EMPLOYMENT TRIBUNALS

Claimant: Ms. A C De Jesus Pereira

Respondent: (1) Oliver Bernard Ltd
(2) La Fosse Associates

Heard at: **London Central** **On:** **25 October 2024**

Before: **Employment Judge Leonard-Johnston**

Representation
Claimant: In person
Respondent: (1) Mr. T Shepphard
(2) Ms. H Abas

RESERVED JUDGMENT

1. The claim against the First Respondent under section 138 of the Trade Union and Labour Relations (Consolidation) Act 1992 is struck out under Employment Tribunal Rule 37(1)(a) because it has no reasonable prospect of success.

2. The claim against the Second Respondent under section 138 of the Trade Union and Labour Relations (Consolidation) Act 1992 is struck out under Employment Tribunal Rule 37(1)(a) because it has no reasonable prospect of success.

REASONS

1. The respondents are both recruitment agencies. The claimant was not employed by the respondents but has been using their services as a job-seeker to try and find employment as a designer. Her claim is brought on the basis that the respondents have unlawfully failed to provide/effectively provide their services because of (a) her nationality and because (b) her trade union membership.

2. The claimant was employed by a third party, Reply UK, which ended on 5 August 2022. The claimant claims that when her employment ended with

Reply UK, she was owed two months' wages and she recovered these wages on 29 September 2022 following the intervention of her trade union. The claimant says that because she involved her trade union, she was blocked and blacklisted by Salt Recruitment Group ("SRG"), a recruitment agency, from 3 September 2022. The claimant brought claims against Reply UK and SRG (Case no: 2210420/2023) which have been struck out. The claimant has appealed that decision. The claimant also brought a claim against another third party called Xcede Ltd (2216650/2023) which was dismissed on withdrawal by the claimant, who then changed her mind and sought for them to be reinstated. EJ Burns confirmed the dismissal on withdrawal by a decision dated 13 February 2024.

3. The claimant brought this claim on 21 November 2023 for unfair dismissal, race discrimination and discrimination on the basis of religion / belief. The claimant subsequently withdrew the complaints of the complaints of unfair dismissal and religion / belief discrimination. The claimant also identified in her ET1 complaints about "trade union membership" and it is those complaints which were the subject of this preliminary hearing.

4. As at the date of hearing the claim contained the following complaints against both respondents.
    a. Race discrimination. The claimant complains that the respondents refused to provide their services because of her Portuguese nationality.
    b. The "trade union complaints". The claimant complains that the respondents refused to provide their recruitment services on the grounds of trade union membership which the claimant says is a breach of section 138 of the **Trade Union and Labour Relations (Consolidation) Act 1992** ("TULR(C)A")).
        i. The claimant complains that the first respondent ("R1") refused its services as an employment agency from 27 September 2022 to 21 August 2023.
        ii. The claimant complains that the second respondent ("R2") refused its services as an employment agency from 21 November 2022 to 20 September 2023.

5. In a case management order dated 18 July 2024, Employment Judge Khan listed the claim for a one-day preliminary hearing to determine the following.
    a. To consider any application made by the claimant to amend the claim.
    b. If the claimant proceeds with the trade union complaint against R2, to decide whether to strike out this complaint on the ground that it has no reasonable prospect of success (rule 37(a)).
    c. Alternatively, in respect of the trade union complaints against the first and / or second respondent, to decide whether to order the claimant to pay a deposit as a condition of continuing with these complaints, and if so, to decide what amount of deposit to order the claimant to pay, taking account of any information the tribunal has in relation to the claimant's ability to pay a deposit (rule 39).
    d. To make any necessary case management orders.

6. Some parts of the order made by EJ Khan dated 18 July 2024 are highly relevant to my decision and accordingly I set those parts out in full.

7. Paragraph 17 of that EJ Khan's order states:

> "*In respect of the trade union complaint, the claimant claims that the first respondent knew about the involvement of her trade union with Reply UK because Paul Tucker, Director at Reply UK, told Holley Potts, Recruiter at SRG, who disclosed this to Dave Sims, a fellow Recruiter at SRG, who shared this with Gary Stefano, a Recruiter at the first respondent. As for the nexus between Mr. Sims and Mr. Stefano, the claimant relies on 4-month period some seven years prior to these events (i.e. October 2014 – February 2015) when they worked together*."

8. Pargraph 20 of EJ Khan's order states:

> "*In respect of the trade union complaint, the claimant stated she did not "honestly believe" the allegedly adverse treatment was connected with her trade union membership, however she confirmed that she proceeded with this complaint. I explained that because of the claimant's admission this complaint was unsustainable and it would be necessary to consider whether it should be struck out at a separate preliminary hearing. The claimant explained that she could not "trace out" a link between Reply UK and the second respondent to establish knowledge of her trade union membership "on the top of her head". The claimant will have time to consider this. I also ordered the claimant to provide the further information set out below (see paragraph 33)."*

9. At the outset of the preliminary hearing the claimant clarified that she had made no written application to amend her claim to include a claim under the **Employment Relations Act 1999 (Blacklists) Regulations 2010**, and was not making any such application at the preliminary hearing.

10. In addition, it was agreed between the parties at the outset that the preliminary hearing should include consideration of the strike out application made by R1 at the preliminary hearing on 11 July 2024 in relation to the trade union complaint, not only that made by the R2. This was on the basis that a) the claimant was aware that the first respondent had made such an application and was content for it to be considered, b) that the tribunal was in any event considering the R1's deposit order application and R2's strike-out application, which covered similar matters, and that it was in the interests of justice to do so, including saving parties and the tribunals resources. It was not objected to by the claimant.

11. I had before me a bundle of 1481 pages which reflects the protracted correspondence and complexity of the proceedings. I also had before me skeleton arguments from both respondents and two skeleton arguments from the claimant; a 24-page document dated 24 October 2024 and a 6-page document dated 27 September 2024. The claimant confirmed that these two documents were an accurate record and compilation of her complaints. I also considered the claimant's "further grounds" against the R1 and R2 dated 24 July 2024 and the claimant's "skeleton arguments" against the R1 and R2 dated 24 July 2024. I also had before me two authorities from the second respondent.

12. Given the procedural complexity and the quantity of documentation I adjourned to read a key reading list suggested by all parties, before hearing

submissions. I reserved my decision in order to consider carefully the claimant's case in full and to properly comprehend her pleadings.

LEGAL FRAMEWORK

13. Section 138 TULR(C)A provides as follows:

> ***138 Refusal of service of employment agency on grounds related to union membership***
>
> *(1) It is unlawful for an employment agency to refuse a person any of its services—(a) because he is, or is not, a member of a trade union, or (b) because he is unwilling to accept a requirement to take steps to become or cease to be, or to remain or not to become, a member of a trade union.*
>
> *(2) A person who is thus unlawfully refused any service of an employment agency has a right of complaint to an employment tribunal.*
>
> *(2A) Section 12A of the Employment Tribunals Act 1996 (financial penalties) applies in relation to a complaint under this section as it applies in relation to a claim involving an employer and a worker (reading references to an employer as references to the employment agency and references to a worker as references to the complainant).*
>
> *(3) Where an advertisement is published which indicates, or might reasonably be understood as indicating—(a) that any service of an employment agency is available only to a person who is, or is not, a member of a trade union, or (b) that any such requirement as is mentioned in subsection (1)(b) will be imposed in relation to a service to which the advertisement relates, a person who does not satisfy that condition or, as the case may be, is unwilling to accept that requirement, and who seeks to avail himself of and is refused that service, shall be conclusively presumed to have been refused it for that reason.*
>
> *(4) A person shall be taken to be refused a service if he seeks to avail himself of it and the agency—(a) refuses or deliberately omits to make the service available to him, or (b) causes him not to avail himself of the service or to cease to avail himself of it, or (c) does not provide the same service, on the same terms, as is provided to others.*
>
> *(5) Where a person is offered a service on terms which include a requirement that he is, or is not, a member of a trade union, or any such requirement as is mentioned in subsection (1)(b), and he does not accept the offer because he does not satisfy or, as the case may be, is unwilling to accept that requirement, he shall be treated as having been refused the service for that reason.*

14. Section 138 states that it is unlawful for an employment agency to refuse a person any of its services because the applicant is, or is not, a union member. A person is taken to be refused a service by an employment agency if the agency refuses or deliberately omits to make the service available or does not provide the same service, on the same terms, as is provided to others. To succeed in a claim under section 138 the claimant must show that she was refused services because she was a member of a

trade union. In other words, that her membership of the trade union was a significant reason behind the refusal of services. A mere link between trade union membership and the reason for refusal is not sufficient for a claim. In **Miller and ors v Interserve Industrial Services Ltd 2013 ICR 445** the EAT confirmed in relation to section 137 of TULR(C)A that in determining whether the refusal of (in that case, of employment) is 'because of' the unlawful trade union reason, it is appropriate for tribunals to take the approach in discrimination cases set out by the House of Lords in **Nagarajan v London Regional Transport 1999 ICR 877.** Accordingly, the question of whether an employment agency refused services 'because of' membership of a trade union is a question as to their reasons for acting as they did, the so-called the 'reason why' question. It will be sufficient that the trade union membership had a "significant influence" on the decision to refuse the services. It need not be the sole ground for the decision.

15. Rule 37 of the **Employment Tribunal Rules of Procedure contained in Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013** ("the Rules") provides that:

Striking out
37.—(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—
(a) that it is scandalous or vexatious or has no reasonable prospect of success;
(b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;
(c) for non-compliance with any of these Rules or with an order of the Tribunal;
(d) that it has not been actively pursued; (e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).
(2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.

16. I remind myself of His Honour Judge James Taylor's EAT decision in **Cox v. Adecco Group UK & Ireland [2021] ICR 1307** paragraphs 21 to 34, and in particular the guidance given at paragraph 28 relating to strike out applications;

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

(1) No-one gains by truly hopeless cases being pursued to a hearing;

(2) Strike out is not prohibited in discrimination or whistleblowing cases; but especial care must be taken in such cases as it is very rarely appropriate;

(3) If the question of whether a claim has reasonable prospect of success turns on factual issues that are disputed, it is highly unlikely that strike out will be appropriate;

(4) The Claimant's case must ordinarily be taken at its highest;

(5) It is necessary to consider, in reasonable detail, what the claims and issues are. Put bluntly, you can't decide whether a claim has reasonable prospects of success if you don't know what it is;

(6) This does not necessarily require the agreement of a formal list of issues, although that may assist greatly, but does require a fair assessment of the claims and issues on the basis of the pleadings and any other documents in which the claimant seeks to set out the claim;

(7) In the case of a litigant in person, the claim should not be ascertained only by requiring the claimant to explain it while under the stresses of a hearing; reasonable care must be taken to read the pleadings (including additional information) and any key documents in which the claimant sets out the case. When pushed by a judge to explain the claim, a litigant in person may become like a rabbit in the headlights and fail to explain the case they have set out in writing;

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

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

The claims

The claim against R1 at its highest

17. The claim against the first respondent at its highest is as follows;
    a. The claimant has been registered with R1 since 15 May 2019 as a job seeker.
    b. R1 stopped providing their services to the claimant after the claimant used her trade union at Reply UK in August and September 2022. Alternatively, R1 pretended to provide services but did not genuinely do so. R1 excluded the claimant from recruitment processes, asked in advance for references and blocked her on their recruitment channels.
    c. Reply UK and SRG are connected with former and current employees of R1 over LinkedIn and through business relationships. In particular, R1's employee Gary Stefano used to work with David Sims of SRG between 2012 and 2015.

18. In the claimant's 'further grounds' dated 24 July 2024 the claimant stated that;

"*As it was explained during the hearing on 11th July 2024 and highlighted by the EJ Khan on point (17) on CMO's Oliver Bernard employees' (Gary Stefano) used to work at Explore Group together with David Sims (actual recruiter at Salt and colleague of Holley Potts).*

> *"(17) In respect of the trade union complaint, the claimant claims that the first respondent knew about the involvement of her trade union with Reply UK because Paul Tucker, Director at Reply UK, told Holley Potts, Recruiter at SRG, who disclosed this to Dave Sims, a fellow Recruiter at SRG, who shared this with Gary Stefano, a Recruiter at the first respondent. As for the nexus between Mr. Sims and Mr. Stefano, the claimant relies on 4-month period some seven years prior to these events (i.e. October 2014 – February 2015) when they worked together*."

Equally, Izzy Clements (actual recruiter at La Fosse and colleague of Annabel Adams (former recruiter at La Fosse) is ex-colleague of Daniel Baldock (recruiter at Xcede) and Saffy Patel who used to work at Source recruitment together. Izzy Clements and the other recruiters, inclusive Daniel Baldock, have several LinkedIn connections with former and ex recruiters from the other competitors agencies, such as Salt Recruitment Group, Xcede, La fosse, of Oliver Bernard, Source Recruitment and other recruitment agencies. As well as direct employers to which also stopped introducing my profile to the hires. Izzy Clements also has LinkedIn's connection with Liam Flannery (current Xcede and colleague of Daniel 2 552 Baldock at Xcede) who has several connections with Ex-employees of Source Recruitment and Salt Recruitment.

Therefore the belief is that Reply UK (Paul Tucker) passed on informally references about my trade union to Salt Recruitment (Holley Potts). M.Potts spreed the gossip among Salt's former and ex employees, inclusive David Sims who pass it to Gary Stefano (actual recruiter at OB and ex-explore group)

Obviously I can't show evidences of the recruiters passing my sensitive data among themselves as it is a gossip. Although, I can present evidences of connections between themselves through their LinkedIn connections, if the tribunal accepts that as evidence."

19. It is worth setting out the key paragraphs of the claimant's case which is found at numerous points in the pleadings, but is also at page 4 of the document dated 24 October 2024, paragraph 3.4 (i):

> "*C's assumption that former and ex-employees of "R2", "OB", "LF" and "XCD", as well as other recruitment agencies have been gossiping about "C's sensitive data (trade union membership, health) and that "C's" detriment post employment with Reply UK was triggered by Reply UK (Paul Tucker) passed on to Salt Recruitment Group (Holley Potts to David Sims) based to R1's ("OB") employees (Gary Stefano) by spreading the word among their former and/or ex-colleagues to other recruitment agencies, as well among their clients (News UK, Publicis Sapient, Vodafone UK, Virgin Media, etc) are supported on recruiters's personal LinkedIn's accounts connections (described bellow) that shows the respondents and other recruitment agencies are all linked*:"

20. The claimant then goes on to provide five and a half pages of LinkedIn connections between recruitment agents. This includes the following:

> *"(i)(3)David Sims, former Salt's employee worked at Explore Group Recruitment between Feb 2012 to Feb 2015 together with "OB's" employee (Gary Stefano) between Oct 2014 to Jun 2021. Explore Group Recruitment to which also stopped providing their services as employment agencies or never represented "C's profile to any of the hires, even if "C" has been a job seeker with them since 2017 (page 5)";*
> *…*
>
> *"(m) (8) Nnenna Kalu used to be a recruiter at "R2" between Jun 2019 to Sep 2020 - 1 yr 4 mos), who inclusive used to approach "C" for new job opportunities. Mr. Kalu has a LinkedIn connection with Izzy Clements (actual recruiter at "LF" and ex-recruiter at "Source"), with Christopher King (ex-SALT), with Rob Smiley (ex-recruiter at "OB" between Mar 2017 to Mar 2020 - 3 yrs 1 mos), with Corinna Jones (ex-SALT), with Kate Gabb (ex-Source & ex Digital Gurus), with Alliecee Cummings (ex-"SALT"), with Sarah Selisko (ex-SALT), with David Pratley-McGill (ex-SALT), with Faye Charleswoth (ex-"XCD") and with Dave Boylesekera (ex-SALT)."(*page 6*)*
> *…*
>
> *"(h)(11.5) (Izzy Clements > Kenan Zarif to): Tim Hughes (Associated director at "OB" since Oct 2018 to present - 5yrs 10 mos) only have been working at competitors recruitment agencies and he is connected with Rob Smiley (ex-OB between Mar 2017 to Mar - 2 yrs 6 mos), with Cam Ovel (ex-"LF"), with Alice Czyz (ex-Source), with Sonny Meddle (ex-OB), and with Velsen Dev (ex-OB)"* (page 7).
> *…*
>
> *"OB's former employee (Rob Smiley) between Mar 2017 to Mar 2017, is connected with Salt's former employee (Nnenna Kalu) who is connected with the Second Respondent's actual employee (Isabella Clements). Both recruiters (Rob Smiley and Nnenna Kalu) used to introduced new job opportunties to "C" over the years"* (page 11).

21. On page 12 and 13 of her skeleton argument dated 24 October 2024 the claimant summarises her case as follows:

> *"(d) R1 confirmed they keep a business relationship with Reply UK, besides the fact their employees keep a personal relationship with recruiters of other recruitment agencies, inclusive with Salt Recruitment Group to which also works directly with Reply UK and triggered "C's" detriment and discrimination on grounds of trade union membership.*
>
> *(e) Therefore, wether "C" has or not evidences of detrimental feedback or communication between OB and Reply UK or between Salt Recruitment Group and Reply UK gossiping about "C's" sensitive data, the fact that OB's stopped pretending to provide their employment services, its already detriment and discrimination against C on grounds of trade union and race*."

22. During the claimant's oral submissions, I spent some time clarifying her position. The claimant accepted she has no evidence that R1 had knowledge about her trade union membership, rather she makes an assumption that they did because of the network she has set out. She assumes R1'S knowledge of her trade union membership because Gary Stefano, employed by R1, used to be a co-worker of David Sims of SRG. She assumes that Paul Tucker at Reply UK, passed on this information to Holly Potts at SRG, who passed it on to David Sims of SRG, who passed it on to Gary Stefano of R1. She provides no explanation as to the reason why they would have done this, other than that the recruiters all know each other and gossip. The claimant's approach is to equate networking connections with the respondents having knowledge of her trade union membership.

23. I also questioned the claimant on her position on the necessary causative link between her trade union membership and the refusal of services, and why she considered it to be the reason why they did not put her forward for roles, as opposed to other reasons such as suitability for those roles. Her answer was that it must be the 'reason why' because they refused her services after she used her trade union at Reply UK. Given that the claimant is a litigant in person I reassured her that I would also spend time reading her many written representations which I have done.

The claim against R2 at its highest

24. The claims against R2 at its highest:
    a. R2 refused its services as an employment agency from 21 November 2022 to 20 September 2023. R2 excluded the claimant from recruitment processes, asked in advance for references and blocked her on their recruitment channels.
    b. R2 has connections to Reply UK and SRG. Those connections are as follows. Isabelle Clements, a current employee of the R2 is connected on LinkedIn with employees at other recruitment agencies, including SRG. The claimant's case is that Paul Tucker, Director at Reply UK, told Holley Potts, Recruiter at SRG about the involvement of the Claimant's trade union, and that this "gossip" was spread amongst the employees and former employees of SRG and ended up with Isabelle Clements at R2. The claimant provides no explanation as to how the gossip spread exactly, but relies on the assertion that the recruiters know each other and gossip.

25. It is important to note that at the closed preliminary hearing before EJ Khan, the Claimant stated that she did not "honestly believe" the alleged adverse treatment by the R2 was connected with her trade union membership. The Claimant also stated that "on the top of her head" she was unable to "trace out" a link between Reply UK and R2 so as to establish knowledge of her trade union membership. This was recorded at paragraph 20 of the case management summary.

26. Despite the warning by EJ Khan that the claim against R2 was unsustainable, at this public preliminary hearing the claimant said that EJ Khan had given her an opportunity to find the link between R2 and Reply UK/SRG and that she had done so. The claimant provided over five pages listing LinkedIn connections between various recruiters, including many LinkedIn connections with Ms. Clements, employee of R2. I do not set those

out in detail here. Again, the claimant's approach is to equate networking links with knowledge of her trade union membership.

Strike out application – R1

27. I remind myself that when considering an application for a strike out, I must first consider whether the grounds for a strike out application are met, and then secondly consider whether to use my discretion. In considering this application I make no findings of fact because I did not hear evidence from either party.

28. I take into account and put significant weight on the fact that the claimant is a litigant in person. I have taken into account that the claimant has had numerous opportunities to clarify her claim, including an opportunity to amend her claim which she did not take. Whilst the claimant has over the course of some months provided more detail about the alleged network of recruiters, I note that her claim has remained consistent throughout in that it is based on speculation that recruiters have been gossiping about her.

29. In respect of the claim against R1, I have considered the respondent's submissions that even taking the claim at its highest, the claimant has not put forward any facts that could establish, even by inference, that R1 had knowledge of her trade union membership, that there was a failure to provide services, or that failure was because of the trade union membership. The respondent submits that the claimant's case against R1 is that R1 is assumed to know about her trade union membership because Paul Taylor (Reply UK) told Holly Potts (SRG) who told David Sims (SRG) who told Gary Stefano (R1) that the claimant was a member of a trade union. No evidence has been provided that any of these conversations took place and the claimant herself says she does not know that they occurred, but assumes that they did. There are four links in this chain, and the last link relies on Gary Stefano and David Sims who worked together for four months 7 years prior to the events. R1 submits that it has never interacted with Reply UK regarding the claimant, and that it does not work regularly with Reply UK but has placed job candidates there in the past. R1 says it has no business connections to SRG.

30. The claimant's case is based on her belief that recruitment agents have been gossiping about her. For the claimant to succeed in a claim she would need to persuade a Tribunal that four recruitment agents conspired against her, despite at least one of them having no professional connection to the claimant at all, and despite the claimant providing no reason why they would do so. Her case is widely speculative. She has provided no evidence that R1 knew about her trade union membership and admits that her case on knowledge is an assumption. I take into account that the claimant herself has accepted that she has no evidence that R1 had knowledge about her trade union membership. She provided no evidence that all the recruiters in the chain ever communicated with each other, let alone about her, and let alone relating to her trade union membership. There is no evidence that the recruiters who are supposed to have conspired to refuse their services are even in contact with each other, other than being connected on the networking website LinkedIn. LinkedIn is a social media platform which is used as a professional network. Making a connection with a person's account on LinkedIn does not mean that the persons know each other or

that they have ever communicated with each other, other than by accepting the connection.

31. I remind myself that where facts are in dispute it will be only be appropriate to exercise discretion to strike out claims in very exceptional cases (**Ezsias v North Glamorgan NHS Trust [2007] ICR 1126**). In my view this is one of those exceptional cases. The case is so entirely speculative that the claimant has no reasonable prospects of convincing a Tribunal that R1 had knowledge of her trade union membership.

32. In relation to whether R1 refused the claimant services, I have considered that the respondent has provided evidence that it emailed the claimant along with other candidates inviting her to apply for available positions between May 2019 and August 2023. On 21 August 2023, the Claimant telephoned Alex Scriven of the R1 to discuss a position she had applied for, which she had not been put forward. R1 explained that she had not been put forward for the position, as more suitable candidates for the vacancy had been identified. It had been explained to the Claimant that there were no jobs available for her due to the current job market. The respondent's submission is that at no point has the Claimant been excluded or blocked from the First Respondent's recruitment process.

33. I note that whilst the claimant has made numerous submissions that the respondent has been pretending to provide recruitment services or ignoring the claimant's interest in roles, on her own case she was approached by R1 for design positions on 6 July 2022 and then during the phone call with R1 on 21 August 2023 she was asked to provide an updated CV. Accordingly, even on the claimant's own case she was not refused services within the meaning of section 138(4)(a), rather she was concerned that R1 was not effectively providing her with a service (in her words, they were pretending). This could amount to a failure under section 138(4)(c) to provide services in a non-discriminatory manner, however, the claimant has not given any examples of instances in which R1 has treated her differently to how it would treat any other job seeker. On her own case the claimant is not able to establish a claim under section 138(4)(a), and she has provided no information on which a Tribunal could make a finding under section 138(4)(c).

34. In relation to the causative link between trade union membership and the alleged refusal of services, the claimant's position is that the refusal of services is itself the evidence of such a link. Her case is that it is obvious that the 'reason why' is the trade union membership because when she used the trade union she was blacklisted. The claimant has been given numerous opportunities to explain what she relies upon, beyond speculation, to establish a causal link between trade union membership and alleged refusal of services, but has not provided one. Having heard her submissions I am satisfied that she would be unlikely to provide any facts that could establish a causal link at a final hearing, because she takes the position that none is needed. I take into account that the claimant is a litigant in person but note that it is still incumbent upon her to establish the facts that could lead to a Tribunal making inferences and then findings about the reason why she was refused services. In cases where the disadvantage is not inherent in the treatment, more is needed to establish that the treatment was because of the trade union membership than the fact of the treatment

itself. The claimant provides no facts that would lead a Tribunal to decide that the alleged refusal of services was because of her trade union membership.

35. The first respondent adopted the submissions made by Ms. Abas for R2 who relied on two authorities. First, **Ashok Asir v British Airways PLC [2017] EWCA Civ 1392** in which Lord Justice Underhill stated that;

> "*Employment tribunals should not be deterred from striking out claims, including discrimination claims, which involve a dispute of fact if they are satisfied that there is indeed no reasonable prospect of the facts necessary to liability being established, and also provided they are keenly aware of the danger of reaching such a conclusion in circumstances where the full evidence has not been heard and explored, perhaps particularly in a discrimination context. Whether the necessary test is met in a particular case depends on an exercise of judgment, and I am not sure that that exercise is assisted by attempting to gloss the well-understood language of the rule by reference to other phrases or adjectives or by debating the difference in the abstract between 'exceptional' and 'most exceptional' circumstances or other such phrases as may be found in the authorities. Nevertheless, it remains the case that the hurdle is high, and specifically that it is higher than the test for the making of a deposit order, which is that there should be 'little reasonable prospect of success'*.

36. Ms. Abas also drew my attention to **Thomas v Expansys UK Ltd 2022 EAT 164.** Ms. Abas submitted that in that case the EAT held that a tribunal had been entitled to strike out the claimant's discrimination claims where she had failed, at the strike-out hearing, to assert that her sex or race had causally influenced a manager's decision to 6 dismiss her. It was unfortunate that the claimant had been effectively put on the spot to explain her case, however, it was legitimate for the tribunal to ask what her case was. The tribunal had, in any event, looked beyond her response to its question and considered the pleadings and other core documents, as it was required to do. The claimant had also been afforded several opportunities to clarify her case before the strike-out hearing but had failed to do so. I am satisfied that in this case the claimant has had ample opportunity to clarify her case and that the claimant took the opportunity to address her position on causation at the preliminary hearing. As set out above I have also carefully considered her many written representations.

37. Having taken into account all the circumstances, and bearing in mind the high threshold involved in such cases, I nevertheless conclude that this claim has no reasonable prospects of success. Each of the elements of a claim under section 138 including knowledge of trade union membership, refusal of services, and the causative link between trade union membership and refusal of services, is speculative, even on the claimant's own case. The claimant has no reasonable prospect of proving facts or raising any inferences from which the tribunal could conclude that the respondents refused their services to her and that this was because of her trade union membership. This claim falls within Rule 37(1)(a) in that it has no reasonable prospect of success.

38. As to whether or not to exercise my discretion to strike out the claim, I place significant weight on the severe consequences of striking out a claim and do not take the decision lightly. However, in this case I consider it is in the overriding interests of justice to strike this claim out, bearing in mind the costs to the respondents of defending a time-consuming and complex case that has no reasonable prospects of success, and the nature and importance of the issues. I take into account that the claimant has an outstanding appeal against the bodies who are the key source of her concern (Reply UK and SRG) and is still able to pursue her race discrimination claim against the respondents.

Strike out application – R2

39. In respect of the claim against R2, I note that many of the same considerations apply as I have set out above for R1, save that the claimant's case on R2 having knowledge of trade union membership is even weaker. The claimant is unable to pinpoint how the fact of her trade union membership passed from Reply UK/SRG to R2, other than that it may have been through the many connections of Ms. Clements. I note that Ms. Clements herself gave a witness statement (at page 1212 of the bundle) stating she had no knowledge of the claimant until these proceedings. Ms. Clements is engaged in internal recruitment or recruitment agents and as such it is expected that she has a very wide network of recruitment agents.

40. I have considered the respondent's submissions that the claimant has not explained why it was not reasonably practicable for her to bring the claim within time. I take this into account but do not place significant weight on it because it is something that is properly determined at the final hearing after hearing evidence.

41. I place significant weight on the claimant's admission before EJ Khan that she did not genuinely believe that R2 knew about her trade union membership. When EJ Khan explained to the claimant that if she genuinely didn't believe that R2 knew about her trade union membership then her claim was clearly unsustainable, instead of reconsidering her claim, the claimant took that as an opportunity to go on a fishing expedition to look for links between R2 and the subjects of her core complaints. All she has provided is a list of Ms. Clements connections to recruitment agents on LinkedIn.

42. Having considered all the information before me and taking her claim at its highest, I find that the claimant has no reasonable prospects of succeeding in persuading a Tribunal that R2 had knowledge of her trade union membership. Because of this, and for reasons given above in relation to R1, she has no reasonable prospect of succeeding in establishing that R2 refused her services because of her trade union membership. I find that the trade union claim against R2 falls within Rule 37(1)(a) in that it has no reasonable prospect of success.

43. I have considered whether to exercise my discretion under Rule 37. I take this into account the claimant's approach to this claim after EJ Khan's order and his warning that her claim was unsustainable. She saw this as an opportunity to go on a fishing expedition rather than take a realistic view of her claim. I also take into account other aspects of the claimant's behavior

in these proceedings which I consider to be approaching vexatious behavior, even taking into account that she is a litigant in person. The claimant has brought numerous satellite claims arising out of her original complaint against Reply UK and SRG and has withdrawn and added information to her claims and flooded the Tribunal with representations. The claimant indicated in the hearing before me that she will appeal any outcome that is not in her favour regardless of the reasons for such a decision. For these reasons in addition to the reasons given above for R1 I have decided it is in the overriding interests of justice to exercise my discretion to strike out the claim.

44. Having made an order to strike out the claims, there is no need to consider the applications for deposit orders.

Employment Judge Leonard-Johnston

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15 November 2024

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

21 November 2024

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FOR EMPLOYMENT TRIBUNALS