reason for the respondent's decision to dismiss him by email of 31 July 2017, dismissing him with effect from 27 August 2017 with one month's notice in lieu.**
> >
> > **b) A tribunal is likely to conclude on the evidence that there were ongoing issues in relation to the claimant's performance and communication and that the confusion which arose in relation to the claimant's absence on leave on 31 July 2017 was a subsidiary matter only which did not amount to a principal reason for the decision to dismiss him. A hearing had in any event been scheduled for 1 August 2017, in connection with the ongoing issues.**

> **c) Any issues of fairness from the claimant's dismissal are issues relevant only to the s.98 general principles of fairness and not the alleged exercise of a statutory right by the claimant. The tribunal has no jurisdiction to hear and determine a claim of unfair dismissal under the so called ordinary provisions of ss.94-98.**
>
> **d) There is little prospect of the tribunal finding in the claimant's favour under s.104.**
>
> **8). The Deposit Order applies only to the claimant's automatically unfair dismissal claim. His claim for breach of contract in relation to the sum of £738.20 allegedly owed to him for June 2017 is not affected by the said Order."**

14. On 13 June 2018, prior to the date by which the deposit fell due to be paid, the Claimant made an application to the Employment Tribunal for the deposit order to be reconsidered. He contended that the Tribunal had erred in reaching the conclusion that the claim for unfair dismissal had little reasonable prospect of success. The request for reconsideration concluded:

> **"I ask that if by any chance this decision is not changed, that the amount I have been asked to deposit be reconsidered. There was a clear agreement in the hearing that my available money each month after my outgoings was under £40 so I fail to see how it was decided that I would be able to afford to pay a lump sum of £900 in 14 days…"**

15. On 3 August 2018, the Employment Tribunal amended the deposit order as a result of the Claimant's request for reconsideration, pursuant to its power under Rule 70 of the **Employment Tribunal Rules of Procedure** to vary an order on a request for reconsideration. The amended order was identical in all respects, including the reasons given for making the order, to that made on 31 May 2018 save that the sum of £300.00 appeared in place of the sum of £900.00 and save that the date of the order being made was changed. In the covering letter that accompanied the order as varied on reconsideration, it was stated:

> **"The Judge directs me to inform the parties that having again reviewed the claimant's case, he remains of the conclusion that there is little prospect of the tribunal finding in the claimant's favour in respect of his unfair dismissal claim under s.104. He does find however that it is in the interests of justice to reduce the monetary deposit ordered to £300.00 having proper regard to the claimant's financial position. The claimant has set out his submissions in that respect in the final paragraph of his application for reconsideration."**

16. On 17 August 2018, the Claimant made a further application to the Employment Tribunal for reconsideration of the deposit order. He complained that the amount of £300.00 that he had been ordered to pay was still unaffordable and that he would not be able to pay it. He requested

that the deposit order be reconsidered for a second time. Although the Claimant's email was headed "Application for a reconsideration", the Employment Tribunal did not conduct a second reconsideration. Instead, the Claimant was sent a letter informing him that the Employment Tribunal was not able to provide advice to him about how best to conduct his case and referring him to sources of advice and support. It appears that the Claimant did not pursue the second reconsideration request with the Employment Tribunal.

Procedural Matters

17. I return now to the procedural issue that arose at the hearing before me once it became clear that the Employment Tribunal had issued a new deposit order in response to the Claimant's request for reconsideration. That order had not been the subject of an appeal and nor had there been an application to amend the Notice of Appeal in the appeal with which I was concerned. At the beginning of her oral submissions, Ms Omambala applied to amend the Claimant's Notice of Appeal to add an appeal against the second deposit order to the existing Notice of Appeal and Grounds of Appeal, which were concerned only with the first deposit order. Mr Gilbart did not oppose the Claimant's application to amend, on the basis that the Respondent wished the appeal to be dealt with at the hearing before me and not further delayed. The Respondent, commendably, did not wish to adopt a combative approach in circumstances where this Tribunal and the parties were already seised of all the issues that arose in relation to the revised deposit order.

18. Nonetheless, it is unusual for such an application to be permitted, and highly unusual where it is made at the hearing of the appeal itself. In **Riniker v City & Islington College Corporation**, UKEAT/495/08 at [61-62], this Tribunal noted that a fresh Notice of Appeal should be filed against a revised judgment of the Employment Tribunal and that an application to amend an existing Notice of Appeal, in circumstances where the time limit for appealing the

second decision had expired, ought only to be granted where an extension of time would otherwise be given.

19. I considered that it was in the interests of justice, and in accordance with the overriding objective in Rule 2A of the **Employment Appeal Tribunal Rules**, to grant the application to amend the Notice of Appeal, in the very unusual circumstances of this case, for the following reasons:

a. The second decision of the Employment Tribunal was, save for the substitution of the figure of £300.00 for that of £900.00, in identical terms to the first decision, including the reasons given for making the deposit order.

b. The Appellant had referred in the Notice of Appeal to the application for reconsideration of the deposit order having been made but had, necessarily, filed that Notice of Appeal before it had been determined. He was a litigant in person and Ms Omambala explained that he had not thereafter appreciated the significance, in procedural terms, of the revised deposit order having been made. Any default on his part was not deliberate.

c. The Respondent's Answer had been drafted on the basis that the amount of the deposit was £300.00, rather than £900.00, and expressly referred to amount of the deposit having been amended. The proposed amendment of the Notice of Appeal did not require any amendment to be made to the Respondent's Answer.

d. The arguments arising on the appeal against the second deposit order were identical to those arising on the original Notice of Appeal against the first deposit order.

e. Refusing the amendment would have prejudiced the Claimant because he would have been unable to pursue an appeal against the operative order of the Employment

Tribunal, non-compliance with which had caused his claim for unfair dismissal to be struck out.

f. The Respondent did not oppose the making of the amendment and there was no prejudice to the Respondent arising from the amendment being made. The Respondent had filed its Answer on the basis that the operative order was the revised deposit order and had not raised any objection to the appeal proceeding, despite the Notice of Appeal having been instituted against the first deposit order.

g. The proposed amendment, if made, would not require the hearing of the appeal to be adjourned or delayed.

20. The circumstances of this appeal demonstrate why it is important that the parties to appeals before this Tribunal bear in mind that instituting an appeal against a decision of an Employment Tribunal does not confer on the appellant the right to challenge, without either the institution of a fresh Notice of Appeal or an amendment to the existing Notice of Appeal, subsequent orders made on applications for reconsideration.

21. This is particularly important where, as in the present case, the application for reconsideration succeeds and results in a new order, with materially different provisions, being made by the Employment Tribunal. In such circumstances it is the later order which becomes the operative order. But such an order is not within the scope of a Notice of Appeal instituted solely against the original order. Litigants and those who advise them should beware of the pitfalls that may be caused by a lack of appreciation of this issue. It may result in a party who has filed a timeous appeal against the first order being unable to challenge the terms of the later order. It should not be assumed that the course that I took on the very unusual facts of this case will be repeated.

The Cross-Appeal

22. It is convenient to deal with the Respondent's cross-appeal first of all. The Respondent contends that the Employment Tribunal ought to have struck the claim out because it had no reasonable prospect of success. If the cross-appeal succeeds then the appeal falls away in its entirety.

23. Section 104 of the **ERA 1996** provides, so far as is material:

> **(1). An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee-**
>
> **…**
>
> **(b) alleged that the employer had infringed a right of his which is a relevant statutory right.**
>
> **(2). It is immaterial for the purposes of subsection (1)-**
>
> **(a) whether or not the employee has the right, or**
>
> **(b) whether or not the right has been infringed;**
>
> **….**
>
> **(3). It is sufficient for subsection (1) to apply that the employee, without specifying the right, made it reasonable clear to the employer what the right claimed to have been infringed was.**
>
> **(4). The following are relevant statutory rights for the purposes of this section –**
>
> **…**
>
> **(d) the rights conferred by the Working Time Regulations 1998…"**

24. In **Mennell v Newell & Wright (Transport Contractors) Ltd** [1997] IRLR 519 at [28], the Court of Appeal held that a claim under s.104 of the **ERA 1996** will be established "if the employee has alleged that his employer has infringed his statutory right and … the making of that allegation was the reason or principal reason for the dismissal." An employee must have made an allegation of a kind protected by s.104, as otherwise the making of such an allegation cannot be the reason for the dismissal. In **Spaceman v ISS Mediclean Ltd**, UKEAT/0142/18, in a judgment delivered several months after the Employment Tribunal's decision with which I am concerned, this Tribunal held that s.104(1)(b) of the **ERA 1996** by its use of the past tense ("that

the employer had infringed a right") requires there to be an allegation that the relevant statutory right has already been infringed, not that it will in the future be infringed. Thus, an allegation made by an employee that an employer may, or will, or intends to breach a statutory right is not sufficient.

25. Mr Gilbart accepted that for the purpose of determining whether the claim should be struck out, the Claimant's case should be considered at its highest. He submitted that the Claimant's case did not disclose any proper basis upon which an Employment Tribunal could uphold the claim of unfair dismissal under section 104 of the **ERA 1996**. He submitted that there is no pleaded allegation of anything qualifying under section 104 having been done by the Claimant, and that the high point of the Claimant's case is that he was dismissed because he had in fact taken holiday, i.e. not because he had complained that his employer had infringed his statutory right to take it.

26. The Claimant's ET1 form does not contain any assertion that he was dismissed because he had alleged that a statutory right had been infringed. However, that is not the end of the matter. On 30 April 2018, prior to the hearing before the Employment Tribunal at which the deposit order was made, the Respondent made a request to the Claimant for further information about the claim. Item 9 of that request asked the Claimant:

> **"When do you say that you made the allegation that a statutory right had been infringed? How did you communicate this allegation to the Respondent?"**

The Claimant's answer to this question was:

> **"The day I was emailed the termination email. I did this via email and via telephone."**

27. In my judgment, this is a clear assertion by the Claimant that on the day that he was dismissed he made an allegation, on more than one occasion, that a statutory right had been infringed. I reject the contention advanced in the Respondent's Answer that the way in which

this sentence is worded shows that the time sequence was the dismissal first, then the call and email afterwards. The wording used by the Claimant does not admit of only that interpretation. Whilst the Claimant did not specify in his answer the precise terms of the allegation that he made, the answer is clear that such an allegation was indeed made on the day that he was dismissed and that it was made by both email and telephone. When considering whether to strike out the claim it is important to bear in mind that the Claimant is a litigant in person and that requiring further particularisation of even a poorly pleaded claim is an alternative to striking it out.

28. Mr Gilbart submits that the material supplied by the Claimant since the Employment Tribunal made its decision shows that his case is misconceived because he does not allege that he ever told anyone that his employer had infringed a statutory right. I have looked at this material *de bene esse* given it was not before the Employment Tribunal, but I do not consider that it supports Mr Gilbart's submission. Specifically, in his Answer to the Cross-Appeal, the Claimant states that he had a telephone conversation with his manager on the day of his dismissal (some 12 hours before the email dismissing him was sent), at a time when he believed that he was on authorised holiday absence. He relates that his manager told him this was not the case and he should "get to work". He states that he told his manager that not only was his absence authorised but that it was "my right to take this holiday". The precise words used in this conversation may be of some importance, but as I understand it the Claimant is contending that his manager ordered him to attend work and that he informed his manager in response that her order that he attend work was in breach of what he termed his "right to take this holiday", which is an entitlement under the **Working Time Regulations 1998**.

29. I do not consider that it can be said that the Claimant's case that he made an allegation falling within the scope of section 104 of the **ERA 1996** has no reasonable prospect of succeeding

at a Full Hearing before the Employment Tribunal. Similarly, I do not consider that there is no reasonable prospect of the Employment Tribunal accepting that it was such an allegation, rather than any more general matters relating to conduct and capability, that was the reason, or the principal reason, for his dismissal very shortly afterwards (indeed, later on the same day). Whilst it may well be difficult for the Claimant to succeed at a Full Hearing of his unfair dismissal claim, in my judgment the Employment Tribunal was right to conclude that he does have a reasonable prospect of success.

30. I therefore dismiss the Respondent's Cross-Appeal.

The Appeal

31. The Appeal is advanced on two grounds. Firstly, it is contended that the Employment Tribunal erred in law in making a deposit order at all because the claim did not have "little reasonable prospect of success". In the alternative, the Claimant contends that the Employment Tribunal erred in law in failing to give any or any adequate reasons for setting the amount of the deposit order.

32. Rule 39 of the **Employment Tribunal Rules of Procedure** provides, so far as material:

> **"(1) Where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party ("the paying party") to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.**
>
> **(2) The Tribunal shall make reasonable enquiries into the paying party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit.**
>
> **(3) The Tribunal's reasons for making the deposit order shall be provided with the order and the paying party must be notified about the potential consequences of the order.**
>
> **(4) If the paying party fails to pay the deposit by the date specified the specific allegation or argument to which the deposit order relates shall be struck out …**
>
> **(5) If the Tribunal at any stage following the making of a deposit order decides the specific allegation or argument against the paying party for substantially the reasons given in the deposit order—**
>
> > **(a) the paying party shall be treated as having acted unreasonably in pursuing that specific allegation or argument for the purpose of rule 76, unless the contrary is shown; and**

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

otherwise the deposit shall be refunded.

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

33. In **Hemdan v Ishmail & Another**, UKEAT/0021/16, this Tribunal identified at [10-11] of its Judgment the purpose of a deposit order as being to identify claims with little prospect of success and to discourage pursuit of those claims by requiring a sum to be paid and by creating a risk of costs if, ultimately, the claim fails. The purpose is not, however, to impede access to justice or to effect a strike-out "through the back door". A deposit order should be capable of being complied with and a party should not be ordered to pay a sum which he or she is unlikely to be able to raise (see at [17]).

The decision to make a deposit order

34. This Tribunal in **Van Rensburg v Royal Borough of Kingston-upon-Thames & Others,** UKEAT/0095/07, held at [27] that an Employment Tribunal must have a proper basis for doubting the likelihood of a party being able to establish the facts essential to a claim or response. The complaint made by the Claimant is about the Employment Tribunal's conclusion at paragraph 7(b) of its Reasons, i.e. that an Employment Tribunal was likely to conclude on a Full Hearing of the claim that the Claimant's dismissal was not because of his raising an allegation protected by section 104 of the **ERA 1996** but that it was the result of issues with the Claimant's performance and communication and that a hearing had already been scheduled for 1 August 2017 in connection with ongoing issues. The Claimant contends that there was no evidential basis for the Employment Tribunal's conclusions and that the Employment Tribunal was not, therefore, entitled to make a deposit order in reliance on them.

35. Mr Gilbart submits that there was an evidential foundation for the Employment Tribunal's conclusion regarding the likely outcome of the final hearing. This was contained within the email notifying the Claimant of his dismissal and in the ET1 itself. In the ET1, the Claimant stated at section 8.2 that his manager had referred him for what he described as a "competency hearing" and he repeated this in section 15, stating that the competency hearing had been in March (i.e. some four months before his dismissal). The Claimant also referred in this section of the ET1 to another manager having sent an email in which the Claimant was blamed for a service failure; although the Claimant described this as a "blatant lie", it is the fact that the Claimant states that the email was sent in those terms that is material for present purposes. The Claimant further states in section 15 of the ET1 that he was given a written warning by Mr Foster about a week before he was dismissed because the Claimant had been "uncontactable". Again, the Claimant appears to state in the ET1 that the warning was unjustified but for present purposes the important point is that he asserts that he received such a warning shortly before his dismissal. As for the Employment Judge's reference to a hearing having been scheduled for 1 August 2017, there was an evidential foundation for this because in the email dismissing the Claimant on 31 July 2017, Mr Foster referred to "tomorrow's originally scheduled hearing".

36. Mr Gilbart also relies on evidence which the Respondent says was given by the Claimant during the hearing before the Employment Tribunal. It is said that the Claimant accepted that he had been given a written warning. That evidence does not sufficiently appear from the Employment Tribunal's Reasons; the Employment Tribunal has not been asked to give further reasons and no note of the evidence has been agreed. In any event, the point is not material because the evidence said to have been given by the Claimant is to the same effect as what appears on the face of the ET1.

37. I accept Mr Gilbart's submissions on this issue. In my judgment, the Employment Tribunal was entitled to reach the view that it did at paragraph 7(b) of the Reasons. The evidence to support that view was before it. It was set out on the face of the ET1 and was in Mr Foster's email dismissing the Claimant, both of which the Employment Tribunal had before it. That the Claimant may have disputed the appropriateness of the Respondent's actions in this regard is nothing to the point, in circumstances where his unfair dismissal claim was based solely on the allegation that the reason for dismissal was one prohibited under section 104 of the **ERA 1996**. Several of the matters relied by the Employment Tribunal at paragraph 7(b) of the Reasons were established as having occurred on the Claimant's own case and they had all arisen prior to him raising any allegation qualifying under the terms of section 104.

38. I do not, therefore, uphold the Appeal on the basis that the Employment Tribunal was wrong to make a deposit order at all. It had material before it upon which it could legitimately reach the conclusion that it did at paragraph 7(b) of the Reasons and it had a proper basis for doubting the likelihood of the Claimant establishing that his dismissal resulted from his having made an allegation protected by section 104 of the **ERA 1996**. In my judgment, the circumstances of this case were sufficient for a deposit order to be made.

The reasons challenge

39. The Claimant's alternative argument is that the Employment Tribunal erred in law in failing to give reasons for setting the level of the deposit that it did. It will be apparent from the reasons given by the Employment Tribunal, which save for its procedural narrative I have set out in full at paragraph 13 above, that the Employment Tribunal did not explain why it set the amount of the deposit at the level it did, either initially in the sum of £900.00 or following reconsideration in the sum of £300.00, although in the covering letter accompanying the second order it was stated that the lower sum had been chosen having regard to the Claimant's financial position.

40. The Claimant submitted a statement of means to the Employment Tribunal. This recorded that he had no assets and credit card debt of £400. As to his income, his net wages in his new employment were £1,229.82 per month and his outgoings for rent, food, fuel and so on were £1,200.85 per month, the difference being £28.97 per month. It also appears that the Claimant gave some oral evidence about his means to the Employment Tribunal. The nature of that evidence does not appear from the Employment Tribunal's Reasons, nor has a note of the evidence been agreed, nor has there been any application for the Employment Judge's notes of that evidence.

41. The Tribunal initially made a deposit order for £900.00, i.e. very close to the maximum of £1,000.00 and more than 30 times the Claimant's net monthly income, after expenses, shown on his statement of means. The Tribunal gave no reasons for setting the amount of the deposit order at that level. In his request for reconsideration, which resulted in the second deposit order being made, the Claimant stated that at the hearing it had been established that his monthly available income was approximately £40. The Tribunal then set the amount of the deposit at £300.00, which is more than seven times that amount. Ms Omambala submits that the Employment Tribunal erred in law in failing to explain why it set the amount of the deposit order at the level that it did. This applies to both the first and second deposit orders, where the reasons given by the Employment Tribunal were precisely the same.

42. Mr Gilbart submits that the Employment Tribunal had the advantage of hearing evidence from the Claimant about his means and therefore had sufficient information before it to arrive at a view as to the appropriate amount of the deposit. But that submission does not address the question of what the evidence was before the Employment Tribunal, why it fixed the amount of the deposit order at this level and why it considered that a requirement to pay such an amount

within the period specified was realistically capable of being complied with in the circumstances (see **Hemdan** at [25]). Both of the Employment Tribunal's decisions are silent on these points. Mr Gilbart submits there is no requirement on an Employment Tribunal to provide reasons for the particular level of deposit that is chosen. Rule 39(3) of the **Employment Tribunal Rules** requires reasons to be given "for the making of a deposit order". Mr Gilbart submits that this does not extend to requiring reasons to be given for the particular amount of the deposit order, only for why the order has been made at all. I do not accept that submission. In my judgment, the requirement under the **Employment Tribunal Rules** to give reasons for "making" the deposit order includes not only a requirement to give reasons for making the order at all, but also for the particular amount that is ordered to be paid. It is not therefore necessary to consider whether a requirement to give reasons for the amount of the deposit arises under the general requirement in Rule 62(1) of the **Employment Tribunal Rules** for a tribunal to give reasons for its decision "on any disputed issue, whether substantive or procedural".

43. In any event, even if I am wrong about the proper construction of Rule 39(3) of the **Employment Tribunal Rules**, I accept Ms Omambala's submission that a tribunal is obliged to provide adequate reasons for its decisions as a matter of general principle and that, in the particular case of a deposit order, this includes reasons explaining how a party's means have been taken into account in fixing the amount of the deposit. Ms Omambala referred me to the decision of the Court of Appeal of Northern Ireland, on an appeal against a deposit order made by an Industrial Tribunal, in **Stadnik-Borowiec v Southern Health and Social Care Trust & Others** [2014] NICA 53, [2014] IRLR 723. Giving the judgment of the Court, Coghlin LJ stated at [18], after referring to the general duty to provide reasons under Rule 30(6) of the **Industrial Tribunal Rules of Procedure** in Northern Ireland:

> **"Quite apart from the statutory obligation to provide reasons… there is a general obligation to provide adequate reasons for judicial decisions since, if it is not apparent to the parties why one has won and the other has lost, justice will not have been seen to have been done…"**

A The Court went on to set aside the first of the two deposit orders made by the Industrial Tribunal in that case because the decision did not refer to the specific details of the claimant's financial resources or explain the manner in which they had been taken into account (see at [19]).

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44. In my judgment, the same applies here. It is not possible from the Employment Tribunal's reasons for making either of the deposit orders made to discern what its conclusion about the Claimant's ability to pay the deposit ordered was, or how it had taken the Claimant's means into C account in fixing the amount of either deposit order. In my judgment, that amounts to a material error of law on the part of the Employment Tribunal and the deposit orders made in this case must be set aside as a result. The order striking out the Claimant's claim of unfair dismissal for non-D payment of the deposit of £300.00 must also, in consequence, be set aside.

45. It is not therefore necessary for me to address a further and additional argument that Ms Omambala advanced in her oral submissions, which is that the Employment Tribunal failed to E give adequate reasons for exercising its discretion to make a deposit order.

Conclusion

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46. I therefore allow the Appeal and dismiss the Cross-Appeal. As I have allowed the Appeal only on the basis of the Employment Tribunal's failure to give adequate reasons for fixing the amount of the deposit, rather than on the Claimant's primary case that it was wrong to make a G deposit order at all, the question arises as to the proper disposal of the appeal. Ms Omambala and Mr Gilbart were in agreement that, in the event that I allowed the appeal on this basis, it would be disproportionate for the matter to return to the Employment Tribunal and that I should exercise the discretion afresh. I am satisfied that this is an appropriate case in which to make a H

deposit order, having regard to the purposes of such an order which were identified in **Hemdan** and to the findings which were made by the Employment Tribunal at paragraph 7 of its Reasons.

47. In **Hemdan**, this Tribunal adopted the same course and fixed the deposit in the purely nominal sum of £1 where the claimant's income was limited to receipt of state benefits in the sum of £125.05 per week. In this case, the evidence is that the Claimant's net income, after tax, is in excess of £1,200 per month albeit that he has to meet his living expenses from that and his available income, after taking those living expenses into account, is of the order of £30 to £40 per month. Ms Omambala submitted that the amount of any deposit ordered in these circumstances should be no more than £10. I do not accept that submission; the Claimant has a monthly available income, after living expenses, well in excess of £10. I will fix the amount of the deposit that is to be paid in this case, having regard to the available evidence about the Claimant's means, at £25 and require that it be paid within 28 days of the seal date of the Order of this Tribunal. That is a sum which the Claimant is likely to be able to raise within that period and is not set at so high a level as to impede the Claimant's access to justice. In any event, as this Tribunal noted in **Hemdan** at [26], the costs warning under Rule 39(5) of the **Employment Tribunal Rules** continues to have effect if the deposit is paid and the allegation made by the Claimant fails. Ms Omambala submitted, correctly in my view, that the costs consequences that would arise in those circumstances pursuant to Rule 39(5) are the primary benefit to the present Respondent of the making of a deposit order, rather than the forfeiting under Rule 39(6) of the particular amount ordered to be paid as a deposit.