EMPLOYMENT TRIBUNALS

Claimants		**Respondent**
Mr M Harding	**v**	National Union for Rail, Maritime and
Ms N Robertson		Transport Workers ("RMT")
Mr P Woods		
Mr P Mihaj		

PRELIMINARY HEARING

Heard at: **London Central** **On: 14 November 2022**

Before: **Employment Judge Baty**

Appearances
For the Claimant: All four claimants in person
For the Respondent: Mr S Brittenden (counsel)

JUDGMENT

The claimants' claims are all struck out as they have no reasonable prospect of success.

REASONS

Background

1. By a claim form presented to the employment tribunal on 1 July 2022, the claimants each brought a complaint of a breach by the respondent of section 174 of the Trade Union and Labour Relations (Consolidation) Act 1992 ("TULCRA"), which is headed *"174 Right not to be excluded or expelled from union"*. The text of the claim is identical for each of the claimants. The respondent defended the complaints.

2. It is agreed that all the claimants were members of the respondent and were all expelled, with effect from 8 April 2022.

3. There were originally five claimants. However, one of the claimants, Ms Carol Foster, withdrew her claim and it was dismissed on 29 September 2022. The other four claimants continued to pursue their claims.

Issues for today's hearing

4. There was a preliminary hearing for case management purposes on 4 October 2022 before Employment Judge Hodgson. All four claimants, and Mr Brittenden, attended that hearing. At that hearing, EJ Hodgson listed the present preliminary hearing in public to consider the following:

> 1. to consider any application to amend
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> 2. at the tribunal's discretion, to consider if all or any of the claims should be struck out pursuant to rule 37(1)(a) Employment Tribunal Rules of Procedure 2013 on the ground that any claim or part has no reasonable prospect of success;
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> 3. to consider pursuant to rule 39 Employment Tribunal Rules of Procedure 2013, if any allegation or argument has little reasonable prospect of success and if so, whether there should be a deposit of as a condition of the claimant continuing to advance any allegation or argument. The claimant's ability to pay will be considered. The claimants should be prepared to give evidence with supporting documentation if needed.

5. Each of the claimants then submitted applications to amend their claim, albeit in different formats: Ms Robertson on 19 October 2022; Mr Woods on 19 October 2022; Mr Harding on 29 October 2022; and Mr Mihaj on 2 November 2022. The different applications to amend vary in length and in content although there are a lot of elements of overlap.

6. All four claimants and Mr Brittenden attended this hearing at London Central in person. The tribunal had originally provided a video link in case any of the parties wished to attend remotely with the hearing being carried out in a hybrid basis; however, as all of them attended, the hearing was fully in person and the video link was not therefore used.

7. In advance of the hearing, the respondent had in accordance with the orders from the preliminary hearing provided a bundle (numbered pages 1-280). In addition, Mr Brittenden also provided a skeleton argument. Whilst this had been sent to the tribunal in advance in accordance with the orders from the preliminary hearing, it had not made its way to me before the start of the hearing. I therefore decided to have a short break at the start of the hearing to read that skeleton.

8. I asked Mr Brittenden whether the respondent opposed the applications to amend the claims and he confirmed that the respondent did oppose those applications. It was, therefore, agreed that I would first consider the applications to amend and then, regardless of whether those applications were allowed or not, I would go on to consider the respondent's applications in relation to prospects (strikeout/deposit).

Relevant law

9. The following aspects of law are relevant to the claim and the determination of the various applications.

Section 174 TULCRA

10. Section 174 TULCRA (right not to be excluded or expelled from union) provides as follows:

174.— Right not to be excluded or expelled from union.

(1) An individual shall not be excluded or expelled from a trade union unless the exclusion or expulsion is permitted by this section.

(2) The exclusion or expulsion of an individual from a trade union is permitted by this section if (and only if)—
(a) he does not satisfy, or no longer satisfies, an enforceable membership requirement contained in the rules of the union,
(b) he does not qualify, or no longer qualifies, for membership of the union by reason of the union operating only in a particular part or particular parts of Great Britain,
(c) in the case of a union whose purpose is the regulation of relations between its members and one particular employer or a number of particular employers who are associated, he is not, or is no longer, employed by that employer or one of those employers, or
(d) the exclusion or expulsion is entirely attributable to conduct of his (other than excluded conduct) and the conduct to which it is wholly or mainly attributable is not protected conduct .

(3) A requirement in relation to membership of a union is *"enforceable"* for the purposes of subsection (2)(a) if it restricts membership solely by reference to one or more of the following criteria—
(a) employment in a specified trade, industry or profession,
(b) occupational description (including grade, level or category of appointment), and
(c) possession of specified trade, industrial or professional qualifications or work experience.

(4) For the purposes of subsection (2)(d) *"excluded conduct"* , in relation to an individual, means–
(a) conduct which consists in his being or ceasing to be, or having been or ceased to be, a member of another trade union,
(b) conduct which consists in his being or ceasing to be, or having been or ceased to be, employed by a particular employer or at a particular place, or
(c) conduct to which section 65 (conduct for which an individual may not be disciplined by a union) applies or would apply if the references in that section to

the trade union which is relevant for the purposes of that section were references to any trade union.

(4A) For the purposes of subsection (2)(d) “protected conduct” is conduct which consists in the individual's being or ceasing to be, or having been or ceased to be, a member of a political party.

(4B) Conduct which consists of activities undertaken by an individual as a member of a political party is not conduct falling within subsection (4A).

(4C) Conduct which consists in an individual's being or having been a member of a political party is not conduct falling within subsection (4A) if membership of that political party is contrary to—
(a) a rule of the trade union, or
(b) an objective of the trade union.

(4D) For the purposes of subsection (4C)(b) in the case of conduct consisting in an individual's being a member of a political party, an objective is to be disregarded—
(a) in relation to an exclusion, if it is not reasonably practicable for the objective to be ascertained by a person working in the same trade, industry or profession as the individual;
(b) in relation to an expulsion, if it is not reasonably practicable for the objective to be ascertained by a member of the union.

(4E) For the purposes of subsection (4C)(b) in the case of conduct consisting in an individual's having been a member of a political party, an objective is to be disregarded—
(a) in relation to an exclusion, if at the time of the conduct it was not reasonably practicable for the objective to be ascertained by a person working in the same trade, industry or profession as the individual;
(b) in relation to an expulsion, if at the time of the conduct it was not reasonably practicable for the objective to be ascertained by a member of the union.

(4F) Where the exclusion or expulsion of an individual from a trade union is wholly or mainly attributable to conduct which consists of an individual's being or having been a member of a political party but which by virtue of subsection (4C) is not conduct falling within subsection (4A), the exclusion or expulsion is not permitted by virtue of subsection (2)(d) if any one or more of the conditions in subsection (4G) apply.

(4G) Those conditions are—

(a) the decision to exclude or expel is taken otherwise than in accordance with the union's rules;
(b) the decision to exclude or expel is taken unfairly;
(c) the individual would lose his livelihood or suffer other exceptional hardship by reason of not being, or ceasing to be, a member of the union.

(4H) For the purposes of subsection (4G)(b) a decision to exclude or expel an individual is taken unfairly if (and only if)—
(a) before the decision is taken the individual is not given—
(i) notice of the proposal to exclude or expel him and the reasons for that proposal, and
(ii) a fair opportunity to make representations in respect of that proposal, or
(b) representations made by the individual in respect of that proposal are not considered fairly.

(5) An individual who claims that he has been excluded or expelled from a trade union in contravention of this section may present a complaint to an [employment tribunal].

11. I have felt it necessary to quote the whole section for reasons which I will come to in due course. However, what is clear from the section is that section 174 only confers a very limited right not to be excluded or expelled from a union and the reasons where any such exclusion will be illegal are confined to the relatively narrow circumstances prescribed by the section.

12. This formed the basis of a fundamental misunderstanding on the part of the claimants which, despite my having explained on numerous occasions throughout the hearing, they still seem to have difficulty with; either they had trouble accepting it or, to the extent that they did accept it, they felt that it was quite wrong that the law prescribed this right so narrowly. Section 174 is not akin to the right not to be unfairly dismissed as an employee. Whether a union's decision to expel a member is, for example, unfair or is not conducted with due procedure, or even where there has been unequal treatment in relation to other members in similar situations, is not in itself relevant; section 174 will only be engaged if the reason for the expulsion of the member is because of one of the narrowly defined categories within section 174 (and within section 65 TULCRA as a result of the cross-referencing at section 174(4)(c)). If section 174 is not so engaged, the tribunal will not have jurisdiction to hear the complaint.

13. To focus on the key areas, the protection only arises in the circumstances set out at section 174(2). The circumstances at section 174(2)(a-c) are not applicable to these complaints. Section 174(2)(d) is relevant as it deals with conduct. It provides that the exclusion or expulsion of a member is permitted if it is entirely attributable to conduct which is not either "excluded conduct" or "protected conduct".

14. "Protected conduct" is defined under section 174(4A) as *"conduct which consists in the individual's being or ceasing to be, or having been or ceased to be, a*

member of a political party". That is not applicable to the circumstances of this case, nor have any of the parties suggested that it is.

15. "Excluded conduct" is defined in section 174(4). 174(4)(a & b) are not applicable to the circumstances of this case, nor have any of the parties suggested that they are. 174(4)(c) cross-refers to section 65. This sets out a long list of circumstances, none of which are applicable to this case (with the possible exception of one of them which I refer to below) and none of which either party has suggested might be applicable.

16. The possible exception is section 65(2)(c). That references *"conduct which consists in –*

(c) asserting (whether by bringing proceedings or otherwise) that the union, any official representative of it or a trustee of its property has contravened, or is proposing to contravene, a requirement which is, or is thought to be, imposed by or under the rules of the union or any other agreement or by or under any enactment (whenever passed) or any rule of law;"

17. To be clear, none of the claimants referenced this subsection, either in the claim form or in any of their proposed amendments or in their submissions at this hearing. The only reason that it was referenced at the hearing was because I raised it and asked Mr Brittenden to make submissions on whether or not the respondent considered that any elements in the claimants' proposed amendments might come within section 65(2)(c). To be equally clear, I did not raise the matter in relation to the original claim form, which contains nothing that could possibly come within section 65(2)(c). I shall return to this below.

18. Section 175 TULCRA (*"Time limit for proceedings"*) provides as follows:

(1) An employment tribunal shall not entertain a complaint under section 174 unless it is presented—
(a) before the end of the period of six months beginning with the date of the exclusion or expulsion, 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 the tribunal considers reasonable.
(2) Section 292A (extension of time limits to facilitate conciliation before institution of proceedings) applies for the purposes of subsection (1)(a).

Applications to amend

19. The leading case in relation to amendments is Selkent Bus Co Ltd v Moore [1996] ICR 836. In determining whether to grant an application to amend, a tribunal must always carry out a careful balancing exercise of all the relevant factors, having regard to the interests of justice and to the relative hardship that would be caused to the parties in granting or refusing the amendments. In Selkent, the then President of the EAT, Mr Justice Mummery, identified the following factors as factors that may be relevant in a particular case: the nature of the amendment; the applicability of time limits; and the timing and manner of the application. However, the exercise is

essentially one of balancing the prejudice to one party in granting the amendment against the prejudice to the other party in refusing it.

20. Where the amendments sought are substantive (as opposed to a mere relabelling of facts already pleaded), consideration of time limits is a requirement.

21. Mr Brittenden also referred to the case of Galilee v Commissioner of Police of the Metropolis UKEAT/0207/16/RN. That is authority for the fact that neither the procedural common law doctrine of "relation back" nor section 35(1) of the Limitation Act 1980 apply directly to amendments to pleadings in the employment tribunal. These take effect for the purposes of limitation at the time permission to amend is given and do not "relate back" to the time when the original proceedings were commenced. In other words, when considering time limits for the purposes of amendment applications, it is the date when the permission to amend is given which is the relevant date when considering whether what is pleaded in the amendment has been brought within the applicable time limit.

Strikeout/deposit

22. The power to strike out a claim is contained in Rule 37 of the Employment Tribunal Rules 2013 which provide:

"37. 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. The importance of determining discrimination claims on their merits has been emphasised in the past, in particular in Anyanwu v South Bank Students Union [2001] IRLR 305, where it was stated that the power of strike out should be used only in the most plain and obvious of cases. In that case, Lord Steyn, at paragraph 24, emphasised:

"Discrimination cases are generally fact-sensitive, and their proper determination is always vital in our pluralistic society. In this field, perhaps more than any other, the bias in favour of a claim being examined on the merits or de-merits of its particular facts is a matter of high public interest."

At paragraph 37, Lord Hope of Craighead stated:

"I would have been reluctant to strike out these claims, on the view that discrimination issues of the kind which have been raised in this case should as a general rule be decided only after hearing the evidence. The questions of law that have to be determined are often highly fact-sensitive. The risk of injustice is minimised if the answers to these questions are deferred until all the facts are out. The tribunal can then base its decision on its findings of fact rather than on assumptions as to what the claimant may be able to establish if given an opportunity to lead evidence."

24. However, more recent cases have shown a keener interest in disposing of poor cases. Mummery LJ commented in Gayle v Sandwell & West Birmingham Hospitals NHS Trust [2011] IRLR 810 at paragraph 12:

"One area of debate is about cases of little or no merit, but considerable nuisance value. All are agreed that they should be cleared out of the system as soon as possible. They should not be allowed to take a disproportionate amount of time in the ET or cause the other party to incur irrecoverable legal costs and loss of valuable working time."

25. In addition, Judge Peter Clark in Deer v University of Oxford UKEAT/0532/12/KN [2013] stated at paragraph 42:

"There is a tendency to treat the observations of Lord Hope of Craighead in [Anyanwu] paragraph 37 as meaning that discrimination claims, including victimisation, must always be permitted to run their full course. That is too generalised an approach. Each case must be viewed on its own facts and circumstances."

26. Mr Brittenden also referred me to Eszias v North Glamorgan NHS Trust [2007] ICR 1126 CA, another case regarding strikeout in discrimination cases. He referred me in particular to paragraph 29:

29. It seems to me that on any basis there is a crucial core of disputed facts in this case that is not susceptible to determination otherwise than by hearing and evaluating the evidence. It was an error of law for the Employment Tribunal to decide otherwise. In essence that is what Elias J held. I do not consider that he put an unwarranted gloss on the words "no reasonable prospect of success". **It would only be in an exceptional case that an application to an Employment Tribunal will be struck out as having no reasonable prospect of success when the central facts are in dispute. An example might be where the facts sought to be established by the applicant were totally and inexplicably inconsistent with the undisputed contemporaneous documentation.** The present case does not approach that level. (My emphasis).

27. I am conscious, of course, that this case is not a discrimination claim and that the guidance given above was made in relation to discrimination claims. However, I do not consider that that guidance is less relevant in other cases if there are highly fact sensitive issues to be determined.

28. As regards deposits, the power to order the paying a deposit is at Rule 39 of the Employment Tribunal Rules 2013 which provide:

"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 against that party requiring a party ("the paying party") to pay a deposit of an amount not exceeding £1,000 as a condition of continuing to advance that allegation or argument.

2. The Tribunal shall make reasonable enquiries into the paying party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit."

Background facts

29. Before setting out my analysis of the applications, it is worth stating certain background facts which are relevant to those applications. I have not heard any oral evidence at this hearing. However, the facts set out here are ones which can be established without oral evidence, either because they are set out on the face of documents or because they are facts which are agreed between the parties.

30. The respondent's constitution is enshrined within its rulebook. It is a condition of membership of the respondent that every member shall comply with the rulebook, and in particular, this includes a requirement for all members to comply with specific instructions issued by its governing body, the National Executive Committee ("NEC"). This is set out in rule 4, clause 13 of the rulebook.

31. All four claimants were regular attendees engaging in what they describe as "picketing" activity outside Unity House, which is the respondent's headquarters in

London. Although I have heard a considerable number of submissions, from both sides, about the appropriateness or inappropriateness of their behaviour, that is not relevant to the issues which I have to determine.

32. Those employees of the RMT who worked in Unity House were members of the GMB and NUJ. In January 2022, the GMB and the NUJ registered a dispute with the respondent about the behaviour of the claimants in relation to their members, on the basis that they (the GMB and the NUJ) were seeking to safeguard their members interests. This was clearly a serious situation and one which was escalated, in the manner referred to in this paragraph, not by the respondent but by the GMB and the NUJ.

33. On 12 January 2022, the respondent NEC issued the following instruction to the claimants: *"…we instruct those organising and participating in the protests outside Unity House to cease immediately in order to defuse the current situation and to enable the staff procedures to conclude"*.

34. The claimants did not follow this instruction but carried on protesting outside Unity House.

35. The GMB and NUJ representatives insisted that: *"Action must be taken regarding NEC decision of 12 January 2022. Members of the Union are in direct breach of it, and so are in direct breach of the "essential basis of the contract between the Union and its members""*.

36. In addition, the GMB and the NUJ had also undertaken indicative ballots of their members in relation to registering a trade dispute with the respondent. Each had a significant mandate and support for taking industrial action if the matter was not resolved to their satisfaction: 94% of GMB members supported taking action and the NUJ had secured 100% support. An already serious situation had become more serious.

37. Accordingly, on 26 January 2022, the NEC issued a further instruction to the claimants, reiterating the instruction which had been given on 12 January 2022.

38. The claimants did not follow this instruction but carried on protesting outside Unity House.

39. On 2 February 2022, the respondent suspended the claimants. The correspondence repeated the instruction already given and explained in detail the claimants' obligations under rule 4, clause 13 of the rulebook, that such decisions of the NEC were binding on members.

40. The claimants did not follow this instruction and continued protesting outside Unity House.

41. In due course, the respondent expelled all of the claimants as members, with effect from 8 April 2022.

42. Under the respondent's rules, the claimants were afforded an appeal to the Annual General Meeting of the respondent. Their appeal was not upheld. This was communicated to them by letters of 15 July 2022.

43. Therefore, after three clear warnings, which the claimants knowingly and wilfully disobeyed, the respondent expelled them as members of the respondent.

44. The above is only a summary of the core undisputed facts. However, there is an abundance of contemporaneous documentation in the bundle provided which clearly indicates that the issue was first raised by the actions of the GMB and NUJ rather than the respondent; that the claimants were repeatedly warned and repeatedly ignored the warnings not to protest outside Unity House; and that the reason why they were eventually expelled was their repeated failure to follow those NEC instructions as they were bound to do.

The claim form

45. The entirety of the narrative at clause 8.2 of the claimants' claim form is as follows:

"On the 12th January 2022 we were written to by the the respondent to desist from protesting outside its headquarters. We again were written to on the 26th January to cease protesting.

On 2nd February we were written to again informing us of our suspension from the Union (RMT). Also our respective Branch Secretaries were informed that we were excluded from all union activities i.e. attending meetings and suspenslon from Branch positions. Mr. Harding was also suspended from training courses and his position as national Trustee.

On the 8th April we were written to again informing us of our expulsion from the Union. We had no hearing or any chance to answer the charges leveled against us. We believe we have not had a fair hearing and our Human rights have been denied. We believe that by excluding us from meetings not having a hearing denied us any natural justice and rights. to protest/picket and association in the union.

We are awaiting an appeal which will be held on the 7th or 8th July 2022. This appeal we do not feel will be fair and will not make up for the failings of the lack of an initial hearing. Also we have been denied the right to a representative to either assist or speak on our behalf."

The applications to amend

46. As noted, all four claimants made applications to amend in varying forms. In total, these run to a number of pages. The majority of the points made are, like the claim form itself, points about what the claimants regard as the general unfairness of their treatment, lack of what they regard as a fair procedure in relation to them and allegedly inconsistent treatment between them and other members of the respondent. As already indicated, none of this engages section 174. As regards those provisions of the amendment applications, were the claimants to rely on them alone, their claims would clearly have not just no reasonable prospect of success but no prospect of success at all.

47. However, there were certain sections which, when I read them, made me consider whether there was a possibility that they might engage section 65(2)(c). Those sections, in their entirety, were as follows.

48. In Ms Robertson's application to amend: *"I believe I was singled out, possibly for highlighting their bullying tactics and hypocrisy, for my emails to the general secretaries and putting resolutions through my branch on the same subject"*.

49. In Mr Harding's application to amend: *"I was also concerned when Mr Mihaj raised concerns about how union money was being used. As a National Trustee I raised this with the General Secretary. I believe this to be a large factor in my expulsion. This should be for a tribunal to determine."*

50. In Mr Mihaj's application to amend: *"I believe RMT's General Secretary and Leadership had other motives such as my Employment Tribunal Claim against my unfair dismissal, blowing the whistle on misuse of Public and Members funds as well as my campaign for recognition of an Independent Trade Union (GMB)."* And, much later on in his application to amend: *"Throughout my employment I was worried and raised concerns about how Union Learning Funds, (ULF) and union money was being misused. I was ignored, victimised and unfairly dismissed by the respondent because I blew the whistle, raised the matter with the General Secretary, leadership of the union as well as National Union Trustees. I believe these are the only factors for my expulsion. This should be for a tribunal to determine."*

51. By way of explanation, none of the claimants were employees of the respondent. This was with the exception of Mr Mihaj, who had previously been an employee of the respondent but whose employment had subsequently terminated, prior to the protests which are the background to these claims.

52. Finally, both Mr Harding and Mr Mihaj stated in their applications to amend that *"I feel that TULCRA section 174(4H) should apply in my case or any other part of the act."*

Applications to amend

53. All four of the claimants in turn made oral submissions in relation to their applications to amend the claims. Mr Brittenden then made his submissions. Each of the claimants was then given a further opportunity to make submissions, having heard Mr Brittenden's submissions, which they duly did. Mr Brittenden then made a couple of discreet submissions in response to that. I then adjourned to consider my decision. When I returned, I gave the parties my decision orally at the hearing, with my reasons for it.

54. I applied the principles in Selkent set out in the summary of the law above.

Timing and manner of the applications

55. In terms of the timing and manner of the applications to amend, they were made at a relatively early stage of the employment tribunal proceedings before any substantial work has been done on preparation for a final hearing. These are not applications made at the eleventh hour just before a final hearing. That is a factor which points towards the granting of the amendments.

56. However, with the exception of this factor, the other factors which I set out below all point the other way.

Time limits

57. For the reasons set out below, the amendments sought are substantial and are not a mere relabelling of facts already pleaded. For this reason, I am obliged to consider the question of time limits.

58. Section 175 provides that the primary time limit is six months from the date of expulsion. This is a more generous time limit than most employment tribunal time limits which are three months from the relevant act.

59. All four claimants were expelled on 8 April 2022. The primary time limit, before taking into account the effect of ACAS early conciliation, would be 7 October 2022.

60. For all the claimants except Mr Harding, ACAS early conciliation commenced on 12 April 2022 and ended on 4 May 2022 (a period of 22 days); for Mr Harding, it commenced on 11 April 2022 and ended on 4 May 2022 (a period of 23 days). As the "clock is stopped" in relation to these days, they can be added to the 7 October 2022 date referred to above. That means that, for all the claimants except Mr Harding, the primary time limit ended on 29 October 2022; and for Mr Harding it ended on 30 October 2022.

61. Under the principles in Galilee, the relevant date in relation to the amendments is the date on which they are (or would be) granted, in other words the date of this hearing, 14 November 2022. Therefore, all four of the applications to amend have been presented out of time.

62. The test for extending the primary time limit is not the more generous *"just and equitable"* test which applies in discrimination law but is the harder *"reasonably practicable"* test. For a number of reasons, I consider that it was reasonably practicable for the claimants to have brought these amendments much sooner, either in the original claim form or at a period of time well before the expiration of the primary time limit.

63. Whilst the claimants are litigants in person, they are not ordinary litigants in person. Mr Harding is a tribunal member at the London South employment tribunal and will therefore have had experience of how employment tribunal time limits apply. Mr Mihaj has brought employment tribunal claims previously and therefore has experience in this respect. Furthermore, Mr Harding explained that, whilst the claimants had not instructed external lawyers, he had spoken to a contact of his who was a barrister and who had explained to them about section 174 (albeit Mr Harding said that he did not go into great detail about it, and he did not say whether or not that barrister had given any advice specifically on the issue of time limits). The degree of knowledge which the claimants collectively have is therefore far greater than would ordinarily be the case for litigants in person.

64. Ms Robertson submitted that the claimants had been waiting for the outcome of the appeal. However, the appeal took place in early July 2022 with the decision to refuse the claimants' appeals communicated to them on 15 July 2022. That was some 3½ months before the expiration of the primary time limit, which was plenty of time to submit their applications to amend.

65. There was, therefore, no reason why the claimants could not have submitted these amendments within the primary time limit; it was reasonably practicable for them to do so. Therefore, time is not extended, and the tribunal does not have jurisdiction to hear the complaints in their proposed amended form. That is a significant factor in terms of refusing the applications to amend. However, the factors set out below are more significant still.

Nature of the amendments

66. The claim form itself, which I have set out in full above, is clear, simple and short. It contains no pleading about the reason for the expulsion of the claimants, let alone one which is covered by the limited protections in section 174. It does not therefore engage section 174 on its face. It could not therefore have any prospect of success, let alone any reasonable prospect of success. It would inevitably be struck out for that reason without the need for any further time and cost in preparing for a final hearing.

67. Most of the proposed amendments in the amendment applications, which, as noted, collectively run to several pages, similarly do not engage section 174 and so would not assist the claimants in any case. As noted, these include, by way of example, various allegations of unfair process or of disparate treatment between the claimants and others. To allow them would be simply to set out extra material in claims which could not succeed.

68. I have noted that, in their applications to amend, Mr Harding and Mr Mihaj referred to relying on subsection 174(4H). However, that is based upon a misreading of the statute. Subsection 174(4H) does make reference to decisions to expel members being taken unfairly if an individual is not given notice of the proposal to exclude him or a fair opportunity to make representations etc. However, when one reads the statute, that subsection is entirely predicated upon the two subsections above, which in turn relate to the limited exclusion for *"protected conduct"* (as set out in subsection 174(4A), which, as already noted, is to do with conduct consisting in the individual being or ceasing to be, or having been or ceased to be, a member of a political party. As already noted, that is not relevant to this case. I make no criticism of either Mr Harding or Mr Mihaj in this respect; it takes a very careful reading of the entire section and how the subsections interact in order properly to understand it. However, the correct interpretation is as I have just set out and as such, section 174(4H) is not engaged. Allowing that amendment would be of no assistance to either of them.

69. Only the limited extracts in the applications of Ms Robertson, Mr Harding and Mr Mihaj which I have quoted in full above might possibly engage part of section 174, although it is clear that they did not realise it at the time they made those amendment applications because they did not refer to the section in their proposed amendments (as, by contrast, Mr Harding and Mr Mihaj did in relation to section 174 (4H)) or in their submissions and it was only as a result of my raising it that the point was addressed. Those extracts raise the possibility of whether, if the amendments are allowed, Ms Robertson, Mr Harding and Mr Mihaj are pleading that the reason for their expulsion could be *"excluded conduct"* (as defined in section 174(4)) by reference to section 65(2)(c). Essentially, the suggestion made in those pleadings is that there were other

reasons for expelling those claimants from the respondent either instead of or as well as the expulsion being because of their refusal to stop protesting in breach of the NEC's instructions.

70. However, the documentary evidence which I have seen and much of which I have referenced above, overwhelmingly points to the fact that the driver for the respondent issuing instructions to the claimants was referable to the dispute registered by the GMB and the NUJ to safeguard their members interests; that it was the GMB and the NUJ who raised it (in other words the process initiated as a result of the motivation not of the respondent but of third parties); that the respondent warned the claimants to stop protesting several times; that the claimants continued to protest; and that the respondent subsequently suspended and later expelled them. It is therefore almost certain that the conclusion, based on this undisputed documentary evidence, would be that the reason for the claimants' expulsion was their continuing to protest and nothing else.

71. By contrast, the extracts in the applications to amend which I have referred to are imprecisely and often vaguely put. They are unsubstantiated allegations which are made without any evidence to back them up beyond the assertion of the claimant making that allegation.

72. First, if the claimants had a strong belief, and one backed up by evidence rather than mere assertion, it is highly likely that they would have set this out in their original claim, and not merely as unsubstantiated assertions in applications to amend, in amongst a raft of other assertions (which happen to be of no assistance to them because they do not engage section 174).

73. Secondly, as pleaded in the applications to amend, these amendments are not currently in a form which is clear or capable of being properly responded to by the respondent. They would require considerable further particularisation and detail and that is just in terms of clarifying what the pleaded case is and the scope of it.

74. Furthermore, allowing these amendments would change what is a very straightforward claim into a far more complicated one where lots of additional evidence would be required about a whole range of other matters, for example the issues about Union Learning Funds, use of union money, the un-particularised allegations that Mr Mihaj was ignored, victimised and unfairly dismissed by the respondent, and the unparticularised "bullying tactics" and "hypocrisy", "emails to the general secretaries" and "resolutions" referred to by Ms Robertson as hypothetical reasons for her expulsion. The amendments sought are therefore substantial and, because they introduce alleged reasons for expulsion which are not contained in the claim form, they are not a mere relabelling exercise; they introduce substantial extra alleged facts.

Balance of prejudice

75. To allow these amendments would therefore in turn involve an enormous amount of extra work, time, and cost in terms of preparing for a final hearing and it would extend the length of any such final hearing considerably. That would involve enormous prejudice to the respondent.

76. By contrast, as noted, the documentary evidence which I have seen is such that this really is the sort of exceptional case referred to in Eszias, where "*the facts sought to be established by the applicant were totally and inexplicably inconsistent with the undisputed contemporaneous documentation"*. I would have no hesitation in concluding that, even if these amendments were allowed, they would have no reasonable prospect of success. Therefore, the prejudice to the claimants in refusing the amendments is very small, as a refusal simply denies them the right to proceed with claims in the amended form that they are almost certainly going to lose.

77. For these reasons, the prejudice to the respondent in allowing the amendments far exceeds the prejudice to the claimants in refusing them. The amendment applications are all, therefore, refused.

Reasonable prospects

78. For the claimants' benefit, I explained that, in the light of my decision to refuse the amendments, my consideration of the respondent's application to strike out the claims on the basis that they had no reasonable prospect of success would be on the basis of the claim form as originally drafted.

79. In the light of the reasons which I necessarily had to give in my decision on the amendment application, Mr Brittenden asked whether it was necessary to pursue this application or whether the claimants wanted to withdraw their complaints. However, all four claimants insisted that they would not withdraw and wished to proceed.

80. I therefore heard submissions, first from Mr Brittenden whose application it was, and then from each of the four claimants. Given the reasons given for the decision on the amendment applications, this was in reality something of an academic exercise. That indeed was reflected in the claimants' submissions. A lot of the time was spent with them again referencing their account of why they protested and their conduct on those protests as well as numerous submissions about how unfair the law was in terms of not giving them a cause of action for being expelled (such a submission in itself is indicative that the claim form as it stood had no reasonable prospect of success). Whilst I acknowledged to the claimants that I could clearly see how passionate they were about the dispute, I explained to them on more than one occasion that it was not my task to decide whether the law as it stood was right or wrong; but merely to apply it.

81. After the parties made their submissions, I briefly adjourned to consider my decision and, when the parties returned, gave them my decision.

Decision

82. I decided that the claims had no reasonable prospect of success for two reasons.

83. First, the claims did not identify or engage section 174. On the face of the claims, there was nothing to suggest that the reason for the expulsion of the claimants had anything to do with the protected categories of "excluded conduct" or "protected conduct" which would give the tribunal jurisdiction to hear those complaints. Put simply, the complaints as pleaded did not fall within the section and were not therefore

justiciable. They therefore not only had no reasonable prospect of success; they had no prospect of success at all.

84. Secondly, as already alluded to, the documentary evidence which I had seen was so clear that the decision to expel the claimants was because, following the various instructions from the NEC, they did not stop their protests outside Unity house. As noted, the respondent's action was driven initially by the GMB and NUJ, who stated that they wanted the protest to stop in the interests of the safety of their members and who threatened industrial action (and had the numbers for it). It was not even the respondent which was the main driver; rather, their actions in issuing the instructions stemmed from the very serious situation with the GMB/NUJ. Three warnings were then issued, and the claimants continued to protest. They were then suspended and eventually expelled. As already noted, this is the sort of exceptional case referred to in Eszias, where "*the facts sought to be established by the applicant were totally and inexplicably inconsistent with the undisputed contemporaneous documentation"*.

85. As already noted, and as I explained to the claimants on numerous occasions throughout the hearing, it is irrelevant whether the NEC instructions not to protest were reasonable or not or whether the decision to expel them was fair or not. Like it or not, that is just how the statute works.

86. For the reasons above, therefore, the claims have no reasonable prospect of success. There is no good reason for me not to exercise my discretion to strike them out and every good reason for me to do so.

87. The claims are therefore all struck out.

Other matters

88. In the light of this decision, it was not necessary to go on and consider deposit orders.

89. At the end of the hearing, Mr Harding requested that written reasons be produced.

Employment Judge Baty
16th Nov 2022

JUDGMENT and REASONS SENT to the PARTIES ON

17/11/2022

FOR THE TRIBUNAL OFFICE