EMPLOYMENT TRIBUNALS

Claimant: Ms Ruth Hannan

Respondent: RSA (The Royal Society for the Encouragement of Arts, Manufactures and Commerce)

Heard at: London Central (by video) **On:** 12 July 2023

Before: Employment Judge R Russell

Representation
Claimant: Ms A Fadipe, Counsel
Respondent: Mr A Ohringer, Counsel

RESERVED JUDGMENT

1. The Respondent's application to strike out the claim fails and is dismissed.

2. The Respondent's application for a deposit order fails and is dismissed.

REASONS

Introduction

1. By way of a claim form presented on 02 February 2023 the Claimant brought a claim of unfair dismissal under section 152(1)(b) of the Trade Union and Labour Relations (Consolidation) Act 1992 ("TULRCA"). ACAS early conciliation began on 09 January 2023 and ended on 24 January 2023. By way of a response dated 08 March 2023 the Respondent defends the claim.

2. An application to amend the claim was made at a preliminary hearing on 29 March 2023. EJ Stewart allowed the Claimant to amend her claim to include a complaint that she was subjected to a detriment under section 146(1)(b) TULRCA. The alleged detriment is the curtailment of her notice period, with a payment in lieu.

3. There is a question about whether the Claimant was dismissed. The Claimant resigned on 18 July 2022 and gave three months' notice. She says that the

parties' intended her last date of employment to be 13 October 2022 due to her taking accrued annual leave.

4. The Claimant is a member of the Independent Workers Union of Great Britain ("IWGB"). The Claimant says that she has been active in trying to have the IWGB recognised by the Respondent. On 08 June 2022 the IWGB applied to the Central Arbitration Committee for statutory trade union recognition.

5. On 03 October 2022 the Claimant says that she was contacted by a journalist who had been passed her details by the IWGB. She subsequently spoke with the journalist.

6. An article was published in the Observer on 09 October 2022 entitled *'Not living our values': Royal Society of Arts accused of hypocrisy on staff union*'. The Claimant is quoted in this article, which recounts how the Respondent had refused to voluntarily recognise the IWGB on three occasions and that the IWGB had applied for statutory recognition. The Claimant is mentioned in the article in the following terms:

> *"Ruth Hannan, the RSA's outgoing head of policy and participation and IWGB member, said the RSA was being hypocritical. "The RSA has done a huge amount of work over the past few years on the future of work and what good work looks like – and we've given the IWGB an award", she said. "But the RSA is telling the world one thing, and doing another".*
>
> *Hannan, who is leaving after more than three years but remaining an RSA fellow, said many of the society's illustrious former and current fellows would be shocked by its approach to union rights. "They joined the RSA because it is open, pioneering, enabling and optimistic. They would be disappointed to hear we're not living our values – and that we've made life so hard for staff. We are letting down our very high historical reputation".*

7. There is no dispute between the parties that on 10 October 2022 the Respondent wrote to the Claimant. The letter is headed 'Immediate termination of employment'. It states that the Claimant is not required to attend work for the remainder of her notice period and that she will no longer have access to work systems and premises with immediate effect. The letter says that the Respondent has serious concerns about the comments published in the press.

8. The Claimant says that the letter of 10 October 2022 amounted to a dismissal with immediate effect for taking part in trade union activities. The Respondent says that she was not dismissed.

9. The Respondent applied to strike out the claim under rule 37 of Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 on the basis that it has no reasonable prospect of success. In the alternative, it argues that the claim has little reasonable prospect of success and that the Claimant should be ordered under rule 39 to pay a deposit as a condition of continuing to advance her claim.

10. I had a bundle of 127 pages and a separate bundle of 28 authorities. I was assisted by the clear and helpful oral and written submissions from Ms Adipe and Mr Ohringer. Judgment was reserved.

Submissions and discussion

11. In *Cox v Adecco* [2021] ICR 1307 the EAT held that before considering strike out, the Tribunal should make reasonable efforts to identify the claims and the issues to be decided having regard to the pleadings and any core documents that set out the Claimant's case. As set out above, the issues in this case were clear and were not in dispute by the parties.

12. The Claimant's case is that she was dismissed or, in the alternative, that she was subjected to a detriment by having her notice period curtailed with a payment in lieu, for engaging in the activities of a trade union. Having identified the claims as above, I considered whether they can be said to have no reasonable prospects of success.

13. The Respondent's applications turn on the definition of 'trade union activity'. It submits that the Claimant's actions in speaking with the Observer journalist do not amount to trade union activity. As such, her claims must necessarily fail.

14. Section 146(1)(b) TULRCA states that '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…preventing or deterring him from taking part in activities of an independent trade union at an appropriate time, or penalising him for doing so'.

15. 'Appropriate time' is defined in section 146(2) TULRCA. This is time outside the worker's working hours, or time within working hours specifically set aside for union activities by arrangement or with the consent of the employer.

16. Section 146(5A) TULRCA provides that this section does not apply where the worker is an employee and the detriment complained of is dismissal.

17. Section 152(1)(b) TULRCA provides that the dismissal of an employee shall be regarded as unfair if the reason (or, if more than one, the principal reason) was that the employee…had taken part, or proposed to take part, in the activities of an independent trade union at an appropriate time. Appropriate time is defined in section 152(2) as outside working hours or within working hours by arrangement or with the consent of the employer.

18. What is meant by the activities of an independent trade union is not defined in TULRCA.

19. The Respondent submitted that some assistance may be drawn from section 168 TULRCA, which defines the duties for which officials of an independent trade union are permitted to take time off during working hours. They include negotiations with the employer related to or connected with matters of collective bargaining in relation to which the trade union is recognised by the employer, and receipt of information from the employer and consultation by the employer in respect of collective redundancies.

20. Section 168(3) TURLCA provides that the amount of time off which an employee is to be permitted to take under this section and the purposes for which, the occasions on which and any conditions subject to which time off may be so taken are those that are reasonable in all the circumstances having regard to any relevant provisions of a Code of Practice issued by ACAS.

21. The *ACAS Code of Practice on time off for trade union duties and activities including time off for union learning representatives* (2010) distinguishes between duties of officials and activities of members. In respect of the activities of a trade union member, it provides at paragraph 37 that these may include attending workplace meetings, meeting full time officers to discuss relevant workplace issues, and voting in union elections.

22. I concluded that section 168 TULRCA was of limited assistance. The section relates to duties rather than activities, and those duties must be those that fall on an employee as a union official. The ACAS Code is of assistance insofar as it gives examples of activities of trade union members but these examples are neither exhaustive nor definitive.

23. In *Dixon v West Ella Developments Limited* [1978] ICR 856 (EAT), Phillips J held that tribunals should not adopt too restrictive an approach to the interpretation of 'activities of an independent trade union', bearing in mind the purpose for which these provisions are intended. He considered that the provisions 'should be reasonably, and not too restrictively, interpreted'. In *Chant v Aquaboats Limited* [1978] 3 All ER, it was held that deciding whether dismissal was for the activities of a trade union is very largely a question of fact. Moreover, there must be a clear linking of the activities in question to a trade union. As Kilner Brown J put it in *Chant*, the provision is not about 'activities of an individual trade unionist'.

24. In determining the parameters of what will and what will not amount to activities of a trade union, there are some activities that will not be protected if they are 'wholly unreasonable, extraneous or malicious' (*Lyon v St James Press Ltd* [1976] ICR 413). There it was held that the statutory protection given to trade union activities:

> *"...must not be allowed to operate as a cloak or an excuse for conduct which ordinarily would justify dismissal; equally the right to take part in the affairs of the trade union must not be obstructed by too easily finding acts done for the purpose to be a justification for dismissal. The marks are easy to describe, but the channel between them is difficult to navigate."*

25. The Respondent submits that the comments made to the Observer are disparaging of it and can be characterised as conduct which is wholly unreasonable thereby falling outside the scope of statutory protection. Comments that are critical of an employer will not necessarily cross the line into behaviour that is so unreasonable to fall outside the statutory protection. In *Burgess v Bass Taverns* [1995] IRLR 596 (CA), comments made by a shop steward at an induction course for new employees that were critical of the employer could amount to activities of a trade union notwithstanding the union member's own admission that his comments may have 'gone over the top'. In *Mihaj v Sodexho Ltd* [2014] UKEAT/0139/14, it was held that *Burgess* is authority for the proposition that:

> *"the way in which trade union activities are carried out is immaterial to the decision as to whether they are in fact trade union activities unless the way in which they are carried out is such as to be dishonest, in bad faith, or carried out for some other organisation or cause so as to remove them from the scope of what can properly be called trade union activities".*

26. The way in which the alleged activities are carried out is therefore not irrelevant to the question of whether they fall within the definition of activities of a trade union.

27. Can it be said that the Claimant's activities in this case are such that they clearly fall outside the scope of statutory protection? In *British Airways Engine Overhaul Ltd v Francis* [1981] ICR 278 the EAT concluded that the activities of a shop steward in complaining to the press about her own union amounted to union activities. The Respondent submitted that a distinction may be made in the present case as the Claimant was not a shop steward.

28. The Respondent submitted that the Claimant's conduct is closer to the circumstances in *Azam v Ofqual* UKEAT/0407/14/JOJ. There, a trade union representative had disclosed information to her members in circumstances where the employer had given her information on the condition of strict confidentiality. She was found to have misled her branch executive committee by failing to make it clear that the information was confidential. It was held that she acted outside her remit and this was not the activity of a trade union.

29. In *Luce v London Borough of Bexley* [1990] IRLR 422, the EAT gave the following guidance in approaching the phrase 'activities of an appropriate trade union of which the employee is a member':

> *"First, and most importantly, we are satisfied that the issue is ultimately one of degree and therefore one of fact. This must be left to the good sense and experience of the industrial tribunal which is entitled to look at all the circumstances. Secondly, although we do not consider that the phrase should be understood too restrictively, we are satisfied that it cannot have been the intention of Parliament to have included any activity of whatever nature. The whole context of the phrase is within the ambit of the employment relationship between that employee and that employer and that trade union."*

30. The Respondent submitted that there must be a nexus between the union, the employer, and the Claimant in respect of the activity. A personal gripe, such as it argues is contained in the Observer article, would not demonstrate the necessary tripartite nexus.

31. The Claimant submitted that section 146 TULRCA must be read so far as possible to comply with article 11 of the European Convention of Human Rights (*Mercer v Alternative Future Group Ltd* [2022] ICR 1034) and contended that it must similarly be read to comply with article 10 (Freedom of expression).

Conclusions

32. The power to strike out a claim on the ground that it has no reasonable prospect of success may be exercised only in rare circumstances. It is draconian in nature. The test imposes a very high threshold: there must be no reasonable prospect of success. The Tribunal must consider whether on a careful consideration of all available material it can properly conclude that the claim has no reasonable prospect of success. If the central facts are in dispute, it would be exceptional to strike out a claim (*Eszias v North Glamorgan NHS Trust* [2007] ICR 1126, CA).

33. The test is not whether the Claimant's claim is likely to fail or whether it is possible that the claim will fail. It is not a test which can be satisfied by considering what is put forward by the Respondent 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 a high test (*Balls v Downham Market High School and College* [2011] IRLR 217, EAT).

34. Tribunals should be cautious in exercising the power to strike out, particularly in cases such as discrimination claims where there is a public interest in them being heard and because they are likely to be fact sensitive. The Claimant's case should be taken at its highest unless conclusively disproved by (or totally and inexplicably inconsistent with) undisputed contemporaneous documents (*Ahir v British Airways* [2017] EWCA Civ 1392; *Mechkarov v Citibank NA* [2016] ICR 1121, EAT).

35. I reminded myself of the high threshold to be applied, the fact that the Claimant's case must be taken at its highest, and that dismissal cases will require identification of the reasons for dismissal, which turns on direct evidence and the inferences that may be drawn from it (*Kuzel v Roche Products Limited* [2008] ICR 799, CA).

36. The Respondent asserts that the Claimant was not dismissed. It is not in dispute that the Claimant was sent a letter on 10 October 2022 headed 'immediate termination of employment'. Whether that amounted to a dismissal is a matter on which a Tribunal will need to hear evidence and make findings of fact.

37. The Respondent asserts that the Claimant's conduct is such that it obviously takes her beyond the protection of activities of a trade union. In sum, its case is that even if the Claimant were to have been dismissed (or subjected to a detriment), the claim must fail because those actions cannot be linked to activities of a trade union.

38. The parties agreed that the Claimant spoke to an Observer journalist. I have read the article, which the parties directed me to. It is not the purpose of this hearing to make any findings of fact on the matter. The article mentions the Claimant being a union member. Whether she spoke with the Observer in this capacity and whether this falls within the parameters of protected activities of a trade union appears to be dependent on context. Evidence will be required to determine the issue. Consideration will need to be given to matters such as the events that led to the Claimant being approached by the journalist, the capacity in which she was speaking, any involvement she had in the campaign for recognition, and whether the union was aware of and in agreement with her speaking to the press. These are matters on which findings of fact are needed.

39. The question of whether there was a dismissal or detriment and the reasons for any such treatment are also matters that are fact sensitive. The Claimant's involvement with the union and campaign for recognition, the context in which she was speaking to the Observer, and what was in the mind of the decision-maker who wrote to the Claimant on 10 October 2022 are all evidential matters from which inferences could permissibly be drawn.

40. In the circumstances, taking the Claimant's case at its highest, I do not conclude that her claims of dismissal under section 152(1)(b) TULRCA and detriment under section 146(1)(b) TULRCA can be said to have no reasonable prospect of success.

41. I have also considered the Respondent's application in the alternative that the Claimant be ordered to pay a deposit under rule 39. This is a less draconian alternative to strike out. It requires me to consider whether the case has little (rather than no) reasonable prospects of success. If I determine that is the case, I then have discretion to consider whether to make a deposit order having regard to the overriding objective to deal with cases fairly and justly.

42. I am not satisfied that this is a case in which it can reasonably be said that the Claimant has little reasonable prospects of success. Whether the Claimant's actions amount to activities of a trade union or fall outside the parameters of the statutory protection depends on the context. These are matters about which evidence will need to be heard and findings of fact made. Moreover, the question of whether the Claimant was dismissed or subjected to a detriment is clearly one of fact and that can only be determined by hearing evidence.

43. The Respondent's applications for strike out and deposit fail and are dismissed.

Employment Judge R Russell

Date 08 August 2023

JUDGMENT & REASONS SENT TO THE PARTIES ON

.08/08/2023

FOR THE TRIBUNAL OFFICE