EMPLOYMENT TRIBUNALS

Claimants: Mr C Rees
Ms R Alamwala
Mr R Nathwani
Ms I Ahmed
Mrs M Birdi

Respondent: Brunel University London
Heard at: Watford by CVP video
On: 7 & 8 March 2024
Before: Employment Judge R Lewis

Appearances
For the claimants: In person, led by Mr Rees
For the respondent: Mr R Dennis, counsel

JUDGMENT having been sent to the parties on 12 March 2024 and reasons having been requested by the respondent in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

1. This was the hearing which I had directed in my Order of 6 November 2023. These Reasons should be read in conjunction with my Orders of June 2023 and November 2023, and with the case management order made separately after this hearing. The hearing proceeded in public, fully by video.

2. As set out in the case management order sent separately after this hearing, I dealt on the first day with the applications to amend and strike out, and gave judgment on the second morning, after which I dealt with a number of practical matters. The list of issues attached to the case management order is that which was finalised after amendment and strike out had been dealt with.

3. I preface these reasons with preliminary observations. The tribunal is very familiar with the difficulties encountered by litigants in person. It must do what it reasonably can to place parties on an equal footing, and that is a challenging task where one side is represented and the other is not. That said, I was during and after this hearing concerned that the claimants continued to struggle with points to which I had drawn their attention at previous hearings and in my earlier orders.

4. As I told the parties, there will now be a break in the continuity of case management which these cases have had to date. With that in mind, I

record the following points:-

4.1 The claimants continued to struggle with observing the distinction between matters of workplace grievance about which they have strong feelings, and points of legal claim. I repeat that the tribunal's role is to decide only the latter.

4.2 In the "Clarification" section of my order of June 2023 I summarised the information which needs to be given about a claim, and I pointed out the need to avoid generalised language. The claimants have struggled with this, and I was disappointed to note that in their most recent ET1s (February 2024) they seem not to have observed the discipline which I described.

4.3 I was struck a number of times during this hearing by the failure of thoughtful analysis on the claimants' part. The discussion at this hearing about Heading 2 is one illustration. That was not the only occasion when Mr Rees or Ms Ahmed appeared to reply opportunistically to difficulties in their claims by simply shifting their ground (see for example paragraphs 9 and 36 below).

4.4 I repeat that in a discrimination claim it is not sufficient to prove the existence of a protected characteristic and/or act, and of some detriment or negative event at work; it is necessary to prove some causal connection between the two, which goes beyond bare assertion or the perception of the individual.

4.5 The claimants have repeatedly taken chronology for causation. When asked how a particular detriment related to a protected act, Mr Rees answered on a number of occasions that one came after the other. Chronology is necessary for causation, but is not sufficient to prove it.

4.6 Where I have had to consider amendment, I have considered whether the proposal is a re-casting of the claim or a re-labelling of a claim which has been presented; the nature and scope of the amendment, the manner and timing in which it has been applied for, and the balance of prejudice: would there be greater prejudice to the claimant if the amendment is refused or to the respondent if it is granted (apart from pure litigation prejudice).

4.7 When I have considered strike out, I have done so within the purview of rule 37, and considered whether it can truly be said that a claim, taken at its highest as written and explained, has no reasonable prospect of success. Mr Dennis' skeleton argument referred to the authorities, and reminded me that although the test for strike out is high, it is not insurmountable.

4.8 In striking out any claim or part of claim, I have made no decision as to whether the particular facts may form part of the relevant background evidence at the final hearing. It seems to me that that would depend on how the points are presented in the evidence, and that any decision would then be a matter for the tribunal.

4.9 During the hearing, and in giving judgment, I proceeded with reference to the 14 headings of claim set out in my order of 6 November. In reply to paragraphs 9 and 11 of the orders, the claimants had informed the respondent that they had no further amendment application to make, although they did not adhere to that discipline at this hearing.

Heading 1

5. In November, I directed the claimants to show cause why this claim should not be struck out. The four claimants, apart from Ms Ahmed, did not show any cause in reply, and their claim is therefore struck out on the basis that it has no reasonable prospect of success because it is a complaint about a workplace pay system unrelated to a protected characteristic.

6. Ms Ahmed's attempt to show cause turned out, on analysis, to be a complaint, covered separately in these proceedings, that her alleged "demotion" was an act of religious discrimination, which led to her being paid at a lower rate than that to which she was entitled. That is a different point, and I consider that Ms Ahmed has likewise not shown cause and that her claim falls to be struck out for the same reason. I have explained to Ms Ahmed that her complaint about a fall in pay from Band 3 to Band 2 is properly a claim for remedy arising out of the demotion allegation.

Heading 2

7. This point perhaps shows failure of analysis on the part of the claimants.

8. As was within their knowledge, and confirmed during their grievance investigation (470) the failure to conduct a HERA review after 2021 on its facts created two problems for the claimants. One was that it applied to the entire team of nine of which they were members, thereby suggesting that there was a team management reason which applied to all team members and not just to those who had put in grievances. That in turn suggests that the reason for the failure was not related to the grievance; and secondly and more importantly, it showed that the failure pre-dated the grievance of May 2022.

9. Opportunistically in reply, Mr Rees argued that the claim should be re-framed to say that the grievance outcome, sent on 1 November 2022, recommended that the HERA review process be undertaken then, which the respondent had not done. However, as the relevant ET1s were presented on 8 December 2022, that complaint, if pleaded, could only cover that period of time. (Mr Dennis replied that although the grievance report was sent out on 1 November, the grievance process did not conclude until January 2023, so that that point was misconceived in any event). This point was not in any ET1, and therefore required amendment. The claimants had not applied to make the amendment, and indeed had written that they had no further application to amend to make.

10. That application to amend seemed to me a re-casting of the claim, by turning it into a complaint that the respondent failed to undertake a review within five weeks of distribution of the report which said that it should do so. However, the application to amend was made opportunistically to get round

the logical and chronological difficulties which the claimants had plainly not seen, although they were not difficult to identify or work out.

11. It seemed to me that the prejudice to the respondent, of allowing the claimants to amend in this manner at this time outweighed any prejudice to the claimants of disallowing the amendment.

12. The claim is struck out under rule 37 to the extent that it pre-dates events before 1 November 2022 because of the logical and chronological difficulties set out above. The application to amend to include the events of 1 November 2022 and subsequently is refused, and accordingly heading 2 falls away from the case.

Heading 3

13. Mr Rees confirmed that this claim, namely that the restructure was pursued as an act of victimisation, because of Ms Ahmed's grievance of 2019, is pursued by all claimants. I expressed scepticism that the claimants, other than Ms Ahmed, had a right in law to pursue what seemed to me a claim of victimisation by association, namely that as Ms Ahmed had done a protected act, and they were members of her team, they had the protection of s.27, contrary to the plain wording of the statute, which refers in terms to a protected act of B.

14. Mr Dennis referred me to a Judgment of the EAT (HHJ Richardson) in Thompson v London Central Bus [2016] IRLR 9. In that case a first preliminary hearing decided,

> "A Preliminary Hearing was convened on 8 April 2014 to see whether a claim of victimisation "on an associative basis" could be sustained. By her Judgment dated 14 May 2014, Employment Judge Spencer decided in the Claimant's favour that his claim of victimisation could rely on the acts of others. She held that section 27(1)(a) has to be read as providing simply "because of a protected act" in order to ensure compliance with EU obligations. There has been no appeal against that Judgment."

15. When the case came before the EAT on appeal against a second preliminary point, it proceeded on the footing that the above point was not before it. As Mr Dennis pointed out, the interpretation set out above is that of the tribunal, and is not authority from a higher level. I have not read the ET Judgment, and need not for today decide the point myself. I need only express my scepticism that I might have authority today to over ride the clear language of the Act. That is a point of principle, separate from the probative and evidential difficulties which are inherent in a case where a claimant X seeks to argue that Y has done something detrimental towards X because of something said or done by a third person, Z.

16. I had raised the suggestion on this Heading that the restructure affected both the group containing the claimants, and their colleagues within the wider function. Mr Rees challenged this, saying that the work of other colleagues was not affected. That did not seem to me reconcilable with Ms Ahmed's submission, which was that parts of her job had been taken from her, and allocated to others. If Ms Ahmed was factually correct, then it seemed to me obvious that the restructure affected colleagues who were given more work, as much as it did claimant(s) who felt that they were

losing work.

17. More to the point, the claimants' case is that in 2021/2022 the respondent restructured the work of between nine and a maximum of 90 staff as an act of victimisation because one of the group of 90, Ms Ahmed, had done a protected act.

18. That seemed to me inherently implausible. The logic of the claim was that management undertook a considerable amount of unnecessary management work, potentially disrupting the functional work of a large number of people unnecessarily, and for an improper motive. I have approached this point on a common sense and lived experience understanding, which is that organisations and their managers do not pick out conflicts when they can be avoided, and do not create unnecessary work and burdens for themselves.

19. I strike this claim out under rule 37 because it seems to me so inherently implausible and therefore so unlikely to be proved, that it seems to me to have no reasonable prospect of success.

Heading 4

20. This heading proceeds. The respondent reserves its right to argue that the claim is out of time. It is a claim of all claimants.

Heading 5

21. My order of November was in part factually incorrect, and after some muddle I understood that the complaint in fact related to three remarks.

22. As to the first remark, it is common ground that on 23 September 2021 Mr Jones referred to "aging staff." All claimants have brought a claim of direct discrimination, or age-related harassment, the spread of their ages notwithstanding. That claim proceeds.

23. The second matter was a remark referring to "those who came back." Having heard the discussion, I understand that Ms Ahmed relies upon that phrase as evidence that she was referred to in the first phrase, but not as a stand-alone claim of age discrimination. If it were a stand-alone claim of age discrimination I would strike it out on the grounds that the words in their ordinary and natural meaning cannot reasonably or objectively be interpreted as relating to the protected characteristic of age. Ms Ahmed is of course at liberty to refer to in evidence, and it will be a matter for the tribunal to give it such weight as it thinks fit.

24. The third point under Heading 5 is that in an email of July 2022 (not in the bundle) Mr Jones referred to his 30 years' experience. The claimants assert that by doing so he referred to their range of ages (36 to 57) and discriminated against each of them on grounds of age or harassed them related to age.

25. I strike out that claim as a claim of harassment because on an objective reading, giving Mr Jones' words their ordinary and natural meaning, I do not accept that any claimant has any reasonable prospect of showing that the

remark had the purpose or effect of causing a hostile environment or that it was reasonable to interpret it as doing so. The remark is a remark about Mr Jones, not about anyone else; it is factual, and no one today challenged its factual accuracy. It is a way of saying perhaps "I have a lot of experience and I know what I am doing." It may also imply an assertion of managerial authority; as Mr Jones was the claimants' line manager, he was entitled to remind them and the respondent of his authority, provided that he did so in an appropriate context and in professional language.

26. I find that there is no reasonable prospect of the same words being shown to constitute less favourable treatment of the claimants than any comparator, because the remark is no more than an accurate general statement of fact. I therefore strike it out as a claim of direct discrimination.

Heading 6

27. After some investigation at this hearing, I was told that the Brunel Help IT system was rolled out in March 2022, proved inadequate, and was abandoned after about six months. The claimants claimed that their team had incomplete access to it when it was rolled out, and that this was victimisation of all of them for Ms Ahmed's grievance of 2019.

28. Mr Dennis submitted that this claim required amendment. It appeared in the ET1 at 22, but appeared there to be a claim of Ms Ahmed only, not a claim of the entire team, a matter which would require amendment.

29. However, it faced the same difficulties as Heading 3. It was a matter of system, affecting many people, and the allegation that all nine of the team were given inadequate access to the system because of a grievance submitted by Ms Ahmed three years previously was, in Mr Dennis' submission, inherently implausible. For broadly the same reasons given at paragraphs 15-19 above, I agree, and the claim is struck out in relation to all claimants as it has no reasonable prospect of success. I simply cannot accept that the claimants will be able to show that the wide roll out of a new IT system was applied differently to a group of workers because of an individual event three years previously.

Heading 7

30. It was confirmed that this claim is fully withdrawn and accordingly is dismissed.

Heading 8

31. This claim was based on remarks made by Mr Bent during a grievance interview, which the claimants first saw when sent the grievance outcome and report on 1 November 2022.

32. It is important to note that in considering this allegation, I am in exactly the same position as the claimants, namely that I only have the respondent's paper record of the interview in which the remarks were made.

33. At page 448, lines 25 to 36, I have read the relevant passage in context and in its entirety. In its entirety it is a statement about how to manage an

employee returning from sickness absence. It presents as humane, responsible and empathetic. On paper the words "illnesses don't disappear," which the claimants have focussed on as objectionable, present as a reminder to managers that an employee who returns to work from sick leave should not be assumed to have fully recovered, and should be managed sensitively.

34. The claimant sought to attach to this passage discrimination on a number of protected characteristics. The remark fell far outside the protected period for Ms Ahmed's pregnancy in 2019, and therefore cannot constitute pregnancy related discrimination. I do not accept that there is a claim for disability discrimination based on what Ms Ahmed described as the perceived disability of pregnancy. Pregnancy cannot bring itself within the statutory definition of an impairment that has lasted at least 12 months or is likely to do so. The argument that Mr Bent perceived the claimant as disabled appears to me based on bare assertion only, and is unsustainable on an objective reading of the words in question, if given their ordinary and natural meaning.

35. On that approach, ie a fair and objective reading, and giving the words their ordinary and natural meaning, they are incapable of carrying the interpretation attached to them by the claimants and therefore this claim has no reasonable prospect of success.

36. At this hearing, and for the first time, Ms Ahmed sought to shift the ground of this head of claim. This was an opportunistic response to my questions in discussion about the point. She said that the interview note did not accurately record what Mr Bent had actually said to her at the time, and I understood her to seek to shift this claim away from the written record to the primary event of the conversation. That would indeed be a substantial recasting, made opportunistically and without notice to the respondent, putting the respondent to the undoubted prejudice of litigating a conversation some years in the past. Permission to amend was refused, and any claim relating to that phrase is struck out.

Heading 9

37. I record the correction of paragraph 59 of my order of November. There were two remarks. It was Mr Fuller who made the remark about "reining her in" (454 to 455) and Mr Bent who made the remark about "how do I manage" (450 lines 107 to 115).

38. I have read both passages in context and given them their ordinary and natural meaning. Mr Fuller's remark follows a long passage in which Ms Manzatucci sets out her many difficulties in working with Ms Ahmed, and her attempts to persuade Ms Ahmed to accept organisational change. It is Mr Fuller's comment on how the claimant was line managed. I do not accept that the phrase "reining in" is in any way whatsoever related to gender. It is simply a metaphor drawn from the world of horses.

39. Mr Bent's remark is, in context, part of a thoughtful discussion about managing the claimant, and about the difficulties which Ms Ahmed appeared to experience, and which Mr Bent perceived in her.

40. In my judgment, neither remark is capable of bearing the interpretation placed on them by any claimant, which relates them to any protected characteristic or act, and the claim is struck out in accordance with rule 37, as having no reasonable prospect of success.

Heading 10

41. Heading 10 proceeds as set out in my November order.

Heading 11

42. Ms Ahmed confirmed that she does not pursue a claim about her alleged demotion as a claim of race discrimination but only as a claim of discrimination on grounds of religion; she is a Muslim.

43. I accept that this claim proceeds. The nature of the defence is clear and straightforward: Ms Ahmed was acting up, and her acting up assignment came to an end. I add the comment that in a large public service organisation I would expect the respondent's case to have been well documented at the time, both at the start and end of the acting up period or task.

44. I record also that the respondent reserves its right to argue that it is not just and equitable to extend time for this claim to be heard, as on its face it appears to be significantly out of time.

Heading 12

45. It turned out that the summary in my November order was incomplete. It appeared to be close to common ground that in about April 2019, and in good time before the start of Ramadan, Ms Ahmed asked Ms Lucas-Levett for permission to leave at 4pm throughout Ramadan; Ms Ahmed says that Ms Lucas-Levett refused outright, but the respondent says that Ms Lucas-Levett gave permission for her to leave at 4pm on one day a week.

46. It is agreed that Ms Ahmed then took the matter to a more senior manager, Ms Godsell, who agreed that she could leave at 4pm every day through Ramadan. The refusal of early leaving therefore was never implemented (although I commented to Mr Dennis that that might be relevant only to compensation, not liability.)

47. It was common ground that this event is not pleaded in any ET1. Leave to amend is required. I found this point to be the most difficult single decision in the day's work. I agree that this is a recasting of part of the claim, and I agree that Ms Lucas-Levett's resignation in May 2020 creates a difficulty for the respondent which is relevant to the balance of prejudice.

48. I accept that management of staff who wish to observe Ramadan may be a sensitive issue. While that comment may lead to criticism of Ms Lucas-Levett, it is also surprising that Ms Ahmed did not raise an issue of such importance for such a long time.

49. However, it seems to me that the sensitivity and importance of the issue are important considerations, and that the appropriate course is to allow the

amendment in principle, permitting the respondent, at the final hearing and in light of full evidence, to reserve its right to submit that it is not just and equitable to extend time to advance this claim.

Heading 13

50. It was confirmed that this claim was withdrawn on behalf of all claimants.

Heading 14

51. I have struck out this claim, on grounds of lack of jurisdiction and alternatively because it has no reasonable prospect of success.

52. The claim is that the respondent is liable for a complaint made within the GMB branch. As I understood it, GMB members from outside Ms Ahmed's team complained to the GMB after internal GMB elections in which she was elected as a workplace GMB representative. Their complaint was that Ms Ahmed was not an appropriate GMB representative for them. Their concern may in fact be another indication of my speculation that at the heart of this case lie political disputes within different teams within Student Living, but that is beside the point.

53. I do not regard the GMB members' complaint to the GMB about a GMB election as arguably arising within the course of their employment by the respondent. I am not changed in that view by the fact that the GMB is the workplace representative, or that use was made of workplace IT and email for their communications.

54. I ask whether the respondent could have interfered with or intervened in the election or had any influence on it. Obviously it could not. It would follow that it might be liable for an event in which it was powerless to change things. Could the respondent advance the statutory defence under s.109? Obviously it could not, because it could have no influence whatsoever in how its employees participate in GMB elections. Both those points seem to me to point powerfully against the claimants. The claim is struck out.

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Employment Judge R Lewis

Date: …13 March 2024…….

Judgment sent to the parties on

.....02 April 2024.....

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For the Tribunal office

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