Case No: 2201034/2018

EMPLOYMENT TRIBUNALS

Claimant: **Ms E Williams and others**

Respondents: **(1) Noonan Services Group (UK) Limited** **(2) The London School of Economics**

Heard at: **London Central**

On: **8 January 2018**

Before: **Employment Judge Tayler**

Representation

Claimant: Mr M Sprack, Counsel

First Respondent: Ms C Lord, Counsel

Second Respondent: Mr R Childe, Solicitor

JUDGMENT

1. The Claim in respect of the Sehinde threat detriment has no reasonable prospect of success and is struck out.

REASONS

The Proceedings

1. The Claimants work as cleaners, initially employed by the First Respondent, working at LSE sites. Their employment transferred to the Second Respondent when a cleaning contract was taken back in-house on 6 March 2018.

2. The Claimants are members of the United Voices of the World Union ("the Union")

3. The Claimants submitted a Claim Form against the First Respondent to the Employment Tribunal on 21 February 2018. In the Particulars of Claim attached to the Claim Form the Claimants contended that they were subject to a series of detriments by acts, or deliberate failures to act, for the purposes of:

    3.1. deterring them from being a member of an independent trade union or penalising them for being members

    3.2. deterring them from taking part in the activities of an independent trade union at an appropriate time, or penalising them for doing so

    3.3. deterring them from making use of trade union services at an appropriate time, or penalising them for so doing

    3.4. compelling them to become a member of a different trade union

4. Collectively, I refer these as “the section 146 purposes”.

5. The trade union activities relied upon by the Claimants are:

    5.1. participation in strike action on 15 and 16 March, 11, 17 and 24 May and 1 and 2 June 2017

    5.2. engaging in protest action at appropriate time on LSE sites in 2016 and 2017.

    5.3. engaging in discussions with the Director of Facilities of the LSE and Head of Facilities of the LSE

    5.4. discussing the terms and conditions of their employment and agreeing terms on which to settle with an ongoing industrial dispute

    5.5. attending, voting and speaking at regular Union branch and general meetings at the LSE

    5.6. three days of planned strike action on 12, 13 and 14 July 2017.

6. Collectively, I refer these as “the Union activities”.

7. In addition it was contended that the Claimants made use of trade union services by:

    7.1. use of their Union official to enter into official trade disputes

    7.2. their Union coordinating actual and proposed strike action

7.3. the use of the Union representative to raise a grievance on 14 July 2017.

7.4. the use of the Union representation to lodge an appeal on 16 November 2017

8. Collectively, I refer these as “the Union services”.

9. The Claimants also rely on their Union membership “the Union membership”.

10. Collectively, I refer to the Union activities, Union services and Union membership as “the Union matters”.

11. The Claimant relied upon the following detriments:

11.1. on 21 February 2017 the Respondent banning their trade union representative, Mr Elia, from representing them in any workplace meeting, including grievances, disciplinary and appeals at the Respondent and failing to rescind that ban until 27 April 2017 under threat of legal action from the Claimants and pressure from the Respondent's client LSE: “the Elia ban detriment”

11.2. on 27 April 2017 the Respondent threatening to re-impose the ban described above within the following three months: “the Elia ban re-imposition detriment”

11.3. on 13 July 2017 an employee of the Respondent Susan Sehinde sending a text message to the Claimant's Union representative Mr Elia stating *“As God liveth, whoever will participate in ur 3 days strike will never live to witness their children goodness IJMN [in Jesus Mighty Name] Amen. … Spread my message to your member. I only respect peple. I don't fear them. Thanks”*: “the Sehinde threat detriment”.

11.4. The Respondent's reinstatement of Ms Sehinde at LSE in September 2017: “the Sehinde reinstatement detriment”

11.5. The Respondent's refusal on 27 November to hear an appeal lodged and/or grievance raised regarding Ms Sehinde’s reinstatement: “the Sehinde appeal detriment”

12. The Claimants also brought blacklisting claims.

13. The matter was considered at a Preliminary Hearing for Case Management before Employment Judge Pearl on 10 October 2018. The parties agreed that on the face of matters any liability had been transferred to the LSE as the cleaning contract on which the Claimant were employed had been taken back in house by the LSE in

circumstances that were accepted to be a transfer of an undertaking. Employment Judge Pearl added the LSE as a second Respondent to the claim. Although the Order referred to Ms E Williams as the lead claimant a specific order was not made under rule 36 of the Employment Tribunal Rules 2013 and the claims brought by the other Claimants were not stayed[1].

14. The blacklisting claim was dismissed on withdrawal by a Judgment sent to the parties on 30 October 2018.

15. After the Second Respondent responded to the claim the matter was fixed for a further Preliminary Hearing for Case Management. In the agenda for the Preliminary Hearing for Case Management the Second Respondent asked that the Claimants should set out how the five events they complained about had any relevance to section 146 TULR(C)A and what, if any, detriments (including financial) they suffered as a consequence of those events.

16. At the Preliminary Hearing for Case Management held before Employment Judge Grewal on 21 November 2017 it was agreed that the only complaints before the tribunal was those of being subject to section 146 TULR(C)A detriment.

17. The matter was fixed for a Preliminary Hearing to consider:

    17.1. whether the claims in respect of the Sehinde reinstatement detriment and the Sehinde appeal detriment should be struck out on the grounds that they have no reasonable prospect of success or made the subject of a deposit order on the grounds that they have little reasonable prospect of success

    17.2. whether the five alleged detriments are capable of amounting to a series of similar acts or failures to act

    17.3. depending on the answer to the above two questions, whether the tribunal has jurisdiction to consider the claims in respect of the first three alleged detriments, i.e. whether the Claimants have established that it was not reasonably practicable to present those claims in time

18. At this hearing the Claimant's Counsel stated that it was not being contended that is was not reasonably practicable to present the earlier claims in time. The Claimant relied on the contention that there were a series of similar acts, or failures to act.

[1] It was not suggested at this hearing that the claims against the other Claimants should be stayed or that it would be inappropriate to make deposit orders against them. Indeed, it might be considered unfair for Ms Williams to take the financial risk of proceeding with the claims in the face of a deposit order alone.

19. At the Preliminary Hearing for Case Management before Employment Judge Grewal the Claimants were ordered to provide a response to the question asked at box 2.3 of the Respondent's agenda on or before 14 December 2018. The further and better particulars were provided that day. The Claimants asked that the document also be treated as an application to amend. At this hearing the Respondents accepted that all of the material, save for paragraph 11 constituted further particulars of the claim. The first Respondent contended permission to add at paragraph 11 should be refused. At paragraph 11 it was pleaded:

> "The Claimants contend that where they have claimed detriment to deter them from or penalise them for industrial action which was not or was not to be at an appropriate time, TULRCA 1992 should be construed so as to protect them from such detriment, compatibly with Article 11 of the European Convention of Human Rights."

20. The First Respondent contended that this is a new legal argument that requires permission to amend and that it should not be permitted at this late

stage, particularly as it is contended that it could convert this into a test case on the question of whether industrial action should be treated as a trade union activity at an appropriate time, by construing section 146 TULR(C)A in accordance with article 11 of the European Convention on Human Rights.

The Law

21. In considering the application to amend I had regard to **Selkent Bus Co v Moore** [1996] ICR 836 at 843F. Mummery J as he then was, stated that whenever the discretion to grant an amendment is invoked, the Tribunal should take into account all the circumstances and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it. Mummery J noted a number of relevant factors; including, the nature of the amendment and the applicability of any time limits and the timing and manner of the application. Those are examples of factors that should be taken into account. Essentially, the approach in Selkent is at one with the overriding objective: the focus is on the balance of hardship in allowing or refusing the amendment, which is a key component of dealing with cases fairly and justly. This is also the approach set out in the Presidential Guidance.

22. Strike out is provided for by rule 37 of the Employment Tribunal Rules 2013:

> 37 Striking out
>
> (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;

23. Deposit orders are provided for by rule 39

> 39 Deposit orders
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> (1) Where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little 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.
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> (2) The Tribunal shall make reasonable enquiries into the paying party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit.
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> (3) The Tribunal's reasons for making the deposit order shall be provided with the order and the paying party must be notified about the potential consequences of the order.
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> (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. Where a response is struck out, the consequences shall be as if no response had been presented, as set out in rule 21.
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> (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—
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> (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
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> (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),
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> otherwise the deposit shall be refunded.

24. Applications of strike out should only be made in the clearest of cases. When seeking to strike out on the basis that the claim has no reasonable prospect of success Lady Smith emphasised in **Balls v Downham Market High School & College** [2011] IRLR 217 at para 6:

> ". . . the tribunal must first consider whether on a careful consideration of all the available material it can properly conclude that the claim has no reasonable prospect of success. I stress the word 'no' because it shows that the test is not, whether the Claimant's claim is likely to fail nor is the matter of asking whether it is possible that his claim will fail.

> Nor is it a test which can be satisfied by considering what is put forward by the Respondent either in the ET3 or in submissions and deciding whether their written or oral assertions regarding disputed matters are likely to be established as facts. It is, in short, a high test. There must be no reasonable prospects."

25. Although the threshold for strike out is high it does not mean that it is impermissible. If a claim does not have a realistic, as opposed to merely fanciful, prospect of success it should be struck out: **Ezsias v North Glamorgan NHS Trust** [2007] IRLR 603, CA at para. 26, per Maurice

26. A claim should not be permitted to proceed merely on the basis that "something might turn up" at trial: **Patel v Lloyds Pharmacy Ltd** [2013] UKEAT / 0418/12.

27. The scope for making a deposit order is wider. That is obvious on the wording of the rule and was emphasised by Elias P, as he then was, in **Van Rensburg v The Royal Borough of Kingston Upon Thames** [2007] UKEAT /0096/07, para. 27:

> "...the test of little prospect of success...is plainly not as rigorous as the test that the claim has no reasonable prospect of success... It follows that a tribunal has a greater leeway when considering whether or not to order a deposit. Needless to say, it must have a proper basis for doubting the likelihood of the party being able to establish the facts essential to the claim or response."

28. The effect of making a deposit order is two-fold. In order to pursue the claim, the Claimant must pay the deposit. That gives the Claimant cause to consider the merits of the claim. More importantly, the effect of making a deposit order is that the normal costs regime in the Tribunal is changed to something approaching costs following the event in respect of the argument or allegation to which the deposit order is applied. Failure in the argument or allegation for substantially the reason set out in the deposit order shall have the consequence that advancing it was unreasonable unless the contrary is shown: rule 39(5)(a). If advancing the argument is treated unreasonable the threshold for making an award of costs will have been passed. Where a Claimant continues with an argument or allegation that is subject of a deposit order the Claimant is at risk of costs that may greatly exceed the amount of the deposit. It is possible for a Claimant to show that advancing the argument was not unreasonable despite the making of the deposit order where, for example, it transpires that the running of an argument that appeared to have little reasonable prospect of success transpired on analysis of the evidence to have been much more arguable, even though it did not succeed.

29. Section 146 of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULR(C)A) renders certain types of trade union detriments unlawful:

> 146(1) A worker has the right not to be subjected to any detriment as an individual by any act, or any deliberate failure to act, by his

employer if the act or failure takes place for the sole or main purpose of—

(a) preventing or deterring him from being or seeking to become a member of an independent trade union, or penalising him for doing so,

(b) preventing or deterring him from taking part in the activities of an independent trade union at an appropriate time, or penalising him for doing so,

(ba) preventing or deterring him from making use of trade union services at an appropriate time, or penalising him for doing so, or

(c) compelling him to be or become a member of any trade union or of a particular trade union or of one of a number of particular trade unions.

(2) In subsection (1) “an appropriate time” means —

(a) a time outside the worker's working hours, or

(b) a time within his working hours at which, in accordance with arrangements agreed with or consent given by his employer, it is permissible for him to take part in the activities of a trade union or (as the case may be) make use of trade union services;

and for this purpose “working hours” , in relation to a worker, means any time when, in accordance with his contract of employment (or other contract personally to do work or perform services)] 9 , he is required to be at work.

(2A) In this section–

(a) “trade union services” means services made available to the worker by an independent trade union by virtue of his membership of the union, and

(b) references to a worker's “making use” of trade union services include his consenting to the raising of a matter on his behalf by an independent trade union of which he is a member.

(2B) If an independent trade union of which a worker is a member raises a matter on his behalf (with or without his consent), penalising the worker for that is to be treated as penalising him as mentioned in subsection (1)(ba).

(2C) A worker also has the right not to be subjected to any detriment as an individual by any act, or any deliberate failure to

> act, by his employer if the act or failure takes place because of the worker's failure to accept an offer made in contravention of section 145A or 145B.

30. Separate provisions make it unlawful to dismiss an employee for taking part in the activities of an independent trade union at an appropriate time. In the dismissal context it was held in **Drew v St Edmundsbury Borough Council** [1980] IRLR 459 that taking part in industrial action does not constitute taking part in trade union activities. This was principally because employees engaging in industrial action lose their right to claim unfair dismissal under separate provisions and so it would be inconsistent if the dismissal was at the same time automatically unfair because they were taking part in trade union activities. The further problem in respect of industrial action is that it is unlikely to be at an appropriate time. The situation is considered at paragraphs 697 to 700 of Harvey where the learned editor states:

> "There are no legislative provisions aimed directly at protecting a worker who has participated in industrial action from being subjected by his employer to a detriment short of dismissal as a punishment for taking part in industrial action. While workers are protected by TULR(C)A 1992 s 146 from detriments imposed for the purpose of punishing them for, or deterring them from, taking part in union activities, that protection only apply to activities undertaken at an 'appropriate time'. As explained in NI [519], most industrial action will take place when the employee was working or should have been working and thus falls outside 'appropriate time'.
>
> …
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> It is likely that the absence of protection from detriment is contrary to art 11 of the European Convention on Human Rights. In *Danilenkov v Russia (Application 67336/01) (30 July 2009, unreported), ECtHR* it was held that the state was required to ensure that the law protected strikers against treatment such as being given different and less attractive duties and less remunerative shifts. The issuing of disciplinary warnings to strikers employed in the public sector was held to be in breach of the Convention in *Karaçay v Turkey (Application 6616/03) (27 March 2007, unreported), ECtHR* and *Kaya v Turkey*
> *(Application 30946/04) (15 September 2009, unreported), ECtHR*."

31. Provision for a claim to the Employment Tribunal is made by section 146(5) TULR(C)A

> (5) A worker or former worker may present a complaint to an employment tribunal on the ground that he has been subjected to a detriment by his employer in contravention of this section.

32. Section 147 TULRCA provides :

(1) An employment tribunal shall not consider a complaint under section 146 unless it is presented—

(a) before the end of the period of three months beginning with the date of the act or failure to which the complaint relates or, where that act or failure is part of a series of similar acts or failures (or both) the last of them, or

(b) where the tribunal is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period, within such further period as it considers reasonable.

(2) For the purposes of subsection (1)—

(a) where an act extends over a period, the reference to the date of the act is a reference to the last day of that period;

(b) a failure to act shall be treated as done when it was decided on.

(3) For the purposes of subsection (2), in the absence of evidence establishing the contrary an employer shall be taken to decide on a failure to act—

(a) when he does an act inconsistent with doing the failed act, or

(b) if he has done no such inconsistent act, when the period expires within which he might reasonably have been expected to do the failed act if it was to be done.

(4) Section 292A (extension of time limits to facilitate conciliation before institution of proceedings) applies for the purposes of subsection (1)(a).

33. Section 148 of TULR(C)A 92 further provides:

148(1) On a complaint under section 146 it shall be for the employer to show what was the sole or main purpose for which he acted or failed to act

Preliminary View on Facts

34. In considering this matter I do not make any findings of fact, but set out my understanding of the documents placed before me in the agreed bundle and consider the Claimants' cases at their highest. Nothing set out in these reasons binds the Tribunal hearing any Final Hearing.

35. On 5 October 2016 a written complaint was made about the manner in which Mr Elia had represented a union member at a disciplinary hearing. It was alleged that he had been threatening and "out-of-control".

36. On 20 January 2017 another complaint was made about the way in which Mr Elia had represented a union member at an investigation meeting.

37. On the 15 February 2017 a violence at work incident report form was competed in which allegation were made about the way in which Mr Elia had represented a union member at a meeting on 21 February 2017.

38. On 21 February 2017 the first Respondent wrote to Mr Elia stating that they had received three complaints and that the individuals in question felt intimidated, bullied and harassed. It was stated that:

> "To date you have been permitted to attend meetings with UVW members who are employees of Noonan; however, in light of the above, and with immediate effect, we no longer permit you to attend Company procedural meetings with Noonan employees"

39. This is claimed as the Elia ban detriment.

40. On 13 April 2017 Mr Elia wrote challenging the ban and contending that it was unlawful;. The email was copied into staff of the Second Respondent who informed the First Respondent that their legal advice was that the ban would be likely to be found unreasonable.

41. On 24 April 2017the first Respondent wrote to Mr Elliott stating that they considered that they had acted reasonably but they went on to state:

> "We have however discussed this matter with LSE and have agreed that you may again be permitted to attend meetings (were appropriate and if requested by the employee) for an initial three month period; thereafter the circumstances will be reviewed and a further decision made regarding your continuing attendance at meetings. If during the three month period we receive any complaints, we reserve the right to review our position
>
> It is our expectation that meetings will be conducted in a constructive, respectful and reasonable manner and that due process will be allowed to prevail. If there are any concerns or issues raised that contravene our expectations we will again review the circumstances and decide on the appropriate course of action.

42. This is claimed as the Elia ban re-imposition detriment

43. On 27 April 2017 Mr Elia wrote an email suggesting that the threat of reimposition of the plan was itself unlawful.

44. Thereafter Mr Elia has been permitted to represent union members.

45. There is then a significant gap before the next alleged detriment.

46. On 13 July 2017 Ms Sehinde sent a text to her colleagues the following terms:

> *"As God liveth, whoever will participate in ur 3 days strike will never live to witness their children goodness IJMN [in Jesus Mighty Name] Amen. … Spread my message to your member. I only respect peple. I don't fear them. Thanks"*

47. This is claimed as the Sehinde threat detriment.

48. The Claimants issued a grievance on 14 July 2017. A grievance hearing was held on 18 July 2017. The Claimants were represented by Mr Elia. During the grievance hearing the Claimants contended that they felt that Ms Sehinde had made a threat to their lives. One of the Claimant said that his preferred outcome was for her to be dismissed. Two of the Claimants suggested she should be given a written warning. Two of the Claimants suggested she should be removal from site. One Claimant said that he would not like Ms Sehinde to lose her job, but was afraid to work with her. It was noted that Ms Sehinde had spoken to two of the Claimants and apologised for sending the text.

49. Ms Sehinde was suspended on 18 July 2017.

50. An investigation meeting with Ms Sehinde took place on 20 July 2017. Ms Sehinde stated that the text had not been meant as a death threat. She was a former member of the union. She stated that she had heard that the union was planning strike action on the day of the graduation ceremony. She felt this would spoil the students' day. She said that she was angry about this and did not think that the strike should go ahead. She stated that what she meant by her text was that she would wish that if they took strike action and ruined other people's children's graduation they deserved to see their children's graduation spoiled. When asked what the words "will never live" meant, Ms Sehinde stated:

> "I'm sorry that was not my intention, I just wanted them to think how they would feel if their children's graduation day was spoiled in the way they were planning to spoil the student's day here"

51. On 20 July 2017 Ms Sehinde provided a letter unreservedly apologising for the contents of her text message.

52. On 27 September 2017 a grievance outcome was sent to the Claimants. The grievance was upheld. The Claimants were informed that any appeal should be made within five days of receipt of the letter

53. On or about 9 October 2016 Ms Sehinde was reinstated. This is claimed as the Sehinde reinstatement detriment.

54. On 16 November 2017 Mr Elia sent a letter seeking to appeal against the grievance outcome. On 27 November 2017 the first Respondent wrote stating that the appeal had been lodged out of time and that the grievance had, in any event, been upheld. It was stated that there had been no request for information about basis upon which the grievance had been upheld. A copy of Ms Sehinde's apology was attached as it had been stated that it would be provided after the grievance.

55. The refusal to pursue an appeal is claimed as the Sehinde appeal detriment.

56. It appears that an advice and guidance session was held with Ms Sehinde on 15 December 2017 in which she was told not to send similar texts in the future.

Analysis

57. I first considered the application to amend. I do not consider that this involves the addition of a new cause of action. The claim remains one under section 146 TULR(C)ATULR(C)A. The Claimants seek to raises a point of interpretation. It is the argument set out in the paragraph of Harvey that I have quoted above. I consider it is highly questionable whether this is something that requires pleading. In High or County Court proceedings it could properly be dealt with by way of reply. I can see the point that the first Respondent should have some advance notification of the argument, but I do not consider there is any proper basis for preventing the Claimants seeking to put forward their argument as to the proper at construction of section 146 in compliance with article 11 of the European Convention on Human Rights. The point appears arguable and the Claimants, should they pursue this claim, should have the opportunity to argue it. I do not think the fact that this could lead to the matter becoming a test case is a proper basis for refusing the Claimants the opportunity to argue the claim as they wish. As there is no provision for a reply in the Employment Tribunal I permit the amendment, although as stated I have real doubts as to whether such an amendment is required. The Respondents are on notice that this is an argument that the Claimants will raise and will have a full and proper opportunity to meet it. The detriment to the Claimants of refusing the amendment would greatly outweigh that of allowing it.

58. Moving on to consider strike out or deposit order; at the heart the Claimants' contention is the contention that the first Respondent had an animus against their trade union and its general secretary, Mr Elia. It is argued that this general animus against the union and Mr Elia affected all their actions.

59. I consider I should assume that the Claimants will be able to establish that they took part in trade union activities, used trade union services and are trade union members. In other words that what I defined as the Union matters will be made out. While I appreciate that there is a significant argument as to whether taking part in industrial action can constitute trade union activity the section quoted from Harvey above, and the authorities referred to therein,

suggest the matter is arguable. In any event, the Claimants rely on a series of other Union matters.

60. In considering the Sehinde reinstatement detriment and the Sehinde appeal detriment I consider it is unlikely that the CLaimants will be able to establish that the decision to reinstate Ms Sehinde (i.e. not to dismiss or transfer her) and the decision to refuse a grievance appeal was done for and of the section 146 purposes. The Respondent were in a position where a complaint had been made against Ms Sehinde. They had to treat her fairly. She put forward a plausible explanation for her text and apologised for it. I consider it is unlikely that the Claimants will establish that reinstatement was done for any of the section 146 purpose. Even taking account of the reversal of the burden of proof the likelihood is that the Tribunal will conclude that the Respondent was seeking to deal fairly with a disciplinary matter and was not acting for any of the section 146 purposes. I do not consider the claim is so weak as to be fanciful, in that it is possible that the Claimants might establish that Ms Sehinde was treated less severely because of the animus that the first Respondent allegedly had against the union and Mr Elia. However, I consider that it is a claim that has little reasonable prospect of success. Similarly, I consider that there is little reasonable prospect of success in the Claimant's establishing that the decision not to permit an appeal against the grievance outcome was for any of the section 146 purposes. It is much more the that the tribunal will conclude that the Respondent decided not to take the matter any further having decided on appropriate action to deal with Ms Sehinde and because the grievance appeal was substantially out of time. Although, I consider the claim is not so fanciful that it should be struck out, I consider that it is a claim that has little reasonable prospect of success.

61. I consider that the Sehinde threat detriment claim is wholly fanciful even taking account of the reversal of the burden of proof. Ms Sehinde is a colleague of the Claimants. She is a former member of the union. She explained at the grievance hearing that she was motivated by the concern that students would have their graduation day ruined. I consider it is fanciful to suggest that she sent the text acting on behalf of the first Respondent or for any of the section 146 purposes.

62. In respect of the Elia ban detriment and the Elia ban re-imposition detriment, I consider there is little reasonable prospect of the Claimants establishing that these this were done for any of the section 146 purposes. I consider it is much more likely that it will be concluded that these actions were taken because of the complaints that had been made about the way Mr Elia had represented members in meetings. Furthermore, I consider it is unlikely that the Elia ban re-imposition detriment would be treated as continuing to the date of the TUPE transfer as suggested in the Claimants' Counsel's Skeleton Argument. It is pleaded is a detriment that lasted three months not as a continuing detriment. Even on that basis the complaint is out of time (having taken account of the ACAS early conciliation extension). The Elia ban detriment is on the face of it out of time. I consider it is unlikely that the Elia ban detriment and the Elia ban re-imposition detriment would be treated as forming a series of similar acts with the Sehinde reinstatement detriment and the Sehinde

appeal detriment. Different people are involved. There is no obvious connection between the decisions taken in respect of the way in which Mr Elia represented members and the way in which the text message sent by Ms Sehinde was dealt with. While I accept it is possible that the alleged detriments could be connected by an animus against the Union and Mr Elia at and that it might established (bearing in mind the reversal of the burden of proof) that the Elia ban detriment and the Elia ban re-imposition detriment were done for one or more of the section 146 purposes, so that the claims are not so fanciful as to warrant strike out, I consider it is unlikely that at the claims will be made out. I consider these claims have little reasonable prospect of success.

63. No evidence was put before me as to the Claimants' means. All but one of them is still working for the second Respondent. I have no evidence in respect of the Claimant who has left. The Claimants should have put some evidence before the tribunal. The second Respondent's solicitor stated that the Claimants currently work approximately 40 hours a week at £10.98 per hour, giving £410 per week gross and £21,320 gross per annum. I accept that they are relatively low paid employees working as cleaners. I take this into account and am prepared to assume their means are limited. However, there is no evidence put before me that suggests that they are incapable of paying any deposit. I conclude that each Claimant should be ordered to pay a deposit of £25 to pursue each or any of the allegations that I have concluded have little reasonable prospects of success. If they wish to pursue all allegations they will have to pay deposits totalling £100.

64. Potentially more significant than the payment of the deposit, is the risk of costs should the claims fail for substantially the reasons set out in this decision. That is a matter the Claimant should consider with some care before deciding whether to pay the deposits.

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EMPLOYMENT JUDGE TAYLER

30 January 2019

JUDGMENT & REASONS SENT TO THE PARTIES ON
30 January 2019