EMPLOYMENT TRIBUNALS

Claimant: Ms A de Jesus Pereira

Respondent 1: Reply Limited

Respondent 2: Salt Recruitment Limited

JUDGMENT WITH REASONS

(STRIKE OUT APPLICATIONS)

1. **The claim against the First Respondent (R1) is struck out under Employment Tribunal Rule 37(1)(a) because it has no reasonable prospect of success.**

2. **The claim against the Second Respondent (R2) is struck out under Employment Tribunal Rule 37(1)(a) because it has no reasonable prospect of success**.

BACKGROUND

3. This judgment is made on the papers (with the agreement of the parties) and following appearances of the parties at Preliminary Hearing which I conducted on 22 March 2024 ("**the March PH**") before the Claimant (who represented herself), Mr D Martin KC (Counsel) for R1 and Ms J Duane (Counsel) for R2.

4. I make no findings of fact in this judgment as, whilst I was provided with written witness statements, I did not hear evidence.

5. R1 employed the Claimant as a UX / UI Designer from 17/01/2022 (the Claimant uses a start date which is for her year of birth and must therefore be an error) to 10/08/2022 (the parties agree on this date).

6. R2 is a digital recruitment agency working with clients to fill employment and sub-contractor vacancies. It is not in dispute that it was not R2 that placed the Claimant with R1.

7. The Claimant claimed other payments but accepted that these had been paid to her and so that claim was dismissed on withdrawal by EJ Joyce on 1 December 2023 at a preliminary hearing for case management (the "**December PH**").

8. The Claimant ticked the box for unfair dismissal but withdrew this claim at the March PH and it was dismissed on withdrawal.

9. At the December PH it was identified that the remainder of the Claimant's claim was for detriment due to trade union membership (para 9 of the December PH case management Orders ("**the December CMOs**")). This was subject to clarification by the Claimant which was ordered to be given by 22 December 2023.

10. At the December PH, EJ Joyce listed the claim for the March PH for the following purposes:

> *(i) R1 and R2's application for strike out and, in the alternative a deposit order (see R1's Skeleton Argument in today's PH bundle for current basis for application);*
>
> *(ii) C's application to join additional respondents as follows: BP International Limited; Sanderson Managed Services Limited; Oliver Bernard Ltd and La Fosse Associates Ltd;*
>
> *(iii) C has also filed two additional claims separately in relation to Oliver Bernard Ltd, La Fosse Associates Ltd and XCEDE. The preliminary hearing will also consider whether these claims ought to be joined to the current claim;*
>
> *(iv) Any further case management as necessary*.

11. Case Management Orders were issued for the preparation of the March PH. In particular it was ordered that:

> *(9) In light of the above, I ordered the claimant to provide the following further information/clarification to the respondent and the tribunal by 22 December 2023 in a single document of no longer than 10 pages, single spaced with font size 12:*
>
> *(i) whether or not she is maintaining a claim for unfair dismissal and if so on what exact basis;*
>
> *(ii) whether or not she is maintaining a claim for detriment due to trade union membership;*
>
> *(iii) If she is maintaining her claim for detriment due to trade union membership what (a) is the legal basis for that claim? and; (b) what are all of the detriments complained of?*
>
> *(iv) As to the detriments already referenced by the claimant, what are the bad references that were provided in relation to her? To whom were they provided, when they were provided and any copies of any such references if made in writing.*

12. At the March PH I was provided with:

12.1 R1's skeleton (together with a bundle of authorities) ("**R1Skel**")

12.2 R2's Skeleton (together with a bundle of authorities) ("**R2Skel**")

12.3 A Bundle of 575 pages (the "**Bundle**")

12.4 A witness statement of Paul Tucker dated 23 February 2024 of the First Respondent ("**PTWS**")

12.5 A witness statement from the Claimant dated 30 October 2023 ("**CWS**")

13. At the March PH the Claimant made clear that, as regards the clarification of her complaint, she relied on a document at pages 463 – 483 of the bundle which she had prepared subsequent to the preliminary hearing on 1 December 2023 (the "**C Particulars**"). She also confirmed that she had received the sources of advice information sheet from the Tribunal.

14. At the March PH the Claimant confirmed that she understood that her claim is confined to the details in her ET1 form and the document she provided pursuant to EJ Joyce's orders serves only to clarify the claims contained in the ET1. The key passages from the Claim Form which set out the claim are as follows:

> ***Against R1:***
> *As consequence of my unfair dismissal Paul Tucker, the director of the Open Reply, who manages the Vodafone client relationships and external partners, such as We love Salt provided bad references about myself because I'm member of the trade union since 2017 ("**R1 Key Passage**");*
>
> ***Against R2:***
> *We love Salt, the recruitment agency who has Open Reply as client, once I was unfairly fired automatically dismissed all my applications to their open opportunities, which are managed by Holley Potts - who confirmed by Linked In private messages that Open Reply is their client, and they have at least 3 designers placed within 'Open Reply, before she blocked me. At the same time that I was briefly discussing new opportunities with 'We love Salt' team, including Holley Potts, I was never represented at any of those, as they never sent me the right to represent email, required by the GDPR legislation, as part of being data collectors. I only notice that I'm being discriminated against on 15 May 2023, after I saw that I was blocked on Linked In by a staff member of ·we love Salt' recruitment agency - by Holley Potts ("**R2 Key Passage**").*

15. At the March PH it was apparent that the clarity that EJ Joyce had ordered be given on the nature of the Claimant's trade union detriment claim had not been achieved. The C Particulars was a densely typed document that was hard to follow. I therefore spent some time trying to achieve that clarity in discussion with the parties.

16. It became clear at the March PH that the only claim against R1 was that it was alleged that R1 had given the Claimant bad references because the Claimant

had used a Trade Union to secure payments from R1 which she said she had been owed. As I have said, Mr Tucker did not swear his evidence (nor did the Claimant) and there was no cross examination of the written witness evidence. However, Mr Tucker of R1 said in his statement said that he had never received a request for nor given any reference to anyone in relation to the Claimant and he had have never spoken to anyone outside of R1 regarding the Claimant whether on social media, such as on LinkedIn, or otherwise. In the discussion, which it was difficult to keep focused, it became clear that the Claimant did not suggest that any formal references had been given but that she alleged that Mr Tucker had gossiped about her because of her Trade Union membership. She said she did not have any direct evidence of this. She had come to this conclusion in May 2023 when, as she says in her Claim Form, she saw that she was blocked on LinkedIn by a staff member of R2 (Holley Potts).

17. At the March PH we were not able to get any further clarity on the claim in the time remaining available.

18. In light of the position we had reached at the March PH it was agreed and documented in case management orders (the "**March CMO's**") that:

    18.1 The Claimant would have until 12 April 2024 to reply to R1's and R2's skeleton arguments on strike out and deposit orders (paying attention to the out of time and ability to pay deposit order issues raised);

    18.2 The Respondents, if so advised, would have until 3 May 2024 to respond to any matters raised in the Claimant's response.

    18.3 I would then decide if I was in a position to determine the strike out and deposit order applications given the state of understanding of the claim and in light of the efforts that had been made to get clarity on the claims and on closer reading of the C Particulars;

    18.4 If I was able to decide the applications then I would do so on the papers. I note here that this was the preference of all the parties and the Claimant expressed a preference to avoid further hearings as she did not see them as a valuable use of time (a position which she has emphasised again since).

    18.5 If the claims or parts of them were to proceed following that consideration then 15 July and 16 July 2024 would be used (as I deemed necessary) for further case management of the claims – including consideration of the Claimant's applications to join additional respondents to the claim or to hear this claim with other claims ("**the Preliminary Listing**").

    18.6 If I was not able to decide the applications and I considered it necessary to hold the Preliminary Listing would be used for the purposes of seeking to particularise the claims further and then hearing any strike out or deposit order applications followed, as applicable, by the Claimant's applications for joining other parties/claims.

    18.7 If possible I would seek to make these decisions and confirm the status of the Preliminary Listing by the middle of May (in the interests of the

overriding objective and costs).

19. Following the March PH I was provided with:

19.1 Two versions of a document from the Claimant headed "CLAIMANT's SKELETON ARGUMENTS AGAIST "R1" & "R2" TO FOLLOW UP THE PRELIMINARY HEARING ON FRIDAY 22 MARCH 2024" totalling 25 pages which was submitted on 12 April 2024 (the "**C Response**"). I accepted the R1's submissions that the differences between the two versions were not material but focused on the longer of the two versions.

19.2 A number of other documents sent in by the Claimant which, whilst indexed, were not combined into a single page numbered file. I accept the R1's submission that there were around 199 of such documents and that they ran to over 1400 pages in length. These were not sufficiently clearly cross referenced in the C Response and it was not practical or proportionate for me to review them, the Claimant not having been given permission to rely on them. I restricted my review of documents to the Bundle.

19.3 R1's written submissions in reply to the C Response totalling 8 pages and to be read in conjunction with R1Skel (the "**R1 Reply**") together with a bundle of authorities totalling 67 pages and referring to **Chapman v. Simon [1994] IRLR 124, Ahuja v. Inghams [2002] ICR 1485**, **Stuart Harris Associates Ltd v. Goburdhun [2023] EAT 145**.

19.4 R2's written submissions in reply to the C Response totalling 8 pages and to be read in conjunction with R1Skel (the "**R2 Reply**").

THE LAW

Trade Union and Labour Relations (Consolidation) Act 1992 ("TULRCA")

20. Given the clarification of the nature of the claim at the December PH, it seems to me that the only potentially relevant statutory provisions are under TULRCA as follows:

137 Refusal of employment on grounds related to union membership

> *(1) It is unlawful to refuse a person employment—(a) because he is, or is not, a member of a trade union, or (b) because he is unwilling to accept a requirement—(i) to take steps to become or cease to be, or to remain or not to become, a member of a trade union, or (ii) to make payments or suffer deductions in the event of his not being a member of a trade union.*
>
> *(2) A person who is thus unlawfully refused employment has a right of complaint to an employment tribunal.*
>
> *(3) Where an advertisement is published which indicates, or might reasonably be understood as indicating—(a) that employment to which the advertisement relates is open only to a person who is, or is not, a*

member of a trade union, or (b) that any such requirement as is mentioned in subsection (1)(b) will be imposed in relation to employment to which the advertisement relates, a person who does not satisfy that condition or, as the case may be, is unwilling to accept that requirement, and who seeks and is refused employment to which the advertisement relates, shall be conclusively presumed to have been refused employment for that reason.

(4) Where there is an arrangement or practice under which employment is offered only to persons put forward or approved by a trade union, and the trade union puts forward or approves only persons who are members of the union, a person who is not a member of the union and who is refused employment in pursuance of the arrangement or practice shall be taken to have been refused employment because he is not a member of the trade union.

(5) A person shall be taken to be refused employment if he seeks employment of any description with a person and that person—(a) refuses or deliberately omits to entertain and process his application or enquiry, or (b) causes him to withdraw or cease to pursue his application or enquiry, or (c) refuses or deliberately omits to offer him employment of that description, or (d) makes him an offer of such employment the terms of which are such as no reasonable employer who wished to fill the post would offer and which is not accepted, or (e) makes him an offer of such employment but withdraws it or causes him not to accept it.

(6) Where a person is offered employment on terms which include a requirement that he is, or is not, a member of a trade union, or any such requirement as is mentioned in subsection (1)(b), and he does not accept the offer because he does not satisfy or, as the case may be, is unwilling to accept that requirement, he shall be treated as having been refused employment for that reason.

(7) Where a person may not be considered for appointment or election to an office in a trade union unless he is a member of the union, or of a particular branch or section of the union or of one of a number of particular branches or sections of the union, nothing in this section applies to anything done for the purpose of securing compliance with that condition although as holder of the office he would be employed by the union.

For this purpose an "office" means any position—(a) by virtue of which the holder is an official of the union, or (b) to which Chapter IV of Part I applies (duty to hold elections).

(8) The provisions of this section apply in relation to an employment agency acting, or purporting to act, on behalf of an employer as in relation to an employer.

138 Refusal of service of employment agency on grounds related to union membership

(1) It is unlawful for an employment agency to refuse a person any of its services—(a) because he is, or is not, a member of a trade union, or (b) because he is unwilling to accept a requirement to take steps to become or cease to be, or to remain or not to become, a member of a trade union.

(2) A person who is thus unlawfully refused any service of an employment agency has a right of complaint to an employment tribunal.

(2A) Section 12A of the Employment Tribunals Act 1996 (financial penalties) applies in relation to a complaint under this section as it applies in relation to a claim involving an employer and a worker (reading references to an employer as references to the employment agency and references to a worker as references to the complainant).

(3) Where an advertisement is published which indicates, or might reasonably be understood as indicating—(a) that any service of an employment agency is available only to a person who is, or is not, a member of a trade union, or (b) that any such requirement as is mentioned in subsection (1)(b) will be imposed in relation to a service to which the advertisement relates, a person who does not satisfy that condition or, as the case may be, is unwilling to accept that requirement, and who seeks to avail himself of and is refused that service, shall be conclusively presumed to have been refused it for that reason.

(4) A person shall be taken to be refused a service if he seeks to avail himself of it and the agency—(a) refuses or deliberately omits to make the service available to him, or (b) causes him not to avail himself of the service or to cease to avail himself of it, or (c) does not provide the same service, on the same terms, as is provided to others.

(5) Where a person is offered a service on terms which include a requirement that he is, or is not, a member of a trade union, or any such requirement as is mentioned in subsection (1)(b), and he does not accept the offer because he does not satisfy or, as the case may be, is unwilling to accept that requirement, he shall be treated as having been refused the service for that reason.

139 Time limit for proceedings

(1) An employment tribunal shall not consider a complaint under section 137 or 138 unless it is presented to the tribunal—(a) before the end of the period of three months beginning with the date of the conduct to which the complaint relates, 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) The date of the conduct to which a complaint under section 137 relates shall be taken to be—(a) in the case of an actual refusal, the date of the refusal; (b) in the case of a deliberate omission—(i) to entertain and process the complainant's application or enquiry, or (ii) to offer employment, the end of the period within which it was reasonable to expect the employer to act; (c) in the case of conduct causing the complainant to withdraw or cease to pursue his application or enquiry, the date of that conduct; (d) in a case where an offer was made but withdrawn, the date when it was withdrawn; (e) in any other case where an offer was made but not accepted, the date on which it was made.

(3) The date of the conduct to which a complaint under section 138 relates shall be taken to be—(a) in the case of an actual refusal, the date of the refusal; (b) in the case of a deliberate omission to make a service available, the end of the period within which it was reasonable to expect the employment agency to act; (c) in the case of conduct causing the complainant not to avail himself of a service or to cease to avail himself of it, the date of that conduct; (d) in the case of failure to provide the same service, on the same terms, as is provided to others, the date or last date on which the service in fact provided was provided.

(4) Section 292A (extension of time limits to facilitate conciliation before institution of proceedings) applies for the purposes of subsection (1)(a).

141 Complaint against employer and employment agency

(1) Where a person has a right of complaint against a prospective employer and against an employment agency arising out of the same facts, he may present a complaint against either of them or against them jointly.

(2) If a complaint is brought against one only, he or the complainant may request the tribunal to join or sist the other as a party to the proceedings. The request shall be granted if it is made before the hearing of the complaint begins, but may be refused if it is made after that time; and no such request may be made after the tribunal has made its decision as to whether the complaint is well-founded.

(3) Where a complaint is brought against an employer and an employment agency jointly, or where it is brought against one and the other is joined or sisted as a party to the proceedings, and the tribunal—(a) finds that the complaint is well-founded as against the employer and the agency, and (b) makes an award of compensation, it may order that the compensation shall be paid by the one or the other, or partly by one and partly by the other, as the tribunal may consider just and equitable in the circumstances.

142 Awards against third parties

(1) If in proceedings on a complaint under section 137 or 138 either the complainant or the respondent claims that the respondent was induced to act in the manner complained of by pressure which a trade union or other person exercised on him by calling, organising, procuring or financing a strike or other industrial action, or by threatening to do so, the complainant or the respondent may request the [employment tribunal] to direct that the person who he claims exercised the pressure be joined or sisted as a party to the proceedings.

(2) The request shall be granted if it is made before the hearing of the complaint begins, but may be refused if it is made after that time; and no such request may be made after the tribunal has made its decision as to whether the complaint is well-founded.

(3) Where a person has been so joined or sisted as a party to the proceedings and the tribunal—(a) finds that the complaint is well-founded, (b) makes an award of compensation, and (c) also finds that the claim in subsection (1) above is well-founded,it may order that the compensation shall be paid by the person joined instead of by the respondent, or partly by that person and partly by the respondent, as the tribunal may consider just and equitable in the circumstances.
(4) Where by virtue of section 141 (complaint against employer and employment agency) there is more than one respondent, the above provisions apply to either or both of them.

143 Interpretation and other supplementary provisions

(1) In sections 137 to 143—"advertisement" includes every form of advertisement or notice, whether to the public or not, and references to publishing an advertisement shall be construed accordingly; "employment" means employment under a contract of employment, and related expressions shall be construed accordingly; and "employment agency" means a person who, for profit or not, provides services for the purpose of finding employment for workers or supplying employers with workers, but subject to subsection (2) below.

(2) For the purposes of sections 137 to 143 as they apply to employment agencies—(a) services other than those mentioned in the definition of "employment agency" above shall be disregarded, and (b) a trade union shall not be regarded as an employment agency by reason of services provided by it only for, or in relation to, its members.

(3) References in sections 137 to 143 to being or not being a member of a trade union are to being or not being a member of any trade union, of a particular trade union or of one of a number of particular trade unions. Any such reference includes a reference to being or not being a member of a particular branch or section of a trade union or of one of a number of particular branches or sections of a trade union.

(4) The remedy of a person for conduct which is unlawful by virtue of section 137 or 138 is by way of a complaint to an [employment tribunal] in accordance with this Part, and not otherwise.

No other legal liability arises by reason that conduct is unlawful by virtue of either of those sections.

146 Detriment on grounds related to union membership or activities

(1) 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—(a) preventing or deterring him from being or seeking to become a member of an independent trade union, or penalising him for doing so, (b) preventing or deterring him from taking part in the activities of an independent trade union at an appropriate time, or penalising him for doing so, …(ba) preventing or deterring him from making use of trade union services at an appropriate time, or penalising him for doing so, or (c) compelling him to be or become a member of any trade union or of a particular trade union or of one of a number of particular trade unions.

(2) In subsection [(1)] "an appropriate time" means—(a) a time outside the worker's working hours, or (b) a time within his working hours at which, in accordance with arrangements agreed with or consent given by his employer, it is permissible for him to take part in the activities of a trade union or (as the case may be) make use of trade union services; and for this purpose "working hours", in relation to a worker, means any time when, in accordance with his contract of employment [(or other contract personally to do work or perform services), he is required to be at work.

(2A) In this section—(a) "trade union services" means services made available to the worker by an independent trade union by virtue of his membership of the union, and (b) references to a worker's "making use" of trade union services include his consenting to the raising of a matter on his behalf by an independent trade union of which he is a member.

(2B) If an independent trade union of which a worker is a member raises a matter on his behalf (with or without his consent), penalising the worker for that is to be treated as penalising him as mentioned in subsection (1)(ba).

(2C) A worker also 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 because of the worker's failure to accept an offer made in contravention of section 145A or 145B.

(2D) For the purposes of subsection (2C), not conferring a benefit that, if the offer had been accepted by the worker, would have been conferred on him under the resulting agreement shall be taken to be subjecting him to a detriment as an individual (and to be a deliberate failure to act).]

(3) A worker also 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 enforcing a requirement (whether or not imposed by [a contract of employment or in writing) that, in the event of his not being a member of any trade union or of a particular trade union or of one of a number of particular trade unions, he must make one or more payments.

(4) For the purposes of subsection (3) any deduction made by an employer from the remuneration payable to a worker in respect of his employment shall, if it is attributable to his not being a member of any trade union or of a particular trade union or of one of a number of particular trade unions, be treated as [a detriment to which he has been subjected as an individual by an act of his employer taking place for the sole or main purpose of enforcing a requirement of a kind mentioned in that subsection.

(5) A worker or former worker may present a complaint to an employment tribunal on the ground that he has been subjected to a detriment by his employer in contravention of this section.

(5A) This section does not apply where—(a) the worker is an employee; and (b) the detriment in question amounts to dismissal.

147 Time limit for proceedings

(1) An employment tribunal shall not consider a complaint under section 146 unless it is presented—(a) before the end of the period of three months beginning with the date of the act or failure to which the complaint relates or, where that act or failure is part of a series of similar acts or failures (or both) the last of them, 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 it considers reasonable.

(2) For the purposes of subsection (1)—(a) where an act extends over a period, the reference to the date of the act is a reference to the last day of that period; (b) a failure to act shall be treated as done when it was decided on.

(3) For the purposes of subsection (2), in the absence of evidence establishing the contrary an employer shall be taken to decide on a failure to act—(a) when he does an act inconsistent with doing the failed act, or (b) if he has done no such inconsistent act, when the period expires within which he might reasonably have been expected to do the failed act if it was to be done.

(4) Section 292A (extension of time limits to facilitate conciliation before institution of proceedings) applies for the purposes of subsection (1)(a).

148 Consideration of complaint

(1) On a complaint under section 146 it shall be for the employer to show what was the sole or main purpose for which he acted or failed to act.

(2) In determining any question whether the employer acted or failed to act, or the purpose for which he did so, no account shall be taken of any pressure which was exercised on him by calling, organising, procuring or financing a strike or other industrial action, or by threatening to do so; and that question shall be determined as if no such pressure had been exercised.

151 Interpretation and other supplementary provisions

(1) References in sections 146 to 150 to being, becoming or ceasing to remain a member of a trade union include references to being, becoming or ceasing to remain a member of a particular branch or section of that union and to being, becoming or ceasing to remain a member of one of a number of particular branches or sections of that union …

(1A) References in those sections—(a) to taking part in the activities of a trade union, and (b) to services made available by a trade union by virtue of membership of the union, shall be construed in accordance with subsection (1).

(1B) In sections 146 to 150—"worker" means an individual who works, or normally works, as mentioned in paragraphs (a) to (c) of section 296(1), and "employer" means—(a) in relation to a worker, the person for whom he works; (b) in relation to a former worker, the person for whom he worked.

(2) The remedy of a person for infringement of the right conferred on him by section 146 is by way of a complaint to an employment tribunal in accordance with this Part, and not otherwise.

Strike Out

21. Rule 37 of the Employment Tribunal Rules of Procedure contained in Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 No. 1237 as amended ("**the Rules**") provides that:

Striking out

37.—(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—

(a) that it is scandalous or vexatious or has no reasonable prospect of success;

(b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;

(c) for non-compliance with any of these Rules or with an order of the Tribunal;

(d) that it has not been actively pursued;

(e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).

(2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.

22. Owing to its central relevance to the circumstances of this case and the Respondents' applications for strike of the claims against them, I quote the following extensive section of His Honour Judge James Taylor's EAT decision in **Cox v. Adecco Group UK & Ireland [2021] ICR 1307:**

> *21. The President of the EAT, Choudhury J, helpfully summarised the current, and well-settled, state of the law on strike out in* ***Malik v Birmingham City Council UKEAT/0027/19****:*
>
> > ***"29. Rule 37 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 provides:***
> >
> > ***"Striking out***
> >
> > ***37.— (1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—***
> >
> > ***(a) that it is scandalous or vexatious or has no reasonable prospect of success..."***
> >
> > ***30. It is well-established that striking out a claim of discrimination is considered to be a Draconian step which is only to be taken in the clearest of cases: see Anyanwu & Another v South Bank University and South Bank Student Union [2001] ICR 391. The applicable principles were summarised more recently by the Court of Appeal in the case of Mechkarov v Citibank N.A [2016] ICR 1121, which is referred to in one of the cases before me, HMRC v Mabaso UKEAT/0143/17****.***
> >
> > ***31. In Mechkarov, it was said that the proper approach to be taken in a strike out application in a discrimination case is that:***
> >
> > ***(1) only in the clearest case should a discrimination claim be struck out;***
> >
> > ***(2) where there are core issues of fact that turn to any extent on oral evidence, they should not be decided without hearing oral evidence;***
> >
> > ***(3) the Claimant's case must ordinarily be taken at its highest;***
> >
> > ***(4) if the Claimant's case is "conclusively disproved by" or is "totally and inexplicably inconsistent" with undisputed contemporaneous documents, it may be struck out; and***
> >
> > ***(5) a Tribunal should not conduct an impromptu mini trial of oral evidence***

> ***to resolve core disputed facts."***
>
> ***32. Of course, that is not to say that these cases mean that there is an absolute bar on the striking out of such claims. In Community Law Clinics Solicitors Ltd & Ors v Methuen UKEAT/0024/11, it was stated that in appropriate cases, claims should be struck out and that "the time and resources of the ET's ought not be taken up by having to hear evidence in cases that are bound to fail."***
>
> ***33. A similar point was made in the case of ABN Amro Management Services Ltd & Anor v Hogben UKEAT/0266/09, where it was stated that, "If a case has indeed no reasonable prospect of success, it ought to be struck out." It should not be necessary to add that any decision to strike out needs to be compliant with the principles in Meek v City of Birmingham District Council [1987] IRLR 250 CA and should adequately explain to the affected party why their claims were or were not struck out."***

22. A similar approach to that taken to strike out in discrimination claims is taken in protected disclosure claims: ***Ezsias v North Glamorgan NHS Trust [2007] ICR 1126****.*

23. In addition to the summary of the current state of the law on strike out, I consider that Malik is important because of the consideration the President gave to dealing with strike out of claims made by litigants in person.

24. Guidance for considering claims brought by litigants in person is given in the Equal Treatment Bench Book ("ETBB"). In the introduction to Chapter 1 it is noted, in a very well-known passage:

> ***"Litigants in person may be stressed and worried: they are operating in an alien environment in what is for them effectively a foreign language. They are trying to grasp concepts of law and procedure, about which they may have no knowledge. They may be experiencing feelings of fear, ignorance, frustration, anger, bewilderment and disadvantage, especially if appearing against a represented party.***
>
> ***The outcome of the case may have a profound effect and long-term consequences upon their life. They may have agonised over whether the case was worth the risk to their health and finances, and therefore feel passionately about their situation.***
>
> ***Subject to the law relating to vexatious litigants, everybody of full age and capacity is entitled to be heard in person by any court or tribunal.***
>
> ***All too often, litigants in person are regarded as the problem. On the contrary, they are not in themselves 'a problem'; the problem lies with a system which has not developed with a focus on unrepresented litigants."***

25. At para. 26 of Chapter 1 ETBB, consideration is given to the difficulties that litigants in person may face in pleading their cases:

> ***"Litigants in person may make basic errors in the preparation of civil cases in***
>
> ***courts or tribunals by:***

- ***Failing to choose the best cause of action or defence.***

- ***Failing to put the salient points into their statement of case.***

- ***Describing their case clearly in non-legal terms, but failing to apply the correct legal label or any legal label at all. Sometimes they gain more assistance and leeway from a court in identifying the correct legal label when they have not applied any legal label, than when they have made a wrong guess." [emphasis added]***

26. I consider that the ETBB provides context to the statement by the President of the EAT in Malik about the importance of not expecting a litigant in person to explain their case and take the employment judge to any relevant materials; but for the judge also to consider the pleadings and any other core documents that explain the case the litigant in person wishes to advance:

> ***"50. The claimant was not professionally represented. He had, however, produced a detailed witness statement which, as I set out above, contained some material which might support an allegation of race discrimination. He also placed before the Tribunal other documents in which he attempted to set out his case. These included documents entitled "Additional information", which are appended to the claim form and which contained some of the matters referred to in his witness statement.***
>
> ***51. In my judgment, the obligation to take the Claimant's case at its highest for the purposes of the strike-out application, particularly where a litigant in person is involved, requires the Tribunal to do more than simply ask the claimant to be taken to the relevant material. The Tribunal should carefully consider the claim as pleaded and as set out in relevant supporting documentation before concluding that there is nothing of substance behind it. Insofar as it concludes that there is nothing of substance behind it, it should, in accordance with the obligation to adequately explain its reasoning, set out why it concludes that there is nothing in the claim."***

*27. Because the material that explains the case may be in documents other than the claim form, whereas the employment tribunal is limited to determining the claims in the claim form (**Chapman v Simon [1994] IRLR 124**), consideration may need to be given to whether an amendment should be permitted, especially if this would result in the correct legal labels being applied to facts that have been pleaded, or are apparent from other documents in which the claimant seeks to explain the claim. The fact that a claim as pleaded has no reasonable prospect of success gives an employment judge a discretion to exercise as to whether the claim should be struck out: **HM Prison Service v Dolby [2003] IRLR 694; Hasan v Tesco Stores Ltd UKEAT/0098/16**. Part of the exercise of that discretion may involve consideration of whether an amendment should be permitted should the balance of justice in allowing or refusing the amendment permit if it would result in there being an arguable claim that the claimant should be permitted to advance. In **Mbuisa v Cygnet Healthcare Ltd UKEAT/0119/18, HHJ Eady QC** held at para. 21:*

> ***"Particular caution should be exercised if a case is badly pleaded, for***

example, by a litigant in person, especially in the case of a complainant whose first language is not English: taking the case at its highest, the ET may still ignore the possibility that it could have a reasonable prospect of success if properly pleaded, see Hassan v Tesco Stores Ltd UKEAT/0098/16 at para 15. An ET should not, of course, be deterred from striking out a claim where it is appropriate to do so but real caution should always be exercised, in particular where there is some confusion as to how a case is being put by a litigant in person; all the more so where – as Langstaff J observed in Hassan – the litigant's first language is not English or, I would suggest, where the litigant does not come from a background such that they would be familiar with having to articulate complex arguments in written form."

28. From these cases a number of general propositions emerge, some generally well- understood, some not so much:

(1) No-one gains by truly hopeless cases being pursued to a hearing;

(2) Strike out is not prohibited in discrimination or whistleblowing cases; but especial care must be taken in such cases as it is very rarely appropriate;

(3) If the question of whether a claim has reasonable prospect of success turns on factual issues that are disputed, it is highly unlikely that strike out will be appropriate;

(4) The Claimant's case must ordinarily be taken at its highest;

(5) It is necessary to consider, in reasonable detail, what the claims and issues are. Put bluntly, you can't decide whether a claim has reasonable prospects of success if you don't know what it is;

(6) This does not necessarily require the agreement of a formal list of issues, although that may assist greatly, but does require a fair assessment of the claims and issues on the basis of the pleadings and any other documents in which the claimant seeks to set out the claim;

(7) In the case of a litigant in person, the claim should not be ascertained only by requiring the claimant to explain it while under the stresses of a hearing; reasonable care must be taken to read the pleadings (including additional information) and any key documents in which the claimant sets out the case. When pushed by a judge to explain the claim, a litigant in person may become like a rabbit in the headlights and fail to explain the case they have set out in writing;

(8) Respondents, particularly if legally represented, in accordance with their duties to assist the tribunal to comply with the overriding objective and not to take procedural advantage of litigants in person, should assist the tribunal to identify the documents in which the claim is set out, even if it may not be

explicitly pleaded in a manner that would be expected of a lawyer;

(9) If the claim would have reasonable prospects of success had it been properly pleaded, consideration should be given to the possibility of an amendment, subject to the usual test of balancing the justice of permitting or refusing the amendment, taking account of the relevant circumstances.

29. If a litigant in person has pleaded a case poorly, strike out may seem like a short cut to deal with a case that would otherwise require a great deal of case management. A common scenario is that at a preliminary hearing for case management it proves difficult to identify the claims and issues within the relatively limited time available; the claimant is ordered to provide additional information and a preliminary hearing is fixed at which another employment judge will, amongst other things, have to consider whether to strike out the claim, or make a deposit order. The litigant in person, who struggled to plead the claim initially, unsurprisingly, struggles to provide the additional information and, in trying to produce what has been requested, under increasing pressure, produces a document that makes up for in quantity what it lacks in clarity. The employment judge at the preliminary hearing is now faced with determining strike out in a claim that is even less clear than it was before. This is a real problem. How can the judge assess whether the claim has no, or little, reasonable prospects of success if she/he does not really understand it?

30. There has to be a reasonable attempt at identifying the claims and the issues before considering strike out or making a deposit order. In some cases, a proper analysis of the pleadings, and any core documents in which the claimant seeks to identify the claims, may show that there really is no claim, and there are no issues to be identified; but more often there will be a claim if one reads the documents carefully, even if it might require an amendment. Strike out is not a way of avoiding rolling up one's sleeves and identifying, in reasonable detail, the claims and issues; doing so is a prerequisite of considering whether the claim has reasonable prospects of success. Often it is argued that a claim is bound to fail because there is one issue that is hopeless. For example, in the protected disclosure context, it might be argued that the claimant will not be able to establish a reasonable belief in wrongdoing; however, it is generally not possible to analyse the issue of wrongdoing without considering what information the claimant contends has been disclosed and what type of wrongdoing the claimant contends the information tended to show.

31. Respondents seeking strike out should not see it as a way of avoiding having to get to grips with the claim. They need to assist the employment tribunal in identifying what, on a fair reading of the pleadings and other key documents in which the claimant sets out the case, the claims and issues are. Respondents, particularly if legally represented, in accordance with their duties to assist the tribunal to comply with the overriding objective and not to take procedural advantage of litigants in

person, should assist the tribunal to identify the documents, and key passages of the documents, in which the claim appears to be set out, even if it may not be explicitly pleaded in a manner that would be expected of a lawyer, and take particular care if a litigant in person has applied the wrong legal label to a factual claim that, if properly pleaded, would be arguable. In applying for strike out, it is as well to take care in what you wish for, as you may get it, but then find that an appeal is being resisted with a losing hand.

32. This does not mean that litigants in person have no responsibilities. So far as they can, they should seek to explain their claims clearly even though they may not know the correct legal terms. They should focus on their core claims rather than trying to argue every conceivable point. The more prolix and convoluted the claim is, the less a litigant in person can criticise an employment tribunal for failing to get to grips with all the possible claims and issues. Litigants in person should appreciate that, usually, when a tribunal requires additional information it is with the aim of clarifying, and where possible simplifying, the claim, so that the focus is on the core contentions. The overriding objective also applies to litigants in person, who should do all they can to help the employment tribunal clarify the claim. The employment tribunal can only be expected to take reasonable steps to identify the claims and issues. But respondents, and tribunals, should remember that repeatedly asking for additional information and particularisation rarely assists a litigant in person to clarify the claim. Requests for additional information should be as limited and clearly focussed as possible.

33. I have referred to strike out of claimants' cases, as that is the most common application, but the same points apply to an application to strike out a response, particularly where the respondent is a litigant in person.

34. In many cases an application for a deposit order may be a more proportionate way forward.

Deposit Orders

23. Rule 39 of the Rules provides:

Deposit orders

39.—(1) Where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party ("the paying party") to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.

(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.

(3) The Tribunal's reasons for making the deposit order shall be provided with the order and the paying party must be notified about the potential

consequences of the order.

(4) If the paying party fails to pay the deposit by the date specified the specific allegation or argument to which the deposit order relates shall be struck out. Where a response is struck out, the consequences shall be as if no response had been presented, as set out in rule 21.

(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.

24. The making of a deposit order is a less draconian sanction than a strike out. The test of "little reasonable prospect" is less rigorous than "no reasonable prospect" and a Tribunal therefore has greater leeway to make such an order. It does not, however, follow that a Tribunal will necessarily make a deposit order in relation to an allegation with little reasonable prospect of success – it must exercise its discretion to do so in accordance with the overriding objective to deal with cases justly and fairly (**Hemdan v Ismail and another 2017 ICR 486**).

25. In Hemdan, Simler P gave the following guidance:

"The test for ordering payment of a deposit order by a party is that the party has little reasonable prospect of success in relation to a specific allegation, argument or response, in contrast to the test for a strike out which requires a tribunal to be satisfied that there is no reasonable prospect of success. The test, therefore, is less rigorous in that sense, but nevertheless there must be a proper basis for doubting the likelihood of a party being able to establish facts essential to the claim or the defence. The fact that a tribunal is required to give reasons for reaching such a conclusion serves to emphasise the fact that there must be such a proper basis."

11 Before making any decision relating to the deposit order, the Tribunal must make reasonable enquiries into the paying party's ability to pay the deposit, and must take this into account in fixing the level of the deposit (Rule 39(2)).

ANALYSIS AND CONCLUSIONS

12 As I made clear at the March PH, and as I documented in the March CMO's, a claim is confined to the details set out in the form ET1. R1 in its R1 Reply made reference to case law authority for this position (**Ahuja v. Inghams [2002] ICR 1485**, **Chapman v. Simon [1994] IRLR 124**).

13 I accept R1's submission that the Claimant has had three chances to explain the basis for her claim. The first being at the December PH and in response to the orders issued at that hearing, the second being at the March PH and the third in the Claimant being given the opportunity to reply to the R1Skel and R2Skel in writing.

14 I am of course mindful of the law set out in **Cox,** including but not limited to the fact that I have not heard evidence and the Claimant's case must be taken at its highest, that the Claimant is a litigant in person, that litigants in person are not a problem it is the system which is a problem for them (including the complexity of the law), that the Claimant has found it hard to clearly express her complaint and the statutory basis for it, that strike out is not a shortcut for cases where a claim has not been well or clearly pleaded and that there must be reasonable attempts to assist litigants in person to identify their claims and it is incumbent on the Tribunal to 'roll up its sleeves' in that process.

15 I note, but do not put much weight on, the submission by R2:

> 15.2 that the Claimant describes herself as "intelligent" individual, [Bundle 75] who is clearly capable of articulating her case;
>
> 15.3 that the Claimant appears to accept that she has taken legal advice and states *"…all the solicitors I spoken with don't understand or don't want to understand my claim*" [Bundle 76];
>
> 15.4 that the most plausible and likely reason for this is because the Claimant has been advised that her claims have no prospects of success, but she is disinclined to take such advice.
>
> 15.5 that the Claimant has been in receipt of advice, certainly at a Regional Level prior to 8 August 2022, [Bundle 278] and was also able to obtain legal advice at the material time, [Bundle 281, 288, 343].

16 In this claim the Claimant has had the benefits of two preliminary hearings and she does not want to have to attend any more hearings. Whilst the Claimant has been asked to try to explain her claim in the more pressurised environment of the hearing, she has also had two opportunities to explain the basis for it in writing away from that pressure and I have taken quite some time to read the pleadings, the C Particulars and the C Reply. Giving the Claimant more opportunities has not achieved the intended aim of bringing clarity to the claim. I am mindful of the guidance in **Cox** that:

> "*If a litigant in person has pleaded a case poorly, strike out may seem like a short cut to deal with a case that would otherwise require a great deal of*

> *case management. A common scenario is that at a preliminary hearing for case management it proves difficult to identify the claims and issues within the relatively limited time available; the claimant is ordered to provide additional information and a preliminary hearing is fixed at which another employment judge will, amongst other things, have to consider whether to strike out the claim, or make a deposit order. The litigant in person, who struggled to plead the claim initially, unsurprisingly, struggles to provide the additional information and, in trying to produce what has been requested, under increasing pressure, produces a document that makes up for in quantity what it lacks in clarity. The employment judge at the preliminary hearing is now faced with determining strike out in a claim that is even less clear than it was before. This is a real problem. How can the judge assess whether the claim has no, or little, reasonable prospects of success if she/he does not really understand it*?"

17 However, through a combination of the efforts made at the December PH (conducted by EJ Joyce) and at the March PH (conducted by me) and the opportunities given to the Claimant after each of those hearings, I consider that reasonable efforts have been made to clarify the claim and that the claim is now as clear as it can ever reasonably be expected to be (taking into account the overriding objective and the obvious ability of the Claimant to research legislation and set down events as she sees them). Notwithstanding that I left it as a potential use of the Preliminary Listing, it is clear to me that it would not be proportionate or worthwhile to list the claim for a further preliminary hearing to seek additional clarity on the claim.

18 I accept R1's submissions as regards the role of an Employment Judge and the extent to which efforts have been made to assist the Claimant. R1 set those submissions out as follows in the R1 Reply:

> *22. It is not appropriate for the EJ to enter the fray and give active assistance to either side (whether they are represented or not). The role of the judge is to hear the claim that has been brought. It is acknowledged that a judge is entitled to seek to clarify a claim or to elicit information, but this, like everything, should be kept within reasonable limits.*
>
> *23. Whilst R1 did not object to attempts to clarify claim at the preliminary hearing on 22 March 2024, reasonable limits of enquiry have now been reached.*
>
> *24. Given the tribunal orders that have already been made and the fact that (now) every reasonable opportunity has been extended to C to clarify her claim, it would be inappropriate to expend further judicial resources that would effectively be aimed at assisting C to advance her claim. This would be an inappropriate entry into the fray. For the avoidance of any doubt, this is precisely because the limits of the permissible judicial function have already been exhausted, given the time already spent and the orders already made. This is why R1 says that any more judicial intervention could only amount to assisting C to piece her claim together for her (and would appear to be a hiding to nothing in any event) and it would increase still further R1's (probably irrecoverable) costs.*

25. The principles in this area are well-established but the most recent statement of authority on the matter appears in the judgment of ***Choudhury J in Stuart Harris Associates Ltd v. Goburdhun [2023] EAT 145*** *(see paragraphs 50-52 of the Judgment):*

(1) It is a fundamental tenet of the administration of law that all those who appear before our courts are treated fairly and that judges act - and are seen to act - fairly and impartially throughout a trial.

(2) It is perfectly proper - indeed a duty - for a judge to intervene in the course of witness evidence to ask questions which clarify ambiguities in answers previously given or which identify the nature of the defence, if this is unclear.

(3) It is wrong, however, for a judge to descend into the arena and give the impression of acting as advocate.

(4) The basic right underlying the adversarial system of trial is that of having an impartial judge to see fair play in the conduct of the case against him. Under the common law system one lawyer makes the case against the accused, another his case in response, and a third holds the balance between them, ensuring that the case against the accused is properly and fairly advanced in accordance with the rules of evidence and procedure. All this is elementary and all of it, unsurprisingly, has been stated repeatedly down the years. The core principle, that under the adversarial system the judge remains aloof from the fray and neutral during the elicitation of the evidence, applies no less to civil litigation than to criminal trials.

(5) These principles, of course, apply with equal rigour whether or not litigants are legally represented.

19 The C Particulars and C Reply:

19.2 Made reference to or quoted a wide range of legislation. Many of the statutory provisions referred to do not give rise to a cause of action in the Employment Tribunals and/or could not be claimed against R2 because there has been no worker or employee relationship. It was not possible to discern how the Claimant relied upon the provisions in any event (or how they applied to her claim as pleaded and clarified at the December PH and March PH). For example, the claim contains no complaint of blacklisting, whistleblowing detriment, discrimination under the Equality Act 2010 or complaint under the Conduct of Employment Agencies and Employment Businesses Regulations 2003.

19.3 Gave the impression that the Claimant considered that she could somehow interweave reliance on different statutes to formulate a claim. If statutory references and other details included in the C Particulars or C Reply were intended to be an amendment application

they did not make that clear and, in any event, could not form the basis of an amendment application because they were so unclear.

20 The C Particulars refer to Sections 137, 138, 141, 146, 244 (meaning of trade dispute), 297 (associated employers) of TULRCA. The C Reply in addition referred to Section 142 of TULRCA.

REASONS – FIRST RESPONDENT APPLICATION

26. R1 applied for strike out and/or deposit order in R1's letter of application of 20 November 2023 (Bundle 379-382). The application for strike out was on the grounds that:

    26.1 the entire claim against R1 is out of time; and/or

    26.2 that the claim has no reasonable prospect of success (rule 37(1)(a)).

27. The Claimant having withdrawn her claim of unfair dismissal, the third ground for the application for strike out does not arise.

28. I first deal with the application under 37(1)(a).

29. At the March PH it was clear that that the only claim against R1 was that it was alleged that R1 had given the Claimant bad references because the Claimant had used the support of a trade union to secure payments from R1 which she said she had been owed.

30. I accept R1's submission made in the R1Skel and R1 Reply that:

    30.1 No recipients of bad references are referred to in the ET1.

    30.2 No details of any specific references were set out in the C Particulars.

    30.3 At the March PH I asked the Claimant repeatedly for details of the 'bad references' she alleged had been given by R1 in relation to her. It became clear that the Claimant did not suggest that any formal references had been given but that she alleged that Mr Tucker had gossiped about her because of her Trade Union membership. She said she did not have any direct evidence of this. She had come to this conclusion in May 2023 when, as she says in her Claim Form, she saw that she was blocked on LinkedIn by a staff member of R2 (Holley Potts)." (Emphasis added).

    30.4 The Claimant goes further at paragraph 2.4.6 (page 10) of the C Response where she states that she: "*does not need to show evidences of bad "references/feedback/mouthing" provided neither by "R1", "R2" or British Petrol, as their actions of detriment against "C" speaks for itself*."

    30.5 The content (and tone) of paragraph 5.8 (page 21) of the C Response is further evidence of this approach where the Claimant says: "*Moreover, "C" refuses in advance to produce any more documents that might be required from "ET" to show the claim's grounds, because it is clear for anyone who reads it. Also, because "C" have been shared those together with hard evidences, since the 17 Jul 2023, and "C" complied with the EJ Joyce*

orders dated on 7 Dec 2023 by sharing the grounds of the claim(s) on documents already mentioned on page 1 of this doc, which neither the "ET" nor the Respondents read and/or refused to read it."

30.6 At paragraph 2.9 (page 13) of the C Response the Claimant confirms that she does not wish to pursue as part of her claim before the tribunal the reference given by Christian Fradet; she states that she had no reason to believe that he would have given a bad reference, otherwise she would not have asked him to provide one. This is understandable, because she herself selected Mr Fradet to give a reference and she acquired the job to which the reference request related, but it remains the only reference that the Claimant has sought from anyone at R1 and it was given.

30.7 The Claimant refers to Lynx Recruitment in the C Particulars. Lynx Recruitment is owned by R1. The Claimant has not alleged that she applied to work for R1 again, either directly or through Lynx Recruitment. Accordingly, there is no evidence that the Claimant approached Lynx Recruitment following the termination of her employment by R1 in the way that she approached 'external' agencies such as R2, Oliver Bernard, Xcede, La Fosse etc.

30.8 Accordingly, the Claimant is unable to point to a single 'bad reference' to which the claim could relate and there is no "crucial core of disputed fact" (**Ezsias, para 29**)

30.9 The tribunal is still no further forward from the position summarised in paragraph 14 of the March CMO. The only thing that has changed is that a further attempt has been made to clarify the claim and that the Claimant has become even more resolute in her position, saying that she does not have to do so.

Has a specified ground been established?

31. It seems to me that the only statutory provision which could be relevant to the claim against R1 is Section 146 (Detriment on grounds related to union membership or activities) TULRCA. A claim under this section would need to be framed in terms that, buy giving the Claimant a bad reference, R1 subjected the Claimant to a detriment for the sole or main purpose of penalising the Claimant for making use of trade union services (with the trade union services in question being the support the Claimant says she had from her union in getting payment of arrears of pay and notice pay (subsections (1) (ba), (2B) and (5)).

32. While the Claimant has quoted these provisions she has not framed her claim against R1 in this way.

33. I accept R1's submission that the Claimant cannot present a claim simply on the basis that she has no idea if 'bad references' have been given by R1 but she believes that they have and hopes that something will turn up. I accept R1's submission that that is what is happening in this claim, taking the Claimant's case at its highest.

34. I also accept R1's submission that the claim as advanced against R1 has no substance, is entirely speculative and there are no reasonable grounds for such speculation. The claim accordingly has no reasonable prospects of success.

Should I exercise my discretion to strike out?

35. Notwithstanding the draconian nature of strike out at this stage of a claim and taking into account all the circumstances including the time that has been afforded to the Claimant to articulate her claim and its highly speculative nature, I consider that it is in the interests of justice to exercise my discretion to strike out the claim against R1 as having no reasonable prospects of success under Rule 37(1)(a).

36. I have not gone on to consider the question of time limits because I did not hear evidence on this as a jurisdictional question. I have also not factored it into my assessment of the strike out application under Rule 37(1)(a). However, I will note that it seems unlikely that the Claimant would have been able to establish that her claim had been brought in time (under the TULRCA 'not reasonably practicable' test).

Keeping R1 as a respondent?

37. I accept R1's submissions that the R1 and R2 applications for strike out are separate and need to be considered in their own right. I also accept R1 submissions that, if R2's application is unsuccessful, it would not be proportionate or in the interests of the overriding objective to retain R1 as a party to the litigation.

REASONS – SECOND RESPONDENT APPLICATION

38. R2 provided the following chronology supported by documents in the Bundle, which I accept:

> ***17 January 2022*** *- C commenced work with R1, [Bundle 252]. Notably C was not placed into this role by R2, but another third party.*
>
> ***10 August 2022*** *- C's role is terminated by R1.*
>
> ***10-17 August 2022*** *- Emails between C and Holley Potts, agent of R2, where C agrees to be put forward for two roles. C is advised that if she does not hear from Ms Potts that is because it is likely that the application has not been successful, [Bundle 293-300].*
>
> ***September 2022*** *- Emails between C and Ms Potts where C is advised that her application had gone through and that Ms Potts will keep C posted, [Bundle 324-6]. Ms Potts then provides C with a potential opportunity and asks for C's CV, [Bundle 331-328].*
>
> ***October 2022 -*** *Emails between C and Ms Potts, where C agrees to be put forward for two roles. C is advised that if she does not hear from Ms Potts that is because it is likely that the application has not been successful, [Bundle 333-335].*

21 November 2022 *- Emails between C and Ms Potts where Ms Potts advises that a lot of roles advertised by clients have been cancelled, [Bundle 339].*

26 Apr-4 May 2023 *- C emails David Sims, agent of R2, to enquire about any potential vacancies. Mr Sims responds by directing C to an ATG role and C is put forward for the role, [Bundle 229-234].*

9 May 2023 *- C is advised that ATG would like to invite C to a first stage interview and is asked for her availability, however, the vacancy was filled prior to C being interviewed, [Bundle 227-8].*

Undated Email from C referring to discrimination but providing no further context of what characteristic/act C was relying on, [Bundle 218].

18 May 2023 *- Email from Richard Norris, agent of R2, acknowledging C's complaint and advising that he will investigate C's concerns, but requires further clarity on what she states were the discriminatory issues, [Bundle 219-226]. At this stage C has simply stated that she has been discriminated against, but not how.*

1 June 2023 *- Email from Richard Norris to C explaining that the usual company recruitment processes had been followed and that C's application had not been progressed as C's design did not meet the client's needs, [Bundle 217].*

16 June 2023 *- C commenced EC against R2, [Bundle 6]. Against R1, [Bundle 5].*

19 June 2023 *- EC Certificate issued against R2 and R1.*

20 June 2023 *- ET1, [Bundle 7-18].*

13 August 2023 *- ET3 for R1, [Bundle 19-26].*

11 October 2023 *- Letter from the Tribunal advising that C's claim against R2 had been rejected and the Tribunal would not add C's trade union as a Respondent, [Bundle 377].*

13 October 2023 *- C's claim against R2 is accepted on reconsideration and R2 had until 10 November 2023 to file a response.*

7 November 2023 *- ET3 for R2, [Bundle 27-34], Grounds of Resistance [Bundle 35-6].*

20 November 2023 *- Application for strike out by both R1 and R2, [Bundle 379-382].*

22 November 2023 *- C's Case Management Agenda, [Bundle 70-176].*

24 November 2023 *- R2 application, [Bundle 383-4].*

1 December 2023 *- Case Management Orders, [Bundle 207-213].*

8 December 2023 *- C's Further and Better Particulars, [Bundle 184-194].*

8 December 2023 *- Notice of Hearing, [Bundle 215-6].*

21 December 2023 *- Email from Oliver Doak explaining that C is not receiving a rejection email but an error email due to the manner in which C was trying to upload documentation for job applications. It is explained that the application will not be permitted if it doesn't contain an email address, [Bundle 371-372].*

22 December 2023 *- Amended Grounds of Response from R2, [Bundle 201-206].*

30 January 2024 *- Judgment dismissing C's claim against Xcede Ltd, [Bundle 459-462].*

13 March 2024 *- Letter from R2 setting out further grounds for strike out/deposit orders of the claim(s).*

39. I accept R2's submission that the totality of the claims against R2 are that they allegedly:

    39.1 failed to put the Claimant forward for work because of her trade union status; and

    39.2 blocked all of the Claimant's applications to open opportunities due to the Claimant's affiliation with a Trade Union.

40. I further accept R2's submission that it is fair to assume that the statutory basis for such a claim would be section 138(1)(a) TURCA. However, I consider that there could also be a statutory basis for a claim under 137 TULRCA in particular given that 137 (8) TULRCA provides: "*The provisions of this section apply in relation to an employment agency acting, or purporting to act, on behalf of an employer as in relation to an employer*."

41. I agree with R2 that the claim could not be founded against R2 under Section 146 TULRCA because there is no suggestion that the Claimant, for the purposes of the claim, was a worker in respect of R2 or that R2 was an employer or former employer of the Claimant under Section 151 TULRCA. I accept that it is clear in this claim that:

    41.1 R2 as an agency will select a number of individuals whose qualifications and profile bests fits the vacancy. As such, not all applicants with experience will be put forward (it would be surprising if they were);

    41.2 References will not be requested until a candidate is offered a role and generally a client will make those enquiries directly; and

    41.3 There is no suggestion that the Claimant was ever employed or engaged to work for any of the agencies, including R2. There is therefore no claim

that can be founded against R2 under s.146 TULRCA 1992.

42. It is even clearer that Section 244 does not found a complaint in this claim against R2 as it is simply the provision which the term "trade dispute" under TULRCA.

43. The Claimant's complaints against R2 would need to be formulated under:

    43.1 Section 137 (1) (a) (unlawful to refuse a person employment because he is a member of a trade union); (5) (a person shall be taken to be refused employment if he seeks employment of any description with a person and that person—(a) refuses or deliberately omits to entertain and process his application or enquiry or (c) refuses or deliberately omits to offer him employment of that description) and (8) (which states that these provisions apply in relation to an employment agency acting, or purporting to act, on behalf of an employer as in relation to an employer).

    43.2 Section 138 (1) (unlawful for an employment agency to refuse a person any of its services—(a) because he is a member of a trade union) and (4) (a person shall be taken to be refused a service if he seeks to avail himself of it and the agency—(a) refuses or deliberately omits to make the service available to him).

44. While the Claimant has quoted these provisions she has not framed her claim against R2 in this way.

Has a specified ground been established?

45. Taking the Claimant's claim at its highest, I consider that she has no reasonable prospects of establishing that R2 knew that the Claimant was part of a trade union at the material time. In the C Reply [page 16 paragraph 17] she says that her disclosure about her Trade Union status was not to R2 but to the entirely separate entity, Lynx Recruitment (which is owned by R1). I accept R2 submission that, on the Claimant's best case, the earliest R2 could be said to have held any knowledge pertaining to the Claimant being part of a trade union was 1 June 2023 when the Claimant copied a member of a trade union (Rosie Walsh from Unite the Union) into an email. I agree with R2 that the copying of a trade union into correspondence does not initiate a platform for knowledge of the Claimant's affiliation with a trade union and the content of that email does not denote any sort of relationship between the Claimant and the Trade Union so as to give rise to knowledge by R2.

46. My conclusions on the complaints against R1 are material to the prospects of the Claimant establishing a claim against R2 because I have concluded that the Claimant's contention that R1 gave bad references in respect of her is entirely speculative. The Claimant has also not made clear when she says any such bad reference was given or what it might have said (including of course whether it made reference to her trade union membership).

47. I accept R2's submission that the Claimant has advanced no evidence, save for pure speculation, to create a causative link between R2's purported knowledge of her trade union affiliation and the allegations against R2.

48. The Claimant's contention that because she alleged Ms Potts blocked the Claimant from her personal LinkedIn account in July 2022 R2 automatically dismissed all her applications to their open opportunities which are managed by Holley Potts [Bundle 13, Line 16 and 17 and Bundle 353] also appears to have no reasonable prospects of success since the contemporaneous documentation evidences that on five occasions after the end of the Claimant's employment with R2 the Claimant was put forward for various roles by Ms Potts and Mr Sims [Bundle 227-235, 293-300, 327-335, 339-341, 373]. The feedback from clients was that C's work was not what they were looking for, [Bundle 217, 36 Para 7]. In respect of one of the roles in May 2023, the Claimant was selected for a first-round interview, but before the interview could take place another candidate was appointed. The Claimant concedes at Para 2(g), page 14 of the C Response that on 26 July 2022 Ms Potts emailed the Claimant with a job opportunity/freelance position, but that the Claimant elected not to reply to this email. This shows that the Claimant was being offered opportunities and being put forward for roles

49. The Claimant's contention that she received automatic rejections also appears to be misconceived. The extract relied upon by the Claimant, as set out at Paragraph 29 of the C Particulars [Bunde 470, Para 29] is as follows:

> *'APEX-RESUMEINBOUNDEMAIL EXCEPTION [handleInboundEmail]. An error occurred while processing your submission. Please check to ensure your submission was a resume of a supported type and try again. If you continue to encounter issues please contact Jobscience Support. - (ts2.SFDCErrorException) Error code: 20, Error Message: FAIL - Conversion Failure: ERROR: convert_pdf::run_pdf_to_text() failed'*

50. I accept R2's contention that this autoreply was not a rejection email but an error message sent to the Claimant due to her incorrectly completing an application process/form. This is evident from the error message itself. There is no evidence that it indicates that applications by the Claimant were being deliberately blocked for some other nefarious reason. Indeed an email from Oliver Doak, CRM Manager, provides a full explanation for why this has occurred [Bundle 371-2] i.e. the application will not be permitted if it doesn't contain an email address.

51. I also accept R2's assertion that notwithstanding this, the Claimant asserts at paragraph 45 of the C Particulars [Bundle 474] that she believed that the automatic rejections were only coming from Holley Potts and did not come from David Sims (who is also employed by R2). Therefore, the Claimant does not appear to advance an argument that R2 blocked all of her applications.

52. I accept R2's final contentions that:

    52.1 The Claimant was placed in the role with R1 with an entirely different agency to R2, namely Lynx Recruitment (owned by R1). The Claimant reflects this in the C Response [page 6 para 2.1]. The Claimant's claim is predicated on a tenuous link, namely that from time-to-time R2 may put forward or place individuals with R1, amongst hundreds of other clients. Beyond this the Claimant cannot establish a causal connection between R2 and R1 at the material time [Bundle 249-250];

52.2 No formal references had been made about the Claimant by R2 and she has no evidence to substantiate that they have. She is relying on pure speculation. R2 is clear that references are not requested until a candidate is offered a role and generally a client will make those enquiries directly. It is not disputed that the Claimant was not offered a role by a third party through R2 at this time and as such there would be no need to obtain a reference;

52.3 There is no evidential basis for asserting that R1 had said to R2, at any stage, "don't hire the Claimant" and "she causes trouble with the trade union", or words to that effect. Further, there would be no reason for R1 and R2 to have had that discussion. Again the Claimant relies on bare assertion. Both R1 and R2 are categoric that no references were made and the Claimant has not articulated or provided any evidence to substantiate the contrary.

52.4 Paragraph 20.1 on page 17 of the C Response is factually flawed. The Claimant claims "*Steve O'Donnell confirmed to "C" that "R2" should pay any outstanding salary on last working day*". There is no evidence of such a discussion with R2 on this basis and it is apparent that the Claimant is conflating various parties and events to construct a position which is factually improper and contrary to the contemporaneous evidence. The Claimant's reliance against R2 on this point is misconceived. At best the Claimant could only be referring to Lynx recruitment who are unconnected to R2 and are owned by R1.

53. I accept R2's submission that the Claimant's claim is predicated on there having been a been mass collusion between several separate entities, all of whom have a tenuous link (at best) with one another, who have allegedly taken steps to prevent the Claimant from obtaining work. The Claimant's assertion is not based on evidence but on conjecture.

54. For these reasons I conclude that the Claimant's complaints against R2 have no reasonable prospects of success.

55. As per the application of R1, I have not gone on to consider the question of time limits in respect of the claim against R2 because I did not hear evidence on this as a jurisdictional question. I have also not factored it into my assessment of R2's strike out application under Rule 37(1)(a). However, I again note that it seems to me unlikely that the Claimant would have been able to establish that her claim has been brought in time (under the TULRCA 'not reasonably practicable' test).

Should I exercise my discretion to strike out?

56. R2 advanced further arguments alleging unreasonable conduct on the Claimant but they were set out in the R2 Reply and the Claimant has not had the opportunity to comment them. I have therefore not taken them into account in my decision.

57. I have considered whether I should exercise my discretion to strike the claim out against R2 separately to my decision in respect of the claim against R1.

However, notwithstanding the draconian nature of strike out at this stage of a claim and taking into account all the circumstances including the time that has been afforded to the Claimant to articulate her claim and its highly speculative nature, I consider that it is also in the interests of justice to exercise my discretion to strike out the claim against R2 as having no reasonable prospects of success under Rule 37(1)(a).

58. In consequence of the decisions set out in this judgment the Preliminary Listing will be vacated.

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Employment Judge Woodhead

Date 10 May 2024

Sent to the parties on:

29 May 2024

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For the Tribunals Office

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