EMPLOYMENT TRIBUNALS

Claimant: Dr V Chandra

Respondent: University and College Union (1) and
27 other individual Respondents (2)

Sitting at: London Central **On:** 13th November 2023

Before: Employment Judge Nicklin

JUDGMENT ON COSTS APPLICATION

1. In accordance with Rule 39(5)(b) of the tribunal's Rules of Procedure, the deposit in the amount of £200 paid by the Claimant pursuant to the deposit order dated 16th March 2023 shall be paid to the solicitor for the Respondents, Browne Jacobson LLP, for the benefit of the 26 individual Respondents in this case for whom the solicitors act.

2. The Claimant shall pay the 26 individual Respondents represented by Browne Jacobson LLP in this case the total sum of £3,000 inclusive of VAT in respect of their costs incurred after 16th March 2023 until 27th April 2023 pursuant to Rule 76(1)(a) of the tribunal's Rules of Procedure. The deposit in paragraph 1 shall be credited against this sum (pursuant to Rule 39(6)) making the total net sum payable by the Claimant £2,800.

REASONS

The application and the mode of determination

1. By a written application dated 10th May 2023, 26 individual Respondents (who are no longer parties to the substantive claim) applied for an order that the Claimant pay their costs in respect of the Claimant's claims against 27 individual Respondents which were all dismissed on the ground that the tribunal did not have jurisdiction to hear them by EJ Connolly on 27th April 2023 (judgment sent to the parties on 10th May 2023 and written reasons sent on 26th May 2023).

2. The solicitors acting for the Respondent (the Union) also acted for 26 of the 27 individual Respondents who are no longer parties to the substantive claim following the judgment sent to the parties on 10th May 2023. It is these 26 Respondents who are the applicants for a costs order. They are referred to below, to avoid confusion with the existing Respondent (the Union), as "the 26R". References to the Respondent (or, in places where relevant, the First Respondent) means the Union which is now the only Respondent to the claim.

3. EJ Connolly delivered an oral judgment dismissing the 27 claims at a preliminary hearing in public on 27th April 2023. He then made case management orders which included listing a further preliminary hearing on 18th May 2023 to consider:

    a. The next steps in relation to the deposit order made by EJ Snelson on 16th March 2023 and the deposit subsequently paid by the Claimant;
    b. Clarification of the Claimant's claim against the remaining Respondent (previously the First Respondent);
    c. Case management orders for the progression of the case; and
    d. Any applications made in advance of that hearing.

4. Following the hearing on 27th April 2023 (and the promulgation of the judgment and reasons) the Claimant submitted an appeal against EJ Connolly's decision. In the event, EJ Glennie postponed the May hearing on application by the Claimant and it was relisted to 28th July 2023 ("the July hearing"). The July hearing came before me and I made case management orders through to a 7 day final hearing in December 2024.

5. The July hearing required a detailed review of the elements of the claim against the Respondent in order to complete the Schedule of Conduct relied on by the Claimant and the list of issues. I made directions for these documents to be completed after the conclusion of the hearing and also made orders to deal with any necessary amendment to the claim.

6. In the event, there was insufficient time to hear and decide the 26R's costs application at the July hearing. Both parties agreed that this could and should be fully decided on paper without a further hearing. I made orders directing the parties to provide further submissions on the application. Following receipt, it became apparent that the Claimant had not provided any submissions on the amount of costs in the Respondent's costs schedule which accompanied its original written application. I therefore gave further directions and the Claimant filed a further document in this respect on 20th October 2023. I gave the Respondent until 1st November 2023 to provide any comments in reply (if it considered necessary) and nothing has been received as at the date of this judgment.

7. I therefore proceed below to decide the costs application based on:

    a. The Respondent's original written application dated 10th May 2023 with costs schedule;
    b. The Claimant's initial submissions in response dated 21st July 2023;
    c. The Claimant's further submissions following the July hearing dated 18th August 2023;

d. The Respondent's Reply to those submissions dated 8th September 2023; and
e. The Claimant's submissions on quantum dated 20th October 2023.

8. The 26R contend that I should not have regard to paragraphs 3 to 26 of the Claimant's further submissions because they extend beyond the scope of that which I permitted in the order I made after the hearing on 28th July 2023. I have decided that I should take into account all of the written submissions provided. The case management order I made in respect of submissions on costs was not expressly limited. In any event, as the parties have consented to this exercise being carried out on paper, it is important that all parties are able to fully argue the issues by written submissions. I have ensured that all parties have been able to do this and it would not be in accordance with the overriding objective for me to now exclude sections of those submissions when determining the application.

Background to application

9. By a claim form presented on 7th September 2022, the Claimant complained under section 66 of the Trade Union and Labour Relations (Consolidation) Act 1992 ("TULRCA") that he was subjected to unjustifiable discipline. The claim was brought against the Respondent (the Union, as identified above) and 27 other individual Respondents. The Respondents' position by its Response and Grounds of Resistance on behalf of all Respondents (save for one individual) contended that, other than resisting the claim on its merits in any event, there was no jurisdiction to bring the claim against the individuals: only the Union could answer the claim.

10. The right not to be unjustifiably disciplined is set out in section 64 of TULRCA. Section 66(1) provides for the right of a Claimant to complain that they have been unjustifiably disciplined to an employment tribunal. This refers expressly to presenting a complaint "against the union to an employment tribunal".

11. At the preliminary hearing on 16th March 2023, EJ Snelson made a deposit order in the following terms:

> *The Employment Judge considers that the Claimant's argument that the Employment Tribunal has jurisdiction to consider his claims against the individuals joined as Second to Twenty-eighth Respondents has little reasonable prospect of success. Accordingly, he is ORDERED to pay a deposit of £200 not later than 11 April 2023 as a condition of being permitted to continue to advance the argument.*

12. The reasons for this order refer to a discussion during the hearing in which EJ Snelson explored with the Claimant this jurisdictional issue. The judge pointed out that the protection afforded by TULRCA "*appears to be specifically limited to discipline applied "by the union" and that the legislation appears to contemplate a (secondary) remedy only against "the union" (s67(1))…*".

13. During that preliminary hearing, the Claimant persistently (but very politely) contended that the 27 individuals could constitute "the union" for the purposes of his claim. The judge considered this argument had little reasonable prospect of

success and made the deposit order accordingly. In order to pursue the claim against the 27, the Claimant therefore paid the £200 deposit by the due date.

14. The preliminary hearing in public before EJ Connolly was listed by EJ Snelson to consider:

    a. Whether the tribunal has jurisdiction to consider the claims against any Respondent other than the First Respondent (the Union);
    b. Alternatively, whether those claims should be struck out as having no reasonable prospect of success (on the basis that there is no reasonable prospect of the claims being found to be within the tribunal's jurisdiction); and
    c. Subject to those issues, all remaining case management questions.

15. At the hearing before EJ Connolly on 27th April 2023, the tribunal dismissed the claims against those 27 individuals on the basis that the tribunal did not have jurisdiction to hear them. The judge concluded, at paragraph 35 of his written reasons, that the statutory wording in TULRCA (i.e. the right not to be unjustifiably disciplined by *the union* and to bring a complaint against *the union*) does not permit a Claimant to bring claims against anyone other than the First Respondent. The judge concurred with the interpretation of EJ Snelson in the deposit order. Further, the judge concluded that neither the individual Respondents nor any particular branch of a union met the definition of a trade union within sections 1 or 2 of TULRCA. The judge addressed the Claimant's concerns about the union not being able to respond to local actions and, whilst this did not alter the jurisdictional framework for a claim, he was satisfied that proceeding with a claim only against the First Respondent (the Union) would meet the overriding objective and the general principles of fairness in any event.

The Application

16. The 26R's application is therefore brought on the following bases:

    a. Unreasonable conduct in the Claimant's pursuit of the claims against the 27 (Rule 76(1)(a) of the tribunal's Rules of Procedure); and/or

    b. The claims against the 27 had no reasonable prospect of success (Rule 76(1)(b)); and/or

    c. The claims against the 27 were pursued vexatiously insofar as the Claimant knew or ought to have known he was not permitted to pursue those claims (Rule 76(1)(a)).

17. The unreasonable conduct aspect of the application includes the contention that the tribunal should conclude that the Claimant must be treated as having acted unreasonably in pursuing his claims against the 27 because of the reasons given by EJ Snelson for making the deposit order on 16th March 2023 (Rule 39(5)).

Submissions in respect of the costs application

18. I have read all of the written submissions supplied by all three parties. I do not set them all out here for reasons of brevity and relevance, but I have considered all that the parties have said.

19. The 26R's application and submissions contend that:

    a. Rule 39(5) is engaged because EJ Connolly's judgment arrived at conclusions which were substantially the reasons given by EJ Snelson for making the deposit order (i.e. that TULRCA did not provide for a Claimant to bring a claim under ss64-67 against individuals).
    b. Prior to the deposit order, the 26R say that the apparent weakness in the pursuit of the case against the 27 individuals was highlighted by letter on 23rd November 2022 where the Claimant was warned about this issue. The 26R say that pursuing the claim against them in these circumstances amounts to unreasonable conduct.
    c. The Claimant knew that pursuing the claim against the 26R had no reasonable prospect of success.
    d. The Claimant was aggrieved that some or all of the 26R took issue with his alleged conduct and, in circumstances where there was no legal basis to bring a claim against them, it amounts to vexatious conduct.

20. The 26R break down the costs claimed into two time periods. The first is the costs incurred up to the 16th March 2023 hearing before EJ Snelson. These are claimed in the sum of £2,340 inclusive of VAT and do not represent any of the costs incurred by the Respondent in responding to the claim which continues against it. These are the additional costs in respect of the 26R. Secondly, the 26R claim all of the costs incurred in respect of the period after 16th March 2023 up to the preliminary hearing before EJ Connolly on 27th April 2023 (to include that hearing). These costs amount to £7,896 inclusive of VAT.

21. The Claimant resists the costs application as follows:

    a. The Claimant says that he needed to bring the claim against the 27 individuals in order to prove actual and supposed conduct (meaning, on the Claimant's case, the reasons given for the discipline as opposed to what the Claimant says are the real reasons for the action taken). The Claimant contends that it was necessary to bring in these individuals in order to prove the real reasons for his treatment as the Respondent had made no reference to such reasons in its decision making.
    b. The Claimant says that his arguments were not all covered by the deposit order. For example:
        i. He says that, whilst he sought no specific remedy from the 27 individuals, there were issues existing between himself and the 27 within the jurisdiction of the tribunal.
        ii. The question as to whether the 27 individuals constituted a branch of the Respondent, which the Claimant ran as an argument before EJ Connolly, was not part of the deposit order.
        iii. At the hearing on 27th April 2023, the Claimant distinguished between equality law and employment rights on the one hand (where, he says, there is no privity of contract as between two employees) and claims

related to a trade union where, he says, there may be privity of contract between two members.

c. The Claimant says that the inclusion of the 27 individuals within the proceedings was, in effect, in accordance with the overriding objective because any final judgment might affect them and it would be desirable for these individuals to participate for the purposes of disclosure. The Claimant says this was raised in his legal argument before EJ Connolly.
d. The Claimant is appealing the decision of EJ Connolly in respect of a finding that the LSE branch of the Respondent is not a trade union for the purposes of TULRCA. He accordingly asks that the costs application is not determined until the appeal to the EAT has been resolved.

22. By his further written submissions dated 18th August 2023:

a. The Claimant renewed his request for the determination of this application to be deferred until final consideration of his appeal. However, by a letter dated 10th August 2023, the EAT determined under Rule 3(7) of its procedure rules that there were no reasonable grounds for bringing the appeal. The Claimant intends to seek a hearing under Rule 3(10) and asks that this application is deferred until after such a hearing has taken place. Various arguments to be pursued in respect of any such appeal hearing are set out.
b. The Claimant relies on Rule 34 of the tribunal's Rules of Procedure (power to add any person, by way of substitution or otherwise where conditions set out in the rule are met) and contends that, notwithstanding the wording of section 66 of TULRCA, the Claimant would have been able to argue that the 27 individuals could have been substituted by the LSE branch of the Respondent had EJ Connolly not decided that such a branch was not a trade union for the purposes of the Act. Emphasis is placed on this being a wide case management power and the rule referring expressly to 'any person'. The Claimant relies on the observations made by the EAT about the question of 'trade union' when it determined there were no reasonable grounds to pursue the 27 individuals. The Claimant says that his claim was not against these individuals personally and he has not argued that these individuals could be Respondents in their personal capacity (although that is the effect of bringing a claim against an individual).
c. The Claimant's position is that, in addition to the Respondent, he should be permitted to pursue the claim against its LSE branch and that he was and is seeking to pursue his claim against the branch rather than the individuals personally ("the Branch argument"). This question is said to be outside the scope of the deposit order made by EJ Snelson.
d. The Claimant says that, on its sift of his appeal, he believes that the EAT has found that EJ Connolly made an error of law in finding that the LSE branch was not a trade union (because it was not listed by the certification officer) for the purposes of TULRCA. He should be able to pursue the branch and Rule 34 is engaged but has not been adjudicated upon.

23. By an email to the solicitor acting for the Respondent and the 26R dated 11th April 2023, the Claimant wrote:

> "*I have sent the deposit in the post although I will not be pursuing the purely legal argument whether the individuals can incur personal liability under S.66(1) TULRCA 1992…I will be pursuing the argument that it is in the interests of justice that the individual respondents be added/retained as parties…under Rule 34 of the ET Rules of Procedure* (sic)"

24. The Claimant attached to his submissions his skeleton argument used at the preliminary hearing before EJ Connolly which shows that the Branch argument was raised. The Claimant also argued (albeit by reference to it as an alternative argument) that the 27 individuals should be retained as parties because it was in the interests of justice to do so. He argued that they '*self-selected themselves when they instituted disciplinary proceedings against the claimant'* (paragraph 15 of the skeleton argument).

25. The order sought at the conclusion of the skeleton argument (paragraph 23) is that the 27 individual Respondents are retained as parties to the claim.

26. By their reply dated 8th September 2023, the 26R say:

    a. The assertion that the Claimant has in some way succeeded on his argument giving rise to the deposit order is fanciful and misconceived. The claims against the 27 individuals were dismissed and the appeal has no reasonable prospect of success at the sift stage.
    b. There is no good reason to delay determining the application.
    c. There is limited information advanced about the Claimant's ability to pay and, in any event, this should not preclude an order being made given the conduct.
    d. The costs are reasonable having regard to: fee earner seniority; the rates; the extent of the work required as a result of the Claimant's conduct; and the need for Counsel to attend the preliminary hearing before EJ Connolly.

27. The Claimant, in his final submissions on quantum, says:

    a. The Claimant joined the 27 individuals to the ACAS Early Conciliation process to try and resolve matters. The Respondent had not engaged with him, he says, to try and reach a conciliated outcome.
    b. He confirmed at the first preliminary hearing before EJ Snelson that he did not seek compensation and only a declaration. Since any such declaration would act as a judgment on the actions of the 27 Respondents, they should be involved in the proceedings.
    c. At the time of the hearing before EJ Snelson, the Claimant did not know that a branch could be considered a trade union and he was unaware of Rule 34.
    d. The Claimant changed his approach and wished to pursue the Branch argument following further research. He says that there was no need to argue the point on jurisdiction before EJ Connolly at length because of the case management power under Rule 34. The Claimant contends that it was unreasonable for the 26R to incur the costs to engage counsel for the

hearing "*to still argue a point that was no longer being advanced by the Claimant*".

e. Further points are set out in the Claimant's submissions about joining the branch as a party to the claim. The Claimant maintains that the 26R approached the preliminary hearing before EJ Connolly on the footing that the 27 individuals could not be liable as a matter of law whereas there was no real focus on a Rule 34 to substitute the branch.
f. As to the quantum of the costs:
    i. Much of the cost relates to the preparation of the overall case rather than the hearing before EJ Connolly on 27th April (e.g. the Grounds of Resistance).
    ii. The 26R will likely, the Claimant says, need to continue giving instructions to the Respondent's solicitor throughout (in respect of the substantive issues in the case). There is, therefore, much overlap and this should be considered in respect of the costs of the ET3.
    iii. The Respondents did not need to issue a costs warning. The Claimant contends that there was 'no effort' by the Respondents to engage.
    iv. The costs of emails/discussion concerning the Claimant not being permitted to pursue the claim against anyone other than the Respondent are not reasonable or proportionate because the Claimant challenges the language used in the emails, describing the correspondence as 'unduly aggressive'.
    v. The costs are disproportionate overall.
    vi. As to his ability to pay, the Claimant receives an income of £1110 per month from the LSE and fulfils his union activities on a voluntary basis.

Law

28. Rule 76 of the tribunal's Rules of Procedure provides:

> ***76.***—*(1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that—*
>
> *(a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or*
>
> *(b) any claim or response has no reasonable prospect of success;*
>
> *(c) …*

29. Rule 77 (procedure) provides:

> ***77.*** *A party may apply for a costs order or a preparation time order at any stage up to 28 days after the date on which the judgment finally determining the proceedings in respect of that party was sent to the parties. No such order may be made unless the paying party has had a reasonable opportunity to make representations (in writing or at a hearing, as the Tribunal may order) in response to the application.*

30. Rule 84 provides as follows (in respect of a party's ability to pay):

> ***84.*** *In deciding whether to make a costs, preparation time, or wasted costs order, and if so in what amount, the Tribunal may have regard to the paying party's (or, where a wasted costs order is made, the representative's) ability to pay.*

31. Rule 39(5) and (6) provide for the applicable consequences where a deposit order has been made and after a finding on the issue covered by the deposit order:

> *(5) If the Tribunal at any stage following the making of a deposit order decides the specific allegation or argument against the paying party for substantially the reasons given in the deposit order—*
>
> *(a) the paying party shall be treated as having acted unreasonably in pursuing that specific allegation or argument for the purpose of rule 76, unless the contrary is shown; and*
>
> *(b) the deposit shall be paid to the other party (or, if there is more than one, to such other party or parties as the Tribunal orders),*
>
> *otherwise the deposit shall be refunded.*
>
> *(6) If a deposit has been paid to a party under paragraph (5)(b) and a costs or preparation time order has been made against the paying party in favour of the party who received the deposit, the amount of the deposit shall count towards the settlement of that order.*

32. In determining a costs application under Rule 76(1)(a) or (b), there is a two-stage test. Firstly, I must consider whether the statutory threshold is made out (under Rule 76(1)(a) or (b)). If I decide that it is, I must go on to exercise my discretion, having regard to all the circumstances, as to whether or not to make a costs order. Where the tribunal finds unreasonable conduct, it does not automatically follow that an order should be made. If an order is to be made, I must then go on to determine the amount (see Ayoola v St Christopher's Fellowship, UKEAT/0508/13/BA, 6th June 2014, unreported, per HHJ Eady QC (as she then was)).

33. In Salinas v Bar Stearns International Holdings Inc and another [2005] ICR 1117, Burton J observed, at paragraph 22.3, that: "*This is ordinarily a costs-free jurisdiction and something special or exceptional is required before a costs order will be made, in whole or in part, and even if the necessary requirements…are established, there would still remain a discretion*".

34. Where a deposit order has been made, there should not be a 'fine tooth comb approach' to a comparison between the reasons for the deposit order and the reasons for the finding against the paying party (Dorney and ors v Chippenham College, EAT 10/97).

35. Even where the Claimant is treated as having acted unreasonably by operation of Rule 39(5), it does not follow that a costs order will be made. The tribunal must exercise its discretion as to whether to make an order in the circumstances.

36. When considering the question of unreasonable conduct, the tribunal should take into account the '*nature, gravity and effect'* of a party's unreasonable conduct

(McPherson v BNP Paribas (London Branch) [2004] ICR 1398, CA), but this does not mean that the tribunal should separate the circumstances into 'sections' to carry out a separate analysis (Yerrakalva v Barnsley Metropolitan Borough Council and another [2012] ICR 420, CA). The tribunal must keep sight of the totality of the circumstances.

37. The fundamental principle of a costs award, if made, is to compensate the party in whose favour the order is made. It is not punitive. However, the tribunal is not required to establish a direct causal link between any unreasonable conduct found and the costs incurred by the conduct (see Yerrakalva). Where the tribunal exercises its discretion to make a costs order, it does not need to carry out a detailed or minute assessment but, instead, adopt a broad-brush approach against the background of the relevant circumstances (Sud v Ealing LBC [2013] ICR D39, per Fulford LJ).

38. The tribunal can take into account ability to pay on the question of whether to make a costs order and also, if appropriate, on the amount.

Discussion and conclusions on the application

Preliminary matters

39. I have considered the fact that I did not decide the issues at the preliminary hearing on 27th April 2023 and those findings are relevant to this application both in terms of Rule 39(5) and more generally. EJ Connolly did not reserve the question of costs to himself and instead listed a case management hearing to include consideration of the 'next steps' in respect of the deposit order and any other applications. It follows that the next hearing judge was to consider the deposit and any costs application by the 26R. In the circumstances, I do not consider that it is or was open to me (absent a material change of circumstances) to vary that order so that EJ Connolly would hear the costs application. Neither party contended that I should do so in any event. Had time permitted, the application would have been determined at the July hearing and the parties consented to a paper determination thereafter for the reasons explained above. In any event, I consider that I have been provided with all the information I need to be able to fairly dispose of the application as I have the written reasons for EJ Connolly's decision and detailed written submissions from the parties.

40. I have also considered whether this application should be deferred, as requested by the Claimant, until all routes of appeal to the EAT have been exhausted (that is the effect of the request given that the Claimant has indicated an intention to seek a hearing in the EAT under Rule 3(10) of its procedure rules). I am entirely satisfied that this application should be decided now. The Claimant's appeal has been rejected on sift. That is an appeal against the judgment of EJ Connolly which dismissed the claims against the 27 individuals. It is not in accordance with the overriding objective to delay this application and invite the parties to make further submissions, requiring further time and cost, in several months' time. It is apparent that the Claimant may seek to argue that the LSE branch should be joined (or should have been substituted) either by his request under Rule 3(10) of the EAT's rules or by application to the tribunal. It is exceptionally difficult to see how such a course could lead to the individuals removed as parties by EJ Connolly's judgment returning to the proceedings as individual Respondents. The parties have both

been able to provide detailed submissions in respect of the application. I have taken all of those matters into account and, in so doing, I do not consider that there is any good reason to delay a decision on this application.

Deposit order

41. Before considering the statutory thresholds under Rule 76(1)(a) and (b), I have first considered the effect of the deposit order under Rule 39(5). The question is whether EJ Connolly's judgment dismissing the claims against the 27 individuals was for substantially the reasons given in the deposit order made by EJ Snelson. In my judgment, EJ Connolly's decision was for substantially the reasons given in the deposit order because:

    a. The issue giving rise to the deposit order was that the claims were brought against the 27 individuals (in addition to the Respondent) and section 66 of TULRCA limited the jurisdiction to hear a complaint of unjustifiable discipline to one brought against *the union*.
    b. EJ Snelson recorded that the Claimant, persistently but politely, maintained that references to representatives with the statutory framework could mean that the individuals could constitute the union within the definition of a trade union in section 1 of TULRCA (and therefore for the purposes of a complaint under section 66). It was recorded that the Claimant made reference to the difficulties with obtaining disclosure if these 27 were not parties.
    c. EJ Snelson made the deposit order because there was little reasonable prospect of the claims against the 27 individuals being within the jurisdiction of the tribunal in ss64-67 TULRCA.
    d. EJ Connolly agreed with EJ Snelson's interpretation of section 66 of TULRCA: the claim could only be brought against the Respondent (the Union). The judge dismissed the argument advanced by the Claimant that the individuals could be construed collectively as a union for the purposes of section 1. The weakness in this argument formed part of the reasons for the deposit order.
    e. The judge dismissed the argument that the branch could amount to a trade union for the purposes of section 1. This argument was advanced by the Claimant at the April hearing but was not a stated reason for the deposit order. It is apparent from the written reasons that the Branch argument and the individuals constituting a union for the purposes of the Act were alternative points to the Claimant's primary argument that claims against representatives or members should be permitted under the legislation.
    f. The judgment also addressed the Claimant's concerns which were raised, broadly, before EJ Snelson regarding matters such as disclosure and the knowledge and involvement of the 27 individuals within the LSE branch rather than the wider union (the Respondent). These matters did not give rise to any different conclusion on the matter of jurisdiction than what was foreseen by EJ Snelson in concluding that the claim against the 27 had little reasonable prospect of success.
    g. The Claimant has, in his written submissions, contended that his argument at the April hearing moved away from the deposit order. It is evident that he did then develop the Branch argument (although not exclusively, as above). However, whether he argued that a branch or individuals should respond to the claim, the lack of jurisdiction was consistent throughout.

h. Notwithstanding the fact that the Branch argument was developed after the deposit order and the issues considered by EJ Connolly were therefore broader, the judge was still being asked to decide whether the tribunal had jurisdiction to hear claims against the 27. The decision that it did not was, as a result, for substantially the reasons given in the deposit order because, however advanced, TULRCA does not provide for the complaint to be brought against individuals.

i. In my judgment, there is little, if anything, in the distinction (made in the Claimant's written submissions) between individuals as Respondents having personal liability for any findings against them and individuals as Respondents to the claim for other reasons (e.g. because there are issues between those individuals and the Claimant for the purposes of Rule 34). The Respondents can only be parties if the issues to be tried fall within the jurisdiction of the tribunal (see Rule 34). EJ Snelson considered that the claims against the individuals lacked that jurisdiction and made the deposit order and ordered the preliminary hearing. EJ Connolly then agreed there was no such jurisdiction and dismissed those claims. Whether the Claimant wished to enforce a monetary remedy against a party or not does not go to the important issue of jurisdiction which was at the centre of the deposit order and the tribunal's subsequent judgment.

42. It follows that Rule 39(5) is engaged and the Claimant shall be treated as having acted unreasonably in pursuing his claim against the 27 individual Respondents after the deposit order was made.

Unreasonable conduct

43. In any event, even if I had decided that EJ Connolly's judgment was not for substantially the reasons in the deposit order, I conclude that the pursuit of the claims against the 27 individuals after the hearing on 16th March 2023 amounts to unreasonable conduct for the purposes of Rule 76(1)(a). In addition to the reasons set out at paragraph 41 above, the Claimant was given a clear warning that the legislation clothed the tribunal only with jurisdiction to hear complaints against *the union.* EJ Snelson recorded that he explored the issue with the Claimant during the hearing and drew attention to the specific language of sections 64, 66 and 67. He also made the point to the Claimant that, had Parliament intended to make it possible for such liability to fall on individual members or officers one would have expected that intention to be provided for. This was in circumstances where the issues had already been brought to the Claimant's attention by a letter dated 23rd November 2022 (from the Respondent and the 26R's solicitor) and by the Grounds of Resistance.

44. The Claimant knew that the judge had decided to list a hearing to decide this point and then gave reasons for making a deposit order on the ground that the point had little reasonable prospect of success. It was, of course, a decision for the Claimant to make as to whether to persist with the point, but I am satisfied that he had been given ample warning that the Respondent's costs would be increased by the further preliminary hearing (in terms of preparation, the instruction of counsel and a skeleton argument).

45. The Claimant has consistently taken a thorough and diligent approach to this case, preparing detailed written submissions and carrying out research where necessary. As such, with the position as it was after 16th March 2023, I conclude that the gravity and effect of his decision to persist with any contention that the individuals should remain as parties (which is the order he sought at the end of his skeleton argument for the April hearing), in the knowledge that EJ Snelson had reviewed his claim against the Respondent (the Union) with a view to that claim proceeding to final hearing for a declaratory remedy, was unreasonable.

Other grounds

46. Whilst the lack of prospects of success are relevant to my overall judgment both as to unreasonable conduct and, when considering all the circumstances, whether or not to make an order on this application, I consider that it is unnecessary to consider whether the threshold under Rule 76(1)(b) is made out. The claims were not struck out as having no reasonable prospects of success. A deposit order was made and the matter was then determined as a preliminary issue and, for the reasons set out above, the unreasonable conduct gateway is engaged.

47. It is also unnecessary for me to consider whether the conduct is also vexatious under Rule 76(1)(a). The pursuit of the claims after 16th March 2023 is best characterised as being unreasonable in light of the information given to the Claimant about the law and the deposit order made by EJ Snelson.

Deposit order consequence

48. It follows that, by operation of Rule 39(5), the deposit of £200 paid by the Claimant pursuant to the deposit order shall be paid to the 26R. As there is more than one Respondent, it is a matter for the tribunal as to whom the deposit is to be paid. Given that the 27th individual Respondent did not participate in either the 16th March or 27th April hearings (or the proceedings more generally), the costs associated with claims against the individuals have been borne by the 26R.

49. The payment of the deposit is subject to Rule 39(6) and the decision on costs below.

Whether to make a costs order

50. I must exercise my discretion to decide, notwithstanding that I have found unreasonable conduct (and by virtue of Rule 39(5)), whether to make a costs order. In the circumstances of this case, I have decided that I should make an order for the following reasons:

    a. The Claimant was aware from the 16th March 2023 hearing that the pursuit of his claims against the 27 individuals had little reasonable prospects of success. The issue is simply whether the tribunal has jurisdiction, and it was plain from the judge's reasons for making the deposit order that "*it does not serve the interests of justice to permit what appear to be thoroughly weak arguments to be taken to a full (and probably costly and time-consuming) determination – at least without the originator of those arguments being given the opportunity to reflect on the wisdom of pursuing them*". As above, the jurisdiction for complaints concerning ss64-67 of TULRCA were explored with the Claimant at that hearing. A deposit order

having been made, the Claimant had to decide how to proceed and decided to press on with the argument, developing the argument further but maintaining throughout that the individuals needed to remain as parties. The 26R's solicitor, after the deposit order had been made but before it was paid, made clear in an email to the Claimant (dated 21st March 2023 at 11.38am):

> *Again, I am afraid you're misunderstanding how the issue of jurisdiction applies…There needs to be a basis in law for a claim to be pursued against a party…*
> *…If you wait until after 11 April you will have already paid the deposit and if you then wait until skeleton arguments, the Respondents will have incurred significant costs which they will seek from you even if you at that stage decide to abandon your argument. As I said, you have a decent opportunity now to cease pursuit of an unreasonable point and so avoid costs being awarded against you*…

b. I take into account that the Claimant is a litigant in person and this was correspondence from the solicitor on the other side of the case. However, the point was made reasonably within the context of what had been said at the 16th March 2023 hearing which was consistent with previous correspondence. In my judgment, the Claimant had more than one warning and was fully aware that the legislation did not provide for individuals to be answerable to a complaint within ss64-67 of TULRCA. Such conduct inevitably caused unnecessary costs to the 26R which they had to incur in order for the point to be resolved.

c. The Claimant, whilst acting without legal representation, is a litigant who has prepared his case diligently and carefully. His detailed submissions demonstrate that he has read the tribunal's documents as sent to him. The fact he did not have legal advice at these stages of the case is less important than it might otherwise be in these circumstances.

d. Whilst the Claimant pursued the Branch argument before EJ Connolly, the tribunal was still asked to retain the individuals as parties (despite it being necessary, as explained, that there was jurisdiction to determine the issues the Claimant says existed between himself and the individuals).

e. The hearing on 27th April 2023 was ordered to resolve the issue which was subject to the deposit order (either as a preliminary issue or by considering whether to strike the claims out). Had the Claimant decided not to pay the deposit and pursue the point, the hearing could have been used only for further and final case management. Whilst it could be said that the hearing was therefore needed in any event, a case management hearing would not require the same amount of preparation, any instruction of counsel would be on an entirely different footing (i.e. for case management rather than a contested preliminary hearing in public) and skeleton arguments would not have likely been required. In the event, a further case management hearing was required on 28th July 2023 as a result of EJ Connolly's judgment and his orders meaning that the entire hearing on 27th April 2023 was used for

the purposes of the jurisdictional argument. This has caused avoidable costs in the circumstances.

f. The Claimant is of relatively limited means and his union work is voluntary. Notwithstanding, he paid the deposit order to pursue the point. I consider that I can fairly take his ability to pay into account when determining the amount, but this does not, in my judgment, offer a sufficient reason not to make an order in light of the other factors set out above.

51. In the circumstances and for the above reasons, I conclude that the tribunal should make a costs order in favour of the 26R for the period after the 16th March 2023 hearing up to and including the hearing on 27th April 2023 when the jurisdictional issue was decided. This period represents the time when the Claimant knew of the little reasonable prospects of success but, nevertheless, persisted with the claims up to the hearing on 27th April which was a hearing exclusively concerned with this issue.

Quantum of the costs order

52. I remind myself that costs are compensatory and the tribunal should consider what costs have been caused to the receiving party in the relevant period. The costs must be limited to those reasonably and necessarily incurred.

53. The tribunal may have regard to the Claimant's ability to pay. The Claimant has limited income although I have no other information as to the Claimant's expenditure or whether he owns any assets such as a property. In the circumstances, I do take into account the Claimant's limited income means in assessing costs and have regard to the fact that he will likely have limited disposable income from which to pay any costs order. Affordability is not a factor which must, by itself, necessarily limit an order and the information available is such that an assessment of future earning capacity is unrealistic. However, I have had regard to income when assessing a reasonable and proportionate amount of costs for the Claimant to pay. It may be that the Claimant needs to pay the costs in instalments. That is something which might be agreed by the parties or it may be a matter to be considered by the county court if the order is enforced.

54. The period in respect of which a costs order will be made is identified on the 26R's costs schedule and totals £6,580 plus VAT. This includes a brief fee for counsel, Mr Brown, of £3,000 plus VAT. His fees for attending a 3-hour contested hearing (having regard to his seniority – over 20 years call) is reasonable overall. A jurisdictional question is a preliminary issue which reasonably engages the use of counsel in these circumstances. However, the issue in this case was such that less experienced counsel could reasonably have been instructed at a lower rate given the nature of the argument.

55. The fees for the 26R's solicitor for the relevant period are high. These include attendance at the preliminary hearing. Whilst the 26R are free to instruct their solicitor to attend, they were represented by experienced counsel and it is disproportionate to allow the costs for both lawyers for the hearing. The rate for a Grade A is reasonable but a total of 17.9 hours is excessive in the circumstances.

The work reasonably incurred for this period is the correspondence, instructing counsel and preparation for the 27th April hearing in the form of the bundle.

56. Overall, having regard to the Claimant's income but taking into account the considerations above, I consider that a reasonable and proportionate amount to order the Claimant to pay in respect of costs for the relevant period which were caused by the unreasonable conduct is the sum of £3,000 inclusive of VAT.

57. It follows that, in accordance with Rule 39(6), the £200 deposit paid shall be paid to the 26R and the 26R shall give credit in that amount towards the £3,000 costs order. The Claimant must pay the balance of £2,800.

Employment Judge Nicklin

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Date: **13th November 2023**

JUDGMENT & REASONS SENT TO THE PARTIES ON

14/11/2023

FOR THE TRIBUNAL OFFICE