EMPLOYMENT TRIBUNALS

Claimant: Mr C Rodway and others

Respondent: GTR Limited

Heard at: **London South Croydon** **On:** **5 June 2019**

Before: **Employment Judge Sage (sitting alone)**

Representation
Claimant: Mr. Toms of Counsel
Respondent: Mr. Allen of Counsel

JUDGMENT having been sent to the parties on 5 July 2019 and written reasons having been requested by the Respondent in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013 by the Respondent, the following reasons are provided:

REASONS

1. The issues were agreed at the start hearing and it was confirmed that the issue in relation to whether there were ACAS EC certificates for all Claimants was no longer an issue. There was also no outstanding issue in relation to whether any claims should be withdrawn or should be dismissed. The remaining matters were agreed to be as follows:
    a. Time Limits;
    b. Strike out/deposit orders
    c. Proposed amendments;
    d. To consider a joinder of parties and
    e. To make any necessary orders and directions – those orders were made with the agreement of the parties and sent to the parties on the 11 June 2019.

2. This hearing has been listed for **2 hours**.

Statement

3. A statement was produced by Mr Rodway but his statement did not deal with the issues before this hearing. No questions were put to him in cross examination.

Findings of Fact

4. After the decision reached in Bear Scotland by the Supreme Court, the employees at the Respondent Company were owed backdated holiday pay. Agreement was reached with the recognised trade unions for payments of accrued unpaid holiday pay to be paid. The Tribunal were taken to a letter in the bundle at page 141 dated the 31 October 2016, written by Peter Evans Head of Employee Relations, confirming that the amounts due to be paid to the employees in respect of their holiday pay allowance would be paid in either the 11 November or 2 December 2016 pay run. The letter referred to a precondition which was as follows: "*as the dispute over conductors and DDO is ongoing and your members continue to breach their contracts by taking strike action, thereby causing significant loss to the business and disruption to our customers, we will (without prejudice to our rights) withhold payment of any backdated holiday pay from conductors. Any conductors who have either worked normally during the dispute, or confirmed that they will now work normally during the remainder of the dispute and will not participate in further industrial action, will receive payment…….failing that, GTR intends to make the appropriate payment to employees of this grade in the pay run on 30 December 2016, subject to the current dispute being concluded and no further strike dates being called"* (emphasis added).

5. The Respondent linked the continued participation in industrial action to their decision to withhold payment of the holiday pay. The decision to withhold holiday pay was not described in the above letter as a one off or final decision. The Respondent did not say in this letter that the Claimants would not be paid. The Claimants' entitlement to receive holiday pay that was due and owing to them was contingent upon them agreeing to work normally and not to take part in further industrial action, there was no such requirement imposed upon those who had not taken part in industrial action. Those that had taken part in industrial action and continued to do so, were required to sign a form undertaking to work normally "the undertaking" (and not to take part in strike action or action short of a strike) before their holiday pay allowance would be paid.

6. In response to this letter, Mr Cash of the RMT indicated that the decision to withhold holiday pay was in breach of the collectively bargained agreement (which made no reference to withholding holiday pay) and was a breach of the Trade Union Labour Relations (Consolidation) Act 1992 and a breach of Article 11 of the EHCR.

7. The Tribunal saw in the bundle at pages 148-9 lists of those who had signed the undertakings. The Respondent had compiled lists of those who were entitled to receive their holiday pay allowance and those who were not entitled because of the reasons stated above. Having compared the

list with the list of Claimants in this case, it was noted that there was a question mark beside the name of Mr Duke on page 148 indicating that he had not submitted what was described as a holiday form and he was listed as one of the Claimants. It was also noted that the dates recorded for when the signed undertakings had been submitted were from November 2017 onwards.

8. The Claimants presented their claims on behalf of 58 employees on the 14 November 2017. At that time, the lead Claimant Mr Rodwell was in person and not represented or assisted by his trade union. The claims referred to being involved in a legal trade dispute with the Respondent and to taking strike action. It was stated that those involved in the strike action had been "*subjected to many forms of harassment and bullying by the Respondent because they have supported the strike action*..". The ET1 went on to state that "*this has included the withholding of the payment agreed under the bargaining machinery in relation to this claim*". The collectively bargained agreement dated the 17 October 2016 set out the terms of the agreement that employees should receive their backdated holiday pay allowance which would be payable in November 2016 (page 136-8). The Claimants stated that the Respondent's continued failure to pay this allowance was a breach of Article 11 of the ECHR and reference was also made to the Employment Rights Act. Those were the facts of the case included on the ET1. The Claimants had ticked the box indicating they were claiming discrimination because of religion and belief but no facts were cited in box 8.2 of the claim form to support this head of claim.

9. The ET3 was presented and the Respondent stated that the claim was out of time and should be struck out.

10. There was a preliminary hearing before Employment Judge Harper on the 6 March 2018, Mr Rodway appeared in person on behalf of all Claimants. At that hearing it was identified that the claim did not appear to be a claim for discrimination because of religion and belief. Mr Rodway indicated that the RMT legal department would be taking over representation of the Claimants cases, but the union was not on the record at that time. The matter was listed for a preliminary hearing for 1 day to consider the issues identified above at paragraph 1.

11. A judgment was issued by Employment Judge Ford QC dismissing the claims for discrimination on the grounds of religion and belief on the 16 March 2018. Employment Judge Ford QC also wrote to the parties on the 16 March 2018 asking for the Claimants to clarify the legal basis for their claims by the 6 April 2018. The union responded on the 6 April saying they were unable to meet that time limit asking for time to be extended to the 20 April. In that same letter, Thompsons Solicitors asked to be put on the record. The amended grounds of complaint were presented to the Tribunal with a copy to the Respondent on the 16 April 2018 confirming that the claims were presented pursuant to Employment Relations Act 1999 (Blacklist) Regulations 1999 ("the Blacklisting Regulations"). This response appeared to comply with Employment Judge Ford QC's order made on the 16 March 2018.

12. The case was then transferred to the London South Region (from Bristol) and the hearing was listed for 2 hours. The issues to be dealt with at this hearing remained as listed above at paragraph 1.

13. The Claimants did not receive their holiday pay until 30 January 2019 over 2 years after those who had not taken part in industrial action had been paid (or who had signed the undertakings). At the date payment was made to the Claimants the dispute was still ongoing.

Submissions by the Claimant:
(a) The Proposed amendments

14. The Claimants' produced written and oral submissions which were summarised as follows:

15. The application to amend was described as seeking to replace the legal label used by Mr Rodway from Religion and Belief to a claim under the Blacklisting Regulations. The Claimant referred to the guidelines in Selkent Bus Co Limited (1996) ICR 836 which highlighted that matters that a Tribunal must consider when considering whether to allow the amendment (paragraph 5(a) of the written submissions). The relevant type of amendment in this application is to substitute a legal label for the facts already pleaded. The Tribunal was also reminded that if a new cause of action is proposed as an amendment, the Tribunal must consider whether the complaint is out of time and if it is out of time, then whether time should be extended under the applicable provisions. The Tribunal must also consider the timing and the manner of the application. It was submitted by the Claimant that the amendment did not involve any significant change to the factual basis of the claim and the amendment only involved the substitute of a different legal label.

16. In respect of the timing of the application, this was made at a time when the case was at an early stage, before any orders and directions had been made and before the matter had been listed for a hearing.

17. The Claimants' claims did not get struck out at the preliminary hearing before Employment Judge Harper on the 6 March 2018; at that hearing orders and directions were made. Employment Judge Ford QC wrote to the Claimants on the 16 March 2018 requesting that "….it would be helpful if the bases of the claims were clarified". That letter was superseded by the letter dated the 16 April 2018 (page 25) which is the amended grounds of claim. The Claimants responded to this request clarifying the claims.

18. The claims relate to non-payment of holiday pay. The position has not changed, and it is not a new factual claim, it is relabelling of the claim as invited by the Tribunal by the ET. The Claimants' submit that all the claims are in time.

19. The factual scenario is that all Claimants were placed under pressure and their holiday pay was withheld to coerce them to stop them taking part in the strike, when the claims was presented on the 14 November 2017, they had not been paid.

(b)Time Limits

20. The Claimant submits that these claims are in time. They state that the alleged detriment is that the Respondent introduced a requirement that to qualify for agreed back holiday pay they had to either have not taken part in industrial action or agreed not to take part in the future.

21. The relevant time limits are at **Regulation 10(1)-(3) Blacklisting** Regulations. The Claimants case is that this was an act extending over a period, it was not a one off act. It was a positive act that the Claimants were to "cease taking part in industrial action…." The Respondent was using non-payment of holiday pay as a means of exerting ongoing pressure on trade union members to persuade them to cease support for the ongoing industrial action. The Claimant stated that this was not a one-off act, the Respondent did not refuse to pay the money at all. If the employee complied with the request, they would receive the payment. The detriment was described as both the non-payment of money coupled with the on-going pressure to comply with the requirement. The Claimant stated that the claims were in time as the bullying and harassment were either ongoing or had only ceased in January 2019 when the payments were made but the dispute was and is ongoing.

(c)Little or no reasonable prospect of success.

22. The Claimant said that the test of little prospect of success is that it is at least arguable, and this area of law has very little case law and they state that the claims in this case are reasonable claims and they have good prospects of success. In the written submissions the Claimants referred to Regulation 3(1) and (2) referring to a general prohibition on the use of blacklists. The word 'list' is not defined but the Claimants contend that there is a list and the word should be given a wide meaning in that it requires more than one name, it is a sufficient that a variety of individuals are connected by a common thread in a list. The form of the list does not matter. Reference was made to the BIS Guidance on Blacklisting (page 6) on the definition of list and trade union activity. The Claimant referred to the existence of a list on page 148 of those who had taken part in industrial action and who had not complied with the requirements put in place by the Respondent and therefore would not be paid their holiday pay. The Claimant states that this is a prohibited purpose. It was stated that the list must be compiled for the purposes of discrimination and it was stated that this was discrimination because the Claimants were taking part in strike action (the case of *Britool Ltd v Roberts (1993) IRLR 481)*. The Claimant stated that clearly the list was used against the Claimants to discriminate against them on the grounds of Trade Union activities.

23. For the purposes of strike out it was submitted that the Claimants have claims that are at least arguable. They also stated that there was a lacuna in the law in respect of Section 146(1)(b) of the Trade Union and Labour Relations (Consolidation) Act 1992 in respect of the meaning of activities of an independent trade union at the appropriate time (see paragraphs 27-29 written submissions). It was stated that as the law stands, employees are not covered by the protection offered by this section if at the time they are taking part in industrial action. The Claimants state that this is a breach of Article 11 of the European Convention on Human Rights (freedom of association). It was stated that the European Court on Human

Rights was for years ambivalent about whether this article covered collective rights including the right to strike.

24. However the law has changed and reference was made to two cases *Demir v Turkey (2009) IRLR; Enerji Yapi-Yol Sen v Turkey (2009) Application No 68959/01.* The Court of Appeal has declared that the right to strike is an essential freedom of association under Article 11 *National Union of Rail, Maritime & Transport Workers v Serco Ltd (2011) IRLR 399.* It was also stated that penalties imposed on those taking industrial action amounted to a violation of Article 11 and this is what happened in this case (see the cases of *Danilenkov and others v Russia (2009) Application No 67336/01; Karacay v Turkey (2007) application No 6616/03; Kaya v Turkey (2009) Application No 30946/04).* This case found that victimisation of trade unionist 'is one of the most serious violations of freedom of association'.

25. The UK law does not provide protection from detriment to those who take part in industrial action could well result in the UK finding that they are in breach of Article 11. The Claimants referred to the case of *Wilson v UK (2002) IRLR 568* drawing a parallel between the issues identified in that particular case to the one before the Tribunal. In that case it stated that "by permitting employers to use financial incentives to induce employee to surrender important union rights, the Respondent State has failed in its positive obligation to secure the enjoyment of rights under Article 11 of the Convention".

26. The Claimant submitted that a wide interpretation of the Blacklisting Regulations may help to ensure that the UK law is compliant with the rights and obligations under the ECHR, providing a rememdy for trade union members who are discriminated for taking part in trade union activities. The Tribunal was reminded that UK law has to be interpreted so as to be compliant with our obligations under the ECHR.

The Respondent's submissions

27. This claim arises out of the Bear Scotland holiday pay litigation. In relation to the amendment of the claims, the Claimants have given no reason for the nature or timing of the amendment. There has been no explanation of what claims are now pursued, given that the holiday pay allowance has now been paid. There is also no explanation of why additional Claimants should now be added two years after the alleged detrimental act.

28. The Respondent stated that the claims were originally lodged citing a claim for discrimination on the grounds of religion and belief. Those discrimination claims were withdrawn by an email dated the 7 March 2018 (pages 144-6) and dismissed by a judgement dated the 16 March 2018 (page 46). The Claimant were then asked to clarify their claims by the 6 April 2018, this was not done by that date but on the 16 April 2018, they submitted an amended grounds of complaint (pages 25-6) claiming under the Blacklisting Regulations under Regulation 9 and a reference to Article 11 of the ECHR. No application to amend has been made and no reason given for the timing or nature of the application.

29. The Respondent paid the holiday pay on the 30 January 2019. On the 2 May 2019 a new claim was presented by Aron Ajayi (and possibly others but not yet processed or sent to the Respondent) also claiming under Article 9 of the Blacklisting Regulations. The detriment is not evident as the monies were paid by that date.

30. In respect of time limits the Respondent states that the Claimants claim that they should have been paid in November 2016, the claims are therefore out of time. No good reason has been given as to why it is just and equitable to deal with the claims out of time. Time limits are relevant but not determinative of the issue. This claim was even more out of time when the amendment was presented and there has been no explanation as to why it was presented out of time. This was the Claimant's third claim before the ET. He does not explain why he did not use the services of the trade union.

31. In relation to the strike out and deposit the Respondent stated that the claims are poorly pleaded, the existing claims did not make sense and Claimant's Counsel and solicitors had not made clear what the cause of action is. The Claimant's submissions at paragraphs 14 and 21 refers to claims that are "at least arguable"; there is unusual reticence.

32. The claims have not been actively pursued. Whatever the merits of the claims, the monies have now been paid and there is no remedy. The Respondent stated that the Claimants claims had no reasonable prospect of success. The Respondent pointed to the most obvious issue was that nowhere is there said to be a Blacklist however it was accepted that they only needed something under Regulation 3(2), but the Claimant must identify what that might be.

33. In relation to the proposed amendment, the Respondent had never seen a proper amendment application, the Respondent does not understand the basis for the proposed amendment. The Respondent contends that this is not a mere relabelling of the claim, it is an entirely new claim. The Tribunal must also consider the timing and the manner of the application, there is no explanation of why he waited until April 2018. He was always a member of the union, when did he get solicitors? This is not in his statement and not in Mr Toms submission. I say there is no reason why it was put in late.

34. I have to accept that there was some detriment in November 2016 about non-payment of the holiday pay supplement. This is not a continuing act but a one-off act with continuing consequences. The Respondent says the act was done in 2016 therefore to bring a claim is 2017 is out of time. In relation to detriment the Respondent added in oral submissions that under Regulation 9 a detriment must be made out and it is accepted that for the purposes of this hearing something bad did happen.

35. The tribunal was referred to the Presidential Guidance based on the Selkent guidelines. These are substantial amendments. There is no hardship to the Claimants if the amendment is refused because they have now been paid. There is substantial hardship for the Respondent as they must deal with multiple claims in relation to matters that have now been

satisfied. The original claims were out of time and the amendment was even more out of time. The Claimants have not explained why their amendment application was made at the time and in the manner it was. In oral submissions the Respondent stated that the balance of hardship fell on the Respondent.

36. In the Respondent's oral submissions, he added that if there was a lacuna in the law (responding to paragraphs 26-30 of the Claimant's submissions), you cannot fill it by using a piece of legislation for the purposes of which it does not apply. This legislation cannot be used to allow an application for a payment for something due in December 2016. The Respondent stated that the case could not be shoe horned into the Blacklisting Regulations and stated that not all of those in the case took part in industrial action. The Respondent stated that the list had to be compiled for prohibited purposes (which was "with a view to being used by employers…..for the purposes of discrimination"). The Respondent did not know it was related to a prohibited purpose. The Respondent stated that the sums involved were small and had all been paid.

37. In relation to the application to add further Claimants, the Respondent has not seen a proper application to join and does not understand the basis on which they can bring claims which are now years out of time to seek a payment that has already been made. The Tribunal was again referred to the Presidential Guidance.

The Claimant's response

38. The Claimant clarified that the amended claim was put in after being invited to do so, he was complying with a request from the Judge. An application to amend had not been made and it is being made in this hearing. The Claimant stated that the claims are in time and the nub of the claim is in the ET1, the Claimant was asked to provide the correct statutory basis.

39. In relation to time limits under the Blacklisting Regulations it refers to an Act extending over a period, it is not a failure to act, it is a positive act as the Claimants were instructed to cease taking part in industrial action, it was not a one-off act. The tribunal was referred to the letter on page 141 of the bundle where the Claimants were told that they were not going to be paid until they agreed not to take part in further strike action, they contend therefore it was not a one off, pressure was being applied to deter them from taking action. Although the payments were made in January 2019, the dispute is ongoing.

40. The detriment was described as bullying and harassment and was an ongoing detriment.

41. The Claimant stated that no statement was required in this case as the facts were not in dispute, it is a submission point. The Claimant's point is that all claims were in time and all put in within 3 months.

42. On the issue of whether the case has little prospect of success, the test is that the case is at least arguable. There are no decided cases in this area of what will fall foul of these regulations. Even though there are no cases

in this area does not mean that these are not good claims. The definition of a list is in Regulation 3(2), it should be given a wide meaning. It can be a set of items and the form does not matter. The BIS Guidance at page 6 says that a list can amount to two or more people compiled for a common purpose. We say, it is those who took part in industrial action who would not be paid. Even if the list was haphazard it could still amount to a list. The lists are found on pages 148-9. The Respondent was keeping a list of those who had not complied with the Respondent's instructions and they were using this as a means of recording those for prohibited purposes. The law states that the list must be compiled for the purposes of discrimination and the Claimant states that this is discrimination because they were taking part in trade union activities (see paragraph 25 of the written submission). Taking part in strike action is taking part in trade union activities. Clearly a list has been used to discriminate against trade union members.

43. For the purposes of a strike out, we have a case that is at least arguable. There is a lacuna in the law (as referred to in the submissions referred to above at paragraphs 23-5). The problem is that to be protected you must take part in trade union activities at the appropriate time. The appropriate time is defined as either outside working hours or within the workers working hours where the activity is consented or agreed by the employer (section 146(2) of the Trade union and Labour Relations (Consolidation) Act 1992). Strike action does not take place at an appropriate time therefore the protection of this legislation does not extend to those who take part in strike action. The Claimants contend that this is a breach of Article 11 ECHR and it is an essential part of the freedom of association. The crux of the case is that RMT have imposed a penalty on those taking part in industrial action (reference was made to the Wilson case – see above). The Claimant stated that these were good arguments and could fill the lacuna in the law. The Claimant stated that this was a good claim and should not be struck out.

The Law

EMPLOYMENT RELATIONS ACT 1999

Section 3(5) In this section—

> "list" includes any index or other set of items whether recorded electronically or by any other means, and
> "worker" has the meaning given by section 13.

EMPLOYMENT RELATIONS ACT 1999 (BLACKLISTS) REGULATIONS 2010

3 General prohibition

(1) Subject to regulation 4, no person shall compile, use, sell or supply a prohibited list.

(2) A "'prohibited list'" is a list which—

(a) contains details of persons who are or have been members of trade unions or persons who are taking part or have taken part in the activities of trade unions, and

(b) is compiled with a view to being used by employers or employment agencies for the purposes of discrimination in relation to recruitment or in relation to the treatment of workers.

(3) "'Discrimination'" means treating a person less favourably than another on grounds of trade union membership or trade union activities.

9 Detriment

(1) A person (P) has a right of complaint to an employment tribunal against P's employer (D) if D, by any act or any deliberate failure to act, subjects P to a detriment for a reason which relates to a prohibited list, and either—

(a) D contravenes regulation 3 in relation to that list, or

(b) D—

(i) relies on information supplied by a person who contravenes that regulation in relation to that list, and

(ii) knows or ought reasonably to know that information relied on is supplied in contravention of that regulation.

(2) If there are facts from which the tribunal could conclude, in the absence of any other explanation, that D contravened regulation 3 or relied on information supplied in contravention of that regulation, the tribunal must find that such a contravention or reliance on information occurred unless D shows that it did not.

(3) This regulation does not apply where the detriment in question amounts to the dismissal of an employee within the meaning in Part 10 of the Employment Rights Act 1996.

10 Time limit for proceedings under regulation 9

(1) Subject to paragraph (2), an employment tribunal shall not consider a complaint under regulation 9 unless it is presented 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.

[(1A) Regulation 18 (extension of time limits to facilitate conciliation before institution of proceedings) applies for the purposes of paragraph (1).]

(2) An employment tribunal may consider a complaint under regulation 9 that is otherwise out of time if, in all the circumstances of the case, it considers that it is just and equitable to do so.

(3) For the purposes of paragraph (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 the period;
(b) a failure to act shall be treated as done when it was decided on.

Employment Tribunal (Constitution and Rules of Procedure) Regulations 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;

(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).

39 Deposit orders

(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.

Extract from the BIS document "The Blacklisting of Trade Unionists. BIS Guidance on Blacklisting"

Page 6 What is a list?

"As a general rule, a list would have to contain details of two or more people. This implies that one-person records would not constitute a list, as long as each one was genuinely unconnected to other records. However, where a one-person record is related to other records because, for example, they have been complied for a common purpose, the records are linked and would together qualify as a list.

Information on a list need not be held all in one location. Data can be held in many different locations and on different machines using a variety of

software. A data base which is dispersed on a functional or geographical basis could still constitute a list, for example, if they were all linked to single file system or search engine. Haphazard or unstructured collections of information could also qualify as a list if it could be shown that they were connected in some way and were used for the same purpose. For example it is possible that information contained in blogs or forums on social networking sites could qualify as a list, where, say it was organised systematically or linked by search engine, though much would depend on the facts of each circumstance"

Page 6 "What are trade union activities?"

"….Participating in official industrial action would also probably be categorised as a trade union activity. This means a list of strikers which was drawn up in order to discriminate against them in employment could constitute a blacklist. In contrast, involvement in unofficial industrial action – such as strike action which is not endorsed, organised or authorised by the trade union – would not qualify as a trade union activity".

Decision

44. Firstly, dealing with the issue of the amendment, I have first considered that at the time the ET1 was presented the Claimants were in person. When the claim was first presented, the box for religion and belief was ticked, however this was entirely inconsistent with the facts that appeared in box 8.2 of the ET1. The focus of the claim was that they had been subjected to harassment and bullying because they had supported strike action and the detriments suffered "*included withholding of payments*" of holiday pay. This was the consistent with the letter before action that has been referred to above in the findings of fact above at paragraph 6. The Claimants referred to the Employment Rights Act and Article 11 of the ECHR relating to freedom of association in relation to the exercise of union rights.

45. The Respondent stated that the amendment sought by the Claimant changes the nature of the claim from a claim for discrimination because of religion and belief to a claim under the Blacklisting Regulations, this was described as an entirely new claim and the Respondent states that it should be rejected. The tribunal noted that the factual basis of the claim has not changed, it remains precisely as set down in the claim form, no additional facts were added, and the scope of the claim was not widened. The effect of the amendment gives clarification of the correct legislative provisions that apply to the facts of the case.

46. Although there may be times when citing a different area of law can result in a change in the nature of the claim, it does not appear to be the case in relation to this amendment application. This is a mere relabelling of the claim. The proper legal basis of the claim was clarified on the 16 April 2018 when the amended claim form was served after being requested by Employment Judge Ford QC to provide this clarification, this was provided after the Claimants' had secured legal representation. The Tribunal considered that the Claimants were able to provide a proper clarification of the legal basis of their claim when ordered to do so and at a time when the

case was at an early stage, before any case preparation had taken place and before witness evidence had been taken. This was the reason why the amendment was presented in April 2018 because it was ordered by the Tribunal and it was provided within a reasonable time of the request being made.

47. It was confirmed in the Claimant's submissions that the application for amendment was pursued in this hearing because it was identified in the preliminary hearing on the 6 March 2018 as one of the issues to be discussed. There can be no criticism of the Claimant for complying with orders of the Tribunal. There appeared to be no detriment caused to the Respondent by any delay in pursuing the application to amend and no evidence that the Respondent was prejudiced by the delay in considering this application or by granting the application. The Claimant application to amend is granted.

48. In relation to whether the claim was served in time, it has been submitted by the Respondent that this was a one-off act done by the Respondent in November 2016, the ET1 was served in November 2017. The Respondent stated that the act complained of was a one-off act with continuing consequences therefore the claim was considerably out of time and should be dismissed. The Claimant stated that the claim was presented in time.

49. In the findings of fact made by the Tribunal above in paragraph 4 about the letter on page 141, it was concluded that the Respondent had not made a one-off decision; they indicated that they would withhold payment of any backdated pay while the employees "*continue to breach their contract and take strike action*…" (emphasis added). This was a decision that was revisited monthly as the lists showed the Respondent would have needed to take details of those who had subsequently signed the undertaking and then release monies when appropriate. The Respondent decided on the 31 October 2016 to pay those who they concluded were entitled to receive their holiday pay by the due date. To withhold the holiday pay allowance, the Respondent had compiled a list of those who had taken part industrial action or who had not signed the undertakings (seen in the bundle at page 148-9). This decision would then have to be reviewed monthly to release funds to those who had subsequently signed the undertaking after November 2016. Those who continued to refuse to sign the undertaking would continue to have their holiday pay withheld and this remained the case for the Claimants until January 2019.

50. The Claimants contend that ongoing pressure was applied to them to sign the undertaking and this was an ongoing detriment as was the continued withholding of the holiday pay owed. As to whether there was an ongoing campaign of bullying and harassment this will be a matter of evidence however the act of withholding a payment of holiday for a period of 2 years appears to be a detriment. The facts before the Tribunal are consistent with this being a continuing act, it was not a one off refusal but remained a course of conduct that was revisited on a monthly basis as the list at page 148 showed that the undertakings had been submitted up to the 6 April 2018. As this was a continuing act the claim presented on the 17 November 2017 was in time, as at that date the Respondent had decided

during each pay run from October 2016 to November 2017 to withhold payment of the holiday pay allowance from the Claimants. The claims are in time therefore the Respondents application for the claims to be dismissed is refused.

51. Turning to the issue of strike out, having considered the very detailed submissions of both parties referred to above, it is concluded that the claims should not be struck out. It is accepted that this case involves an entirely new area of law in relation to blacklists and there is little case law on the matter. Although the Respondent has submitted that this is essentially about a single payment of a holiday pay supplement (which has now been paid) which cannot be 'shoe horned' into the Blacklisting Regulations, this appears to be an oversimplification of the facts and issues in the case as referred to above.

52. This case involves the consideration of what amounts to a list under the Blacklisting Regulations (and also considering whether the definition under the Employment Relations Act 1999 provides some assistance). It will then have to be considered if the list was compiled with a view to it being used "for the purposes of discrimination". The Tribunal will also have to consider whether it is arguable that the document that appeared at pages 148-9 was a list of employees who are or who have taken part in the activities of a trade union under regulation 3(2) and whether Respondent retained such a list for a 'prohibited purpose'. The activities of trade union are referred to in the BIS Guidelines and are stated to include participating in official industrial action. These issues are fact based and have not yet been tested by a Tribunal. It is not simply about the payment of a sum that has since been paid; the detriment also relates to the alleged pressure that was applied by the Respondent during the period from October 2016 to November 2017 and whether that pressure amounted to a detriment for a reason related to a prohibited list.

53. It is arguable that the Respondent was aware of those who took industrial action and who, because of taking that action, would not receive the holiday pay due to them. It was also reasonably clear from the little evidence before the Tribunal in this preliminary hearing, that the Respondent was working from a list to determine who should receive payment of holiday pay and who should not. The issues in this case are complex and relate to a new area of law, it is not something that should be determined at a preliminary hearing without considering all the evidence.

54. This is a highly fact sensitive enquiry involving a new and untested area of law and may possibly address what is described by the Claimant as a lacuna in the law. As this is an arguable case it cannot be said to have no reasonable prospect of success. The Respondent's application for a strike out is refused. Also having considered that the case is arguable on the facts, it was confirmed that it was considered to have more than little chance of success, so it was not appropriate to make a deposit order.

55. I conclude that this is an arguable case which should proceed to a full hearing.

56. On the issue of joinder of parties, the files of those who had subsequently issued claims were not before the Tribunal. This matter could not be dealt with at this hearing but could be dealt with at a future hearing.

Employment Judge **Sage**

Date: 22 July 2019