Case Number: 2204621/2022

Reserved Judgment

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**and**	**Respondent**
Mr A Evans		**Prospect**

CORRECTED JUDGMENT[1] ON PRELIMINARY HEARING

HELD AT: London Central **ON: 20 March 2023**

BEFORE: Employment Judge A M Snelson (sitting alone)

On hearing the Claimant in person and Mr S Brittenden, counsel, on behalf of the Respondent, the Tribunal determines that the Claimant's claims other than those numbered (i), (xxiv), (xxv), (xxxiii) and (xxxv) in the Particulars of Claim, para 171 are struck out as having no reasonable prospect of success.

REASONS

Introduction

1. This dispute already has a considerable case management history, owing to the extraordinary way in which the Claimant has chosen to litigate it. The Order which I made following a preliminary hearing for case management held on 4 November 2022 should be read with these Reasons.

2. The Respondent ('the Union') is a substantial trade union. On 1 January 2017, it merged with Bectu, which became a 'sector' within it.

3. The Claimant was for many years a member and officer of Bectu. On the merger just referred to, he became a member of the Union.

4. On 16 June 2021 Ms Philippa Childs, Head of Bectu and Deputy General Secretary of the Union, made a complaint against the Claimant that he had subjected her to a campaign of bullying, harassment and sex discrimination dating back to September 2020. The complaint was investigated in accordance with the Union's procedures.

[1] Corrected on 18 April 2023 under the ET Rules of Procedure 2013, r69 to insert the underlined text in Judgment only.

5. On 29 April 2022, a disciplinary sub-committee of the Union's National Council ('NEC') produced a report on Ms Childs's allegations. It rejected the complaints of sex discrimination, but upheld those of bullying and harassment. After considering various mitigating and aggravating factors, it recommended that the Claimant should be suspended from holding office or acting in any other representative capacity for a period of five years and that the period of suspension should commence only after he had sent a written apology to Ms Childs.

6. On 12 May 2022 the NEC in a closed session approved and adopted the sub-committee's recommendations. Notice of that outcome was sent to the Claimant the following day.

7. By a claim form presented on 14 July 2022 to which particulars of claim running to 60 pages were attached, the Claimant complained pursuant to the Trade Union and Labour Relations (Consolidation) Act 1992 ('TULRCA'), ss64-66 that the Union had subjected him to 38 acts of unjustifiable discipline.

8. In its response form the Union disputed the substance of the claims and contended (grounds of resistance, para 8(4) that:

> **The Claimant advances a number of unnecessarily convoluted detriments. At P/C para. 171 he identifies 38 claims of detriment. The approach adopted is misguided. The Claimant impermissibly seeks to assert that each and every finding or conclusion of the [sub-committee] amounts to an actionable detriment. The proper focus must be on the overall recommendation of the [sub-committee] and the sanction imposed by the NEC.**

9. Pursuant to a listing instruction given by me on the papers, the matter came before me in the form of a public preliminary hearing by CVP with three hours allowed to consider whether parts of the case should be struck out as having no reasonable prospect of success. This followed my unavailing attempt through case management to encourage the Claimant to reconsider his position. By a letter of 30 January 2023 he made his position abundantly clear:

> **The Claimant therefore maintains that each step in the overall reasoning of each report or letter constitutes an identifiable decision to stigmatise him, and as such each decision to include a particular negative comment is a free-standing complaint.**

10. I framed the preliminary issues in this way:

> **… whether, in so far as the Claimant seeks to base any free-standing legal claim on any 'determination' within the meaning of TULRCA 1992, s64(2) other than:**
> **(a) the determination of a disciplinary sub-committee of the NEC conveyed in a report dated 29 April 2022 ('the report') to uphold complaints of bullying and harassment against the Claimant and**

> **recommend specified penalties therefor[2]; and**
> **(b) the determination of the NEC on 12 May 2022 to adopt and implement the findings and recommendations contained in the report,**
> **such purported claims should be struck out under the Employment Tribunal Rules of Procedure 2013, r37(1)(a) and/or (b).**

11. The Claimant, who is clearly familiar with the legislation and authorities but is not, so far as I am aware, legally qualified, appeared in person. Mr Brittenden, counsel, represented the Respondent.

12. I had before me two bundles of documents each exceeding 100 pages in length and substantial skeleton arguments from both sides. The argument occupied the entire morning, making it necessary to reserve judgment.

The Legal Framework

13. TULRCA, s64(1) provides for the right of a present or former member of a trade union not to be unjustifiably disciplined by the union.

14. The section next addresses the concept of "discipline", in these terms:

> **(2) For this purpose an individual is "disciplined" by a trade union if a determination is made, or purportedly made, under the rules of the union or by an official of the union or a number of persons including an official that—**
> **(a) he should be expelled from the union or a branch or section of the union,**
> **(b) he should pay a sum to the union, to a branch or section of the union or to any other person;**
> **(c) sums tendered by him in respect of an obligation to pay subscriptions or other sums to the union, or to a branch or section of the union, should be treated as unpaid or paid for a different purpose,**
> **(d) he should be deprived to any extent of, or of access to, any benefits, services or facilities which would otherwise be provided or made available to him by virtue of his membership of the union, or a branch or section of the union,**
> **(e) another trade union, or a branch or section of it, should be encouraged or advised not to accept him as a member, or**
> **(f) he should be subjected to some other detriment;**
> **and whether an individual is "unjustifiably disciplined" shall be determined in accordance with section 65.**

15. Under s65, certain "unjustifiable" grounds for discipline are stipulated. The key provisions are the following.

> **(1) An individual is unjustifiably disciplined by a trade union if the actual or supposed conduct which constitutes the reason, or one of the reasons, for disciplining him is—**
> **(a) conduct to which this section applies, or**
> **(b) something which is believed by the union to amount to such conduct; but subject to subsection (6) (cases of bad faith in relation to assertion of wrongdoing).**
>
> **(2) This section applies to conduct which consists in—**

[2] When drafting the preliminary issues I was not alive to the fact that binding authority precluded a recommendation from standing as a 'determination' under s64(2) – see further below.

(a) failing to participate in or support a strike or other industrial action (whether by members of the union or by others), or indicating opposition to or a lack of support for such action;

(b) failing to contravene, for a purpose connected with such a strike or other industrial action, a requirement imposed on him by or under a contract of employment;

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

(d) encouraging or assisting a person—

(i) to perform an obligation imposed on him by a contract of employment, or

(ii) to make or attempt to vindicate any such assertion as is mentioned in paragraph (c);

(e) contravening a requirement imposed by or in consequence of a determination which infringes the individual's or another individual's right not to be unjustifiably disciplined,

(f) failing to agree, or withdrawing agreement, to the making from his wages (in accordance with arrangements between his employer and the union) of deductions representing payments to the union in respect of his membership,

(g) resigning or proposing to resign from the union or from another union, becoming or proposing to become a member of another union, refusing to become a member of another union, or being a member of another union,

(h) working with, or proposing to work with, individuals who are not members of the union or who are or are not members of another union,

(i) working for, or proposing to work for, an employer who employs or who has employed individuals who are not members of the union or who are or are not members of another union, or

(j) requiring the union to do an act which the union is, by any provision of this Act, required to do on the requisition of a member.

(3) This section applies to conduct which involves the Certification Officer being consulted or asked to provide advice or assistance with respect to any matter whatever, or which involves any person being consulted or asked to provide advice or assistance with respect to a matter which forms, or might form, the subject-matter of any such assertion as is mentioned in subsection (2)(c) above.

(4) This section also applies to conduct which consists in proposing to engage in, or doing anything preparatory or incidental to, conduct falling within subsection (2) or (3).

(5) This section does not apply to an act, omission or statement comprised in conduct falling within subsection (2), (3) or (4) above if it is shown that the act, omission or statement is one in respect of which individuals would be disciplined by the union irrespective of whether their acts, omissions or statements were in connection with conduct within subsection (2) or (3) above.

(6) An individual is not unjustifiably disciplined if it is shown—

(a) that the reason for disciplining him, or one of them, is that he made such an assertion as is mentioned in subsection (2)(c), or encouraged or assisted another person to make or attempt to vindicate such an assertion,

> **(b) that the assertion was false, and**
> **(c) that he made the assertion, or encouraged or assisted another person to make or attempt to vindicate it, in the belief that it was false or otherwise in bad faith,**
> **and that there was no other reason for disciplining him or that the only other reasons were reasons in respect of which he does not fall to be treated as unjustifiably disciplined.**

16. The Tribunal is given jurisdiction to consider complaints of unjustifiable discipline by s66(1). Where it decides that a complaint is well-founded, it must make a declaration to that effect (s66(3)).

17. Where a complaint under s66 has been upheld, the claimant may apply for compensation (s67(1)). By s 67(8A) a minimum level of compensation is set where one or other of two conditions is satisfied. The first (s67(8A)(a) is where:

> **… the determination infringing the [complainant's] right not to be unjustifiably disciplined has not been revoked …**

18. In *Transport & General Workers Union v Webber* [1990] ICR 711 a member complained of unjustifiable discipline in respect of a determination to expel him said to have been taken by a regional committee of his trade union. The main point in the case was whether the claim was premature in that the proceedings were commenced before the executive council had taken the final decision to expel. Giving judgment on behalf of the EAT (paras 19-20), Wood J observed:

> **… before a decision can constitute a "determination to expel" within the provisions of section 3(5)(a)[3], it must be one which achieves a disposal of that issue; one which does not contain within it a condition subsequent. A decision that an expulsion be effected upon a date in the future would not render it any the less an effective determination, but the facts in the present case indicate that there remained an uncertainty whether or not the applicant was to be expelled. It was not an effective determination in the sense which we have expressed above.**

19. The power to strike out is contained in the Employment Tribunals Rules of Procedure 2013, r37 which, so far as material, provides:

> **(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 … has no reasonable prospect of success …**

20. Numerous authorities stress that striking-out is an exceptional measure and that Tribunals should be particularly careful about striking out discrimination claims, which, typically, are fact-sensitive (*Anyanwu v South Bank Student Union* [2001] 1 WLR 638 HL). No doubt unjustifiable discipline cases are typically fact-sensitive too. Nonetheless, in a proper case, the power to strike out should be exercised, provided that the demanding language of the

[3] The provision corresponding to TULRCA, s64(2)(a) under the legislation then in force

rule is met (*Ahir v British Airways* [2017] EWCA Civ 1393 CA).

Analysis

The claims in more detail

21. The 38 allegations or assertions listed under para 171 of the Particulars of Claim, all presented as free-standing claims, can be broken down into six separate categories of complaint as follows.

    (1) The determinations[4] of the disciplinary sub-committee made on or about 29 April 2022 and conveyed in its report bearing that date that the Claimant should be suspended from holding office or acting in any other representative capacity for a period of five years and that the period of suspension should commence only after he had sent a written apology to Ms Childs (claims (xx) and (xxii)).
    (2) The determinations of the disciplinary sub-committee, consisting largely[5] of primary and secondary (or inferential) findings, on which the recommendations identified in category (1) were premised (claims (ii)-(xix), (xxi) and (xxiii)).
    (3) The determinations of the NEC on or around 12 May 2022 to suspend the Claimant for five years and to make any return to representative duties thereafter conditional on him apologising in writing to Ms Childs in terms acceptable to the NEC (claims (xxxiii) and (xxxv) respectively). As I understand it, these determinations are *both* admitted by the Union to amount to acts of discipline under TULRCA, the former under s64(2)(d) and the latter, presumably, under s64(2)(f).
    (4) The determinations of the NEC on or around 12 May 2022, consisting largely[6] of primary and secondary findings, on which the sanction of suspension coupled with the requirement to apologise were premised (claims (xxvi)-(xxxii), (xxxiv), (xxxvi) and (xxxvii).
    (5) The determination made on or about 13 May 2022 to communicate to the Claimant the outcome of the NEC disciplinary hearing held on 12 May 2022 (claim (xxxviii)).
    (6) Determinations to subject the Claimant to unfair and prejudicial treatment in the procedural handling of the disciplinary proceedings in the form of: (a) a determination made on or before 14 March 2022 to exclude certain individuals from the NEC meeting to be held on 12 May 2022 (claim xxv)[7]; (b) a determination made on or about 14 April 2022 to produce and/or send to the Claimant inaccurate notes of the meeting held by the disciplinary sub-committee on 8 March 2022 (claim (i)); (c) a determination made in early May 2022 to send

[4] I adopt the Claimant's terminology throughout.
[5] Some were not even supporting findings: claim (xxi), for example, amounted only to a comment that suspension entailed interference with the Claimant's freedom of association.
[6] Here again, some of the matters relied on were not even supporting findings. For example, claim (xxvi) was simply an allegation of a determination not to consider the Claimant's evidence properly or at all.
[7] The Claimant's case is not satisfactorily pleaded but it is tolerably clear that the complaint is about a decision conveyed in an email of Ms Wade of 14 March 2022.

> incomplete evidence to the NEC in advance of the disciplinary hearing (claim xxiv).

I will refer to these categories of complaint by their numbers.

The rival arguments

22. The skeleton arguments on both sides were comprehensive. What follows is a brief summary.

23. I did not always find the Claimant's strikingly confident oral submissions easy to follow – partly because he seemed unwilling to address in a direct way the points I put to him. But I can say with some confidence that he did not appear to resile from anything he had set out in writing. He told me that, so far from over-litigating his case, he had passed up the opportunity to pursue yet more claims. He agreed that, on the authority of *Webber*, it was not open to him to rely on the *recommendations* of the disciplinary sub-committee as amounting to "discipline" under s64 but insisted that alleged *determinations* on which those recommendations were said to have been premised could properly stand as founding free-standing claims. These included, he maintained, determinations by the disciplinary sub-committee to make particular findings of fact. The essential point (as I understood it) was that the legislation was concerned with *decisions* by the Union: these were proscribed (provided that a ground under s65 was made out), even if the resultant act was not. So, a *decision* to make a finding of fact or recommend a disciplinary measure is *prima facie* actionable discipline even if the consequential finding or recommendation is not. And, by parity of reasoning, the determinations to make the various findings and judgements underlying the outcome of the disciplinary hearing before the NEC were equally instances of actionable discipline.

24. Mr Brittenden's central argument is encapsulated in his skeleton argument at para 28:

> **A finding of fact or a conclusion reached on a particular issue is in no sense to be equated as a 'determination'. The cause of action can only crystallise when a final sanction or penalty is decided upon. A bare finding of fact does not amount to being "disciplined". The Claimant's error lies in conflating a finding with a disciplinary determination. A finding is an antecedent step which ultimately results in the imposition of the disciplinary penalty. It plainly falls outside the structure of the legislation.**

On this basis, the Claimant's case was, submitted Mr Brittenden, misconceived and had no reasonable prospect of success. Alternatively, it should be struck out as an abuse of the process in that it sought impermissibly to re-litigate the internal disciplinary process.

Conclusions – the undisputed acts of discipline: category (3)

25. These matters (claims (xxxiii) and (xxxv) are valid complaints of determinations by the NEC to discipline the Claimant by suspension

(s64(2)(d)) and the requirement of a written apology (s64(2)(f)). I did not understand Mr Brittenden to argue to the contrary in relation to claim (xxxv). If he did, I disagree with him.

Conclusions – the core dispute: categories (2) and (4)

26. Here, I accept Mr Brittenden's submissions. The bizarre logic of the Claimant's case could almost be left to speak for itself. I reject his arguments, for the following main reasons. First, the legislation is concerned with *disciplinary acts,* not unsound, or even reprehensible, thoughts. It is about a determination by a trade union that a member "should be" (*ie* is to be) subjected to disciplinary action in one form or another. Individual elements or stages in a process of factual inquiry and/or applied analysis cannot be seen as individual disciplinary acts. There is nothing in the language of s64 pointing to such an intention. The Claimant's submission ignores the simple principle that clear Parliamentary language is required to found any enforceable legal right or duty. Where the contention is that a process of reasoning or analysis is *per se* unlawful and actionable in itself, the statute would have to admit of no less repugnant interpretation.[8] So far from unambiguously supporting the Claimant's case, the language of TULRCA argues against it. As Mr Brittenden observed, if a clue is needed (I do not think one is), s67(8A) provides it: the reference to "revoking" a determination infringing a person's right not to be unjustifiably disciplined is eloquent of the fact that s64(2) is directed to *acts*. It is natural to talk of revoking a penalty; it offends language and common sense to speak of revoking a finding of fact or a process of logic.[9]

27. Secondly, the difficulty with the Claimant's argument generally becomes all the more obvious when it is applied specifically to the disciplinary sub-committee's inquiry and recommendations. It would be absurd for the law to deny him the right to rely on the disciplinary sub-committee's conclusions and recommendations (*Webber*) but to permit him to draw out from its underlying findings and reasoning separate foundations on which to rest individual claims. Although he would prefer not to present it so, his case necessarily is: "I wish to base legal claims on a series of individual 'determinations' which, I say, were unlawful building blocks although I accept (because *Webber* compels me to) that no legal complaint can be made about the structure (the sub-committee's conclusions and recommendations) which they were used to create." If the overall determination of the sub-committee to make its two recommendations was not unlawful, the contention that the series of 'mini-determinations' which led to it themselves amounted to actionable wrongs is self-evidently untenable.

28. Thirdly, the deeply problematical nature of the Claimant's argument was

[8] The Claimant did not seem to have reflected on the alarming human rights implications of his arguments.

[9] Perhaps more fantastical still is the idea of a Tribunal being asked to award a financial remedy for the "discipline" inherent only in the making of a finding of fact (s67(1)(a)) and/or wrestling with a union's defence to the effect that such a finding was no longer relied upon and so should be treated as "revoked".

further exposed by his contention that the proposed claim in respect of the disciplinary sub-committee's *recommendations* could itself stand (notwithstanding *Webber*) because his claim was not based on the recommendation but on the *decision to make the recommendation*.[10] Sophistry of this kind has no place in our law (particularly in the field of trade unions and industrial relations, where clarity, practicality and common sense have long been the guiding principles.) There would need to be compelling grounds for reading the legislation in the way contended for and I can see nothing in the statutory language to suggest, let alone compel, such an interpretation.

29. Fourthly, the Claimant derives no more help from the case-law than from the statute. No authority binding on me begins to support his core argument.[11]

30. Fifthly, there appears to be no wider justification for the Claimant's view. He cites no Parliamentary materials. Leaving aside the alarming human rights implications of his argument (already touched on), what good reason is there to think that Parliament contemplated exposing trade unions to serious risk (financial and reputational) in respect of *both* the primary act of discipline (say expulsion or suspension) *and* a multiplicity of subsidiary claims based on the separate steps which led to that treatment? Or, to turn the question around, why should the legislature be taken to have contemplated a trade union acquitted of unlawful discipline in relation to the primary act nonetheless being in danger of being found to have acted unlawfully if, along the way, it has (say) made an unwarranted finding of fact on a particular matter or applied imperfect reasoning to a specific part of its analysis? I see no wider justification. On the contrary, common sense argues against Parliament having had any such perverse intention. Its evident purpose was to provide for a robust jurisdiction founded on practicality and common sense and with a close focus on the 'big picture', not to declare open season on pettifogging skirmishing around the fringes.

31. For all of these reasons, I am entirely satisfied that the claims purportedly based on the findings and reasoning underlying the decisions of the disciplinary sub-committee of 29 April and the NEC of 12 May 2022 are misconceived and have no reasonable prospect of success because they cannot stand as actionable, free-standing instances of discipline under s64.

Conclusions – recommendations of the disciplinary sub-committee: category (1)

32. The claims based on the recommendations of the disciplinary sub-committee ((xx) and (xxii)) are struck out as having no reasonable prospect of success because they cannot stand as actionable determinations under s64(2) (*Webber*). For the reasons given above, I reject the Claimant's absurd distinction between a recommendation and a decision to make a recommendation.

[10] The Claimant ran a parallel and equally invalid argument in relation to findings of fact: making a finding of fact may not be able to stand as an act of discipline, but making a determination to make a finding of fact, or, perhaps, to give expression to a finding of fact, can.
[11] Nor is this to suggest that any first-instance decision lends such support.

Conclusions – notification of the outcome of the NEC hearing: category (5)

33. This claim is obviously unsustainable and hopeless. Undoubtedly, the disciplinary process before the NEC culminated with a detrimental outcome (under s64(2)(d)). But the decision to confirm the outcome was self-evidently not itself a separate act of discipline. It was not a decision that the Claimant should be subjected to a detriment. To the contrary, had the letter of 13 May 2022 not been sent, he would have had respectable grounds for saying that that the decision to *deny* him written notification itself amounted to a determination that he should be subjected to a detriment. And (to state the obvious) the fact that he was not happy to read the contents of the letter cannot make the writing of it actionable. Claim (xxxviii) is struck out as having no reasonable prospect of success.

Conclusions – complaints of procedural unfairness: category (6)

34. The submissions before me were wholly or very largely directed to the main dispute concerning categories (2) and (4). That was understandable but it meant that little if anything was said about this trio of pleaded claims that raise another kind of complaint. They are qualitatively different from the rest. They allege concrete acts or omissions which are said to have amounted to procedural irregularities resulting in prejudice to the Claimant at different stages of the disciplinary process. It seems to me that they can permissibly be seen as raising 'free-standing' matters of complaint in the way that those in categories (2) and (4), which attack the findings and reasoning underlying the key determinations, cannot. On the very limited argument presented on this aspect, I do not feel able to say that no arguable claim under s64(2)(f) can be based upon the complaints in category (6). Accordingly, I decline to make any striking-out order in respect of claims (i), (xxiv) and (xxv). It would be a mistake to interpret my ruling here as suggesting that these claims have merit.

Outcome and Further Conduct

35. The result is that claims (i), (xxiv), (xxv), (xxxiii) and (xxxv) survive. All other claims are struck out.

36. I have been able reach a decision and get this judgment out in good time because a gap appeared in my diary at very short notice. The preliminary hearing for case management which we listed for 18 April now looks much further off than it needs to be. If the parties can agree a date in the short week 3-6 April for a case management hearing (3 hours maximum) the Tribunal may be able to accommodate it.

37. Whenever the case management hearing happens (if one is really needed at all in light of my judgment), the judge will be assisted by concise letters from both sides at least 48 hours in advance setting out the remaining procedural issues and their positions on each.

38. There is no realistic prospect of the Tribunal allocating more of its hard-pressed administrative and judicial resources to case managing this dispute after the next case management hearing.

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EMPLOYMENT JUDGE – Snelson
18/04/2023

Judgment entered in the Register and copies sent to the parties on: 18/04/2023

..... for Secretary of the Tribunals