



EMPLOYMENT TRIBUNALS

Claimants

Respondent

**Dr J Thornby
and 34 Others**

v

University of Warwick

Heard at: **Birmingham** On: **25 and 26 June 2024**
(remotely, by video)

Before: **Employment Judge Kenward** (sitting alone)

Appearances

For the Claimants: **Mr R Johns, Counsel, Mr A Adamou, Counsel**
For the Respondent **Ms S Fraser Butlin KC**

WRITTEN REASONS

JUDGMENT and oral reasons having been given at the hearing on 26 June 2024, with Judgment dated 26 June 2024 having been sent to the parties on 9 July 2024, and written reasons having been requested on 15 July 2023 in accordance with rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the written reasons set out below are now provided.

Judgment

1. The Judgment dated 26 June 2024 was that (1) those parts of the Claims of the Claimants claiming wages in addition to the National Minimum Wage are struck out as having no reasonable prospects of success, and (2) those parts of the Claims of the Claimants claiming wages extending beyond two years back-pay are struck out as having no reasonable prospects of success.

Issue for preliminary hearing

2. The preliminary hearing had been listed to consider the application of the Respondent dated 21 March 2024 that the Tribunal should consider striking out parts of the Claims of the Claimants as having no reasonable prospects of success, namely: (1) the Claimants' "*claims for Implied Salary and other undefined benefits*", and (2) the Claimants' "*claims for monies, other than holiday pay, stretching beyond the period of two years*".
3. In the alternative, the Respondent's application asked the Tribunal to determine whether these parts of the Claims had little reasonable prospect of success and, if so, applied for a deposit order to be made against each of the Claimants.



4. It was accepted that the complaints seeking the National Minimum Wage backdated for two years were outside the scope of the application.

Background and proceedings

5. There are 35 Claimants in these Claims brought by individuals in relation to the period when they claim that they were employed and worked for the Respondent as Resident Tutors, Sub-wardens, Deputy Wardens or Wardens at student accommodation operated by the Respondent.
6. I was provided with sample pleadings relating to the Claim of Freya Verlander which was based upon having worked as a Sub-warden from 1 September 2015. She had brought complaints of unfair dismissal as well as claiming a redundancy payment, notice pay, holiday pay, arrears of pay and other payments. She also brought additional complaints of part-time worker "*detriment short of dismissal and also amounting to dismissal*" and in respect of the National Minimum Wage. A multiple Claim form was completed by way of adding six further Claimants on the basis of their Claims arising from the same set of facts.
7. In fact, a document was attached to the ET1 Form of Claim which was described as a Rider to the ET1 Form of Claim which described the Claim as one of 35 such Claims "*brought on behalf of a cohort of employees*". It was stated that, whilst individual Claims varied in scope, depending on the treatment of the individuals. common to all Claims "*is a question over status, whether salary should have been payable, and whether the Claimants have been unfairly dismissed from their contracts*".
8. Part 1 of the Rider to the ET1 Form of Claim was stated to deal with the common issues. Thus, it was stated that all of the Claimants had worked under a supposed Volunteer Agreement carrying out roles as Resident Tutors or Wardens of various descriptions. In return they received subsidised utilities and subsidised accommodation. In short, it was being suggested that the arrangements in place could be seen in terms of benefits, obligations and control. Descriptions were provided of the issues or duties which had to be dealt with in the course of carrying out these roles.
9. It was stated that the Respondent had dismissed all of the Claimants from their Volunteer Agreements and re-engaged some of them as employees carrying out substantially identical roles, save that the new roles have better defined hours.
10. The case of the Claimants is that they were, in fact, always employees of the Respondent. The arguments in support of this analysis are set out in Part 1 of the Rider to the ET1 Form of Claim which also sets out the complaints which were effectively being brought by all of the Claimants.
11. Paragraphs 15 to 20 of the Rider to the ET1 Form of Claim were in the terms set out below.

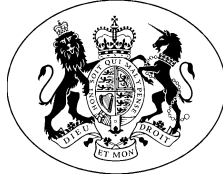


- “15. As a consequence of miscategorising them as volunteers, the Claimants were unpaid for their work when they should have been paid. They should have received statutory holidays, at least the national minimum wage, sick pay and the other regular benefits that the Respondent applies to all employees.*
- 16. The Respondent has unlawfully deducted the wages of the Claimants and they seek their historic pay.*
- 17. As the Respondent persistently referred to the Claimants as volunteers and did not indicate to them that they should seek their own legal advice on that status or their rights, and rather informed them that they had no employment rights, the Claimants could not have reasonably known that there was any entitlement to pay or holiday pay which they should have claimed. Accordingly, applying the principle in **Sash Windows**, the Claimants seek their pay backdated to the beginning of their employment.*
- 18. That pay is to be calculated by reference to the reasonable pay for like work at the University with reference to the new employment contracts for work of a directly similar type.*
- 19. At the minimum, and in the alternative as a claim, there has been a failure to pay the National Minimum Wage, and to comply with the record keeping obligations in section 59(1) of National Minimum Wage Regulations 2015, and section 9 of NMWA 1998.*
- 20. The Claimants seek compensation for all lost pay and pension contributions”.*
12. It can be seen that this is asserting that, if the Claimants are found to be employees, they will be claiming that wages have been unlawfully deducted, and that any such wages should not be limited to pay at the rate of the National Minimum Wage, and should be backdated to the start of any employment, so that the period of pay being claimed could be for many years.
13. Part 1 of the Rider to the ET1 Form of Claim also put forward, in the alternative, complaints of part-time worker detriment. It would seem that the detriment being claimed included that of not assessing them as having employment status and so not paying them. A further detriment was then dismissing them from their roles. This was stated to have amounted to an automatic unfair dismissal on the grounds of part-time status.
14. All of the qualifying Claimants also claimed ordinary unfair dismissal on the basis that they were employees and had been dismissed without good cause or due process.
15. In relation to the various individual complaints brought by various Claimants, I understand from the Case Summary provided with the Case Management Orders from 20 September 2023 that some Claimants also bring complaints of disability discrimination in the form of indirect discrimination and failure to make



reasonable adjustments. There are also complaints of indirect discrimination on the ground of marriage.

16. If the complaints are not brought on the basis of being alleged employees within the relevant statutory definition, then they are brought on the basis of being alleged workers within the equivalent applicable statutory definition.
17. The Respondent's defence is that the Claimants were volunteers, not employees or workers, and so the Tribunal does not have jurisdiction to hear the Claimants' Claims. It also raises issues that many of the Claims have been filed out of time. It defends all the Claims on substantive grounds.
18. The relevant background put forward by the Respondent is that, until September 2022, it operated a Residential Life Team ("RLT"). In short, the purpose of the RLT was to support the residential system at the University where around 7,500 students lived on campus in 2016. A system had been put in place which involved employing Senior Wardens, who were employees, but who were supported by a team of approximately 120 to 130 volunteers each year, with these volunteers taking up one of the following roles: Warden, Deputy Warden, Sub-warden or Resident Tutor. A volunteer's appointment as a member of the RLT was conditional on the individual concerned being a fully registered student or employee of the University. In return for agreeing to volunteer in one of the aforementioned roles, the volunteers received free accommodation on the University campus. They also received an annual utilities payment of £600 including VAT per year in monthly instalments. This was based on an average calculation for utilities, rather than representing a subsidised contribution by the University. The Grounds of Resistance also refer to Council Tax being paid on their behalf by the Respondent. Paragraph 22 also refers to the Wardens receiving an honorarium paid monthly in recognition of the Wardens' supervisory responsibility for other volunteers, with this payment calculated based on a formula of a set sum of £650 plus £2.70 per student in the relevant residence. The honorarium was subject to tax and National Insurance.
19. The Grounds of Resistance set out the other arrangements which applied in respect of these individuals. In summary, the position of the Respondent is that the requirements for worker or employee status were not met by these arrangements. Personal service, control and mutuality of obligation were not present. Volunteers could rely on a substitute.
20. According to the Grounds of Resistance, following a review, a new system was put in place in 2022 involving a Residential Community Team ("RCT"). The Grounds of Resistance sets out the respects in which this differed from the RLT. The Respondent states that this involved volunteers being replaced by Residential Community Assistants ("RCAs") who are engaged as temporary workers. As they are workers, RCAs are paid the National Living Wage. There



was an expression of interest exercise by which the Claimants could have been considered for the new roles without going through an assessment process.

21. Both sides agreed that the issue of employee and / or worker status is a key preliminary issue and that a substantive multi-day preliminary hearing will be required to determine those connected issues. A preliminary hearing had been listed for 15 days from 9 September 2024 for this purpose and has been rearranged for a period of 20 days from 25 June 2025.
22. The Claimants had been directed to serve Schedules of Loss. The narrative to the Schedules of Loss makes the position of the Claimants clear in that it is stated that *“the Claimants are pursuing full employee rights including unpaid wages, sick pay, holiday pay, and pension contributions, as well as any and all other benefits and entitlements of an employee of UoW”*. In this regard, the *“Claimants are seeking unpaid wages covering their full tenure as members of the RLT, at a rate commensurate with the roles and responsibilities undertaken (or NMW in the alternative)”*. The Claimants submit that the principle established by *King v Sash Window Workshop Limited (C-214/16) [2018] ICR 693, ECJ*, relating to past recovery of holiday pay applies by analogy to wages in circumstances where Claimants were prevented from exercising their rights.
23. It is stated that the *“core of the Claimants’ case is that their position was misrepresented in that they were repeatedly told and given documentation to lead them to believe that they were volunteers as thus not entitled to a salary / wage”*. Thus, the Claimants *“were prevented from exercising their rights and additionally they were prevented from seeking recompense given what they were led to believe by UoW”*.
24. Paragraphs 11 to 14 of the narrative to the Schedules of Loss were in the terms set out below
 11. *The Claimants maintain that these “Volunteer Agreements” formed the basis of what should be considered their employment contracts with UoW.*
 12. *The Tribunal will be seized of assessing the true nature of the parties’ agreement in line with Autoclenz Ltd v Belcher and others [2011] IRLR 820 (SC) including looking behind the written terms.*
 13. *The parties must be assumed to have intended their contract to be workable. Consequently, the Claimants submit that the implication of a term relating to salary / wage is necessary in the business sense to give efficacy to the contract and in any event would have been included by the officious bystander.*
 14. *The Claimants maintain that given each roles’ disparate responsibilities and seniorities that the agreement (and subsequent implied term relating to salary / wage) was different for each role”*.
25. Paragraphs 16 to 19 of the narrative to the Schedules of Loss are as below.



- “16. Roles within the RLT have been benchmarked against comparable roles at UoW. This has been done to establish a suitable grade-equivalence according to the main university salary scale. The Resident Tutor and Warden roles in RLT have been benchmarked respectively against the Residential Community Assistant (RCA) and Residential Community Coordinator (RCC) roles within the new Residential Community Team. This has been done solely for establishing comparative starting points on the university pay scale. The Claimants maintain that the roles and duties, particularly between the Resident Tutors and the RCAs, were different in extent and scope.*
- 17. RCAs are paid hourly and receive the ‘Real Living Wage’ (RLW), while RCCs are full-time employees rated at FA7 on the main university pay scale.*
- 18. The Claimants contend that the Resident Tutor role exceeded the current RCA role, both in scope and responsibility. Moreover, there is precedent of UoW ascribing value to Resident Tutors’ additional years of experience, and thus the suitable starting point is to place Resident Tutors on the main university pay scale, beginning at FA1.*
- 19. Sub Wardens and Deputy Wardens have, therefore, been allocated an appropriate bracket when considering the level of responsibility, seniority and experience required for the role”.*
26. Thus, it is being contended that the Claimants should be compensated for any unpaid wages which they should have received as employees by reference to the wages which they contend would have been paid on the Respondent’s pay scale with Resident Tutors being placed at FA1-2, Sub-wardens at FA3-4, Deputy Wardens at FA5-6 and Wardens at FA7.
27. To take an example, this approach results in the Schedule of Loss for Dr John Thornby claiming that he is entitled to £407,640.51 in unpaid wages (plus pension contribution on top of this). This was in respect of a period of 17 years up to 31 August 2022. For Theologia Iliadou, the equivalent figure for a period from 1 March 2010 to 1 August 2022 was £336,971.42 not including the head of claim in respect of pension contribution. These are the highest two figures from the sample of Schedules of Loss provided in the Bundle.
28. The Claimants have confirmed that the losses that they are seeking are based on the concept of an ‘implied salary’ calculated as being in accordance with the Respondent’s existing pay scales for its employees, together with “*other regular benefits*”.
29. In the Claimants’ written submissions it was made clear that the Claimants are claiming “*pension loss, sick pay as well as holiday pay and non-payment of Covid Bonuses*” on the basis that these “*are benefits that would have been available to the Claimants if they were employees as contended*”, with the Claimants now also making it clear that the other regular benefits which could potentially be



claimed might include health & dental insurance, parking or travel allowance, gym membership, life insurance or critical illness cover, scholarships and bursaries for further study, training and further development. Essentially the point is that, if the Claimants are found to be employees, then they claim that they should be entitled to claim the same benefits that other employees of the Respondent had historically been receiving.

30. In so far as the Claimants in the written submissions assert that "*it was unclear what other benefits may be available to employees of the Respondent*", so that this might depend upon disclosure of evidence, it was being suggested that this was "*a fact dependant issue and is entirely dependent on the witness evidence due to be heard by the Tribunal as well as a proper examination of disclosure*".
31. The Respondent set out its position in correspondence, in response to the Schedules of Loss. That position was that the narrative and accompanying Schedules and calculations were misconceived as they have no basis in law and were therefore considerably over-inflated "*which we believe is setting wholly unrealistic expectations for the Claimants in respect of the potential value of their Claims*".
32. Two fundamental points in dispute were identified.
33. The first was that, in relation to the calculation of unpaid wages being claimed, the Claimants were alleging a term should be implied into the Volunteer Agreements relating to salary / wage such that the University's pay scales for employees should apply to the Claimants. It was asserted that complaints of unlawful deductions from wages should be based on identifiable or specific sums of money which are "*properly payable*" (*Coors Brewers Limited v Adcock [2007] ICR 983, CA*). The Respondent's position was that there was no legal basis applicable to these Claims upon which such salaries could be claimed (beyond the level of the National Minimum Wage).
34. The second point related to the duration of time for which unpaid wages were being claimed. It was being asserted on behalf of the Claimants that *King v Sash Window Workshop Limited* was applicable to wages complaints generally. However, the Respondent's position was that this is misconceived, and that *King v Sash Window Workshop Limited* is applicable to holiday pay complaints only. This error meant that the Schedules of Loss ran "*to hundreds of thousands of pounds for individual cases, when the Claimants' losses are limited to two years from the date the Claim was filed only*". Reference being made to the Deduction from Wages (Limitation) Regulations 2014 (SI/2014/3322) (the "2014 Regulations") and section 23(4A) and (4B) of the Employment Rights Act 1996 ("ERA 1996") which applies a backstop to wages complaints (except the limited payments listed under ERA 1996 section 27(1)(b) to (j)). *King v Sash Window Workshop Limited* related to article 7 of the Working Time Directive 2003 and regulation 13 of the Working Time Regulations 1998. It was a case in respect of



holiday pay only and not an authority to the effect that unpaid wages can be claimed for a period of more than two years.

35. This was followed up by the Respondent making an application dated 21 March 2024 for parts of the Claimants' Claims (as identified at paragraph 1 above) to be dismissed on the basis that they have no reasonable prospect of success pursuant to rule 37(1)(a) of the Employment Tribunals Rules of Procedure 2013 (the "Tribunals Rules"). In the alternative, the Respondent sought an order pursuant to rule 39(1) of the Tribunal Rules that the Claimants should each pay a deposit of £1,000 as a condition of continuing to advance the relevant part of their Claim.
36. The Respondent was effectively asserting that these parts of the Claims had no reasonable prospect of success.
37. For the avoidance of doubt, while the Respondent did not accept that such complaints would succeed, the Respondent was not seeking to strike out the Claims in so far as they involved claiming the National Minimum Wage for a period of two years prior to termination of the Claimants' Volunteer Agreements with the Respondent (or longer in the case of holiday pay).
38. In relation to the part of any Claim by which the Claimants were seeking to recover more than the National Minimum Wage, it was stated that the "*concept of the Implied Salary as sought by the Claimants has no basis in law*" in that there "*is no legal mechanism by which the Claimants can claim an entitlement to salary at an unspecified rate or on the basis of 'like work'*" and there "*is no precedent whatsoever for such a term to be implied in law*".
39. Insofar as the Claimants are seeking "*other regular benefits*" or any other monies beyond the National Minimum Wage or holiday pay, it was asserted that any such part of any Claim was similarly misconceived. There was no legal entitlement to such sums.
40. In relation to the part of any Claim by which the Claimants were seeking to recover pay beyond the statutory limit of two years as set out in the 2014 Regulations and at ERA 1996 section 23(4A) and (4B), it was noted that the Claimants were suggesting in paragraph 17 of the Rider to the ET1 Form of Claim that the principle in *King v Sash Window Workshop Limited* should be applied to the Claimants' complaints of unlawful deduction from wages in respect of the 'implied salary', National Minimum Wage and the "*other regular benefits*". In response, it was contended that the Claimants had not identified any legal basis on which the principles of *King v Sash Window Workshop Limited* can be extended to cover payments other than holiday pay. The principles in *King v Sash Window Workshop Limited* arise because holiday pay is derived from an EU Directive and apply in order to give effect to the requirement to provide an effective remedy. This does not apply to any of the Claimants' complaints of unlawful deduction from wages.



41. On 2 April 2024 the Claimant's Solicitors made it clear that any such application was contested.
42. It should also be noted that the Respondent has further confirmed the limited scope of the application. The main issue in the proceedings is that the Claimants contend that they were workers and / or employees and seek to bring Claims based on establishing such status. The Respondent has made it clear that it maintains its denial of the various complaints. The Claims are all denied including the contention that the Claimants are workers and / or employees. However, the Respondent accepts that questions as to status are fact sensitive and would require a hearing, at which evidence is heard, to determine. The complaints in respect of the National Minimum Wage, unfair dismissal and the numerous other complaints that are brought flow from the answer to that question. The application is limited to the parts of the Claims claiming wages beyond the National Minimum Wage, and those parts claiming National Minimum Wage payments (save in respect of holiday pay) extending beyond two years back pay.

Relevant law

43. Under rule 37(1) (a) of the Tribunals Rules, 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*", with one of the grounds being that it "*has no reasonable prospect of success*".
44. This requires that the Tribunal determine two matters. Firstly, whether the Claims have no reasonable prospect of success under rule 37(1)(a) and secondly, whether to exercise its discretion to strike out the Claim or to make an alternative Order (*HM Prison Service v Dolby [2003] IRLR 694*).
45. Guidance as to considering such applications was given by Lady Smith in *Balls v Downham Market High School and College [2011] IRLR 217, EAT*, at paragraph 6, as set out below.
- "Where strike out is sought or contemplated on the ground that the claim has no reasonable prospects of success, the structure of the exercise that the tribunal has to carry out is the same; the tribunal must first consider whether, on a careful consideration of all the available material, it can properly conclude that the claim has no reasonable prospects of success. I stress the word "no" because it shows that the test is not whether the claimant's claim is likely to fail nor is it a matter of asking whether it is possible that his claim will fail. Nor is it a test which can be satisfied by considering what is put forward by the respondent either in the ET3 or in submissions and deciding whether their written or oral assertions regarding disputed matters are likely to be established as facts. It is, in short, a high test. There must be no reasonable prospects"*.
46. In *Ezsias v North Glamorgan NHS Trust [2007] EWCA Civ 330, [2007] ICR 1126*, the Court of Appeal held that it "*would only be in an exceptional case that an*



application to an employment tribunal will be struck out as having no reasonable prospect of success when the central facts are in dispute”.

47. Under rule 39(1) of the Tribunal Rules, where “*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”.*
48. Section 17(1) of the National Minimum Wage Act 1998 (“NMWA 1998”) provides that if “*a worker who qualifies for the national minimum wage is remunerated for any pay reference period by his employer at a rate which is less than the national minimum wage, the worker shall at any time (“the time of determination”) be taken to be entitled under this contract to be paid, as additional remuneration in respect of that period”*, with specific provision made for calculating that additional remuneration.
49. Section 44 of the NMWA 1998 deals with voluntary workers and sets out limited circumstances in which a “*worker employed by a charity, a voluntary organisation, an associated fund-raising body or a statutory body does not qualify for the national minimum wage in respect of that employment”.*
50. ERA 1996 section 23 deals with complaints to the Tribunal as to unlawful deductions from wages. There is a time limit of three months, but section 23(3) provides that where a complaint is brought under respect of a series of deductions, that time limit runs from the last such deduction in the series.
51. The Deduction from Wages (Limitation) Regulations 2014 introduced additional sub-sections into ERA 1996 section 23 as set out below.
- “(4A) An employment tribunal is not (despite subsections (3) and (4)) to consider so much of a complaint brought under this section as relates to a deduction where the date of payment of the wages from which the deduction was made was before the period of two years ending with the date of presentation of the complaint.*
- (4B) Subsection (4A) does not apply so far as a complaint relates to a deduction from wages that are of a kind mentioned in section 27(1)(b) to (j)”.*
52. Thus, the 2014 Regulations impose a back pay limit of two years on all sums within the scope of ERA 1996 section 27(1)(a) which defines wages as “*any sums payable to the worker in connection with his employment, including — (a) any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise”.*
53. However, in *King v Sash Window Workshop Limited (C-214/16) [2018] ICR 693, ECJ*, the European Court of Justice held that article 7 of the Working Time Directive 2003/88 must be interpreted as precluding national provisions or practices that prevent a worker from carrying over and, where appropriate,



accumulating, until termination of his employment relationship, paid annual leave rights not exercised in respect of several consecutive reference periods because his employer refused to remunerate that leave.

54. In *Smith v Pimlico Plumbers Limited* [2022] EWCA Civ 70, [2022] ICR 818, CA, the Court of Appeal held that a worker who took unpaid annual leave when his employer disputed the right to such leave and refused to pay for the leave would be seen as having been prevented, by reasons beyond his control, from exercising the composite right afforded by article 7 the Working Time Directive 2003.
55. Although it had ceased to be a necessary part of its decision, the Court of Appeal in *Smith v Pimlico Plumbers Limited* also indicated (see paragraphs 91 to 101 of the Judgment) its strong provisional view that a “series of deductions” from wages for the purposes of ERA 1996 section 23(3)(a) was not ended by a gap of more than three months between unlawful deductions. This was based on a literal interpretation of ERA 1996 section 23(3) in that Section 23(3) “means what it says”, and the word “series” is “an ordinary English word”.
56. Terms may be implied into a contract in fact or in law. It appears that the Claimants are only relying on a term implied in fact. The Claimants do not appear to have put forward a case that the terms that they are seeking to introduce into the contract of employment should be implied by law. The principles for the implication of a term in fact have been summarised by Lord Hughes, giving the Judgment of the Privy Council, in *Ali v Petroleum Company of Trinidad and Tobago* [2017] UKPC 2, [2017] ICR. 531, PC, at paragraph 5, as set out below.
- “It is enough to reiterate that the process of implying a term into the contract must not become the re-writing of the contract in a way which the court believes to be reasonable, or which the court prefers to the agreement which the parties have negotiated. A term is to be implied only if it is necessary to make the contract work, and this it may be if (i) it is so obvious that it goes without saying (and the parties, although they did not, ex hypothesi, apply their minds to the point, would have rounded on the notional officious bystander to say, and with one voice, ‘Oh, of course’) and/or (ii) it is necessary to give the contract business efficacy. Usually the outcome of either approach will be the same. The concept of necessity must not be watered down. Necessity is not established by showing that the contract would be improved by the addition. The fairness or equity of a suggested implied term is an essential but not a sufficient pre-condition for inclusion. And if there is an express term in the contract which is inconsistent with the proposed implied term, the latter cannot, by definition, meet these tests, since the parties have demonstrated that it is not their agreement”.*
57. The parties must be assumed to have intended their contract to be workable. Consequently, Courts and Tribunals will imply terms which are “necessary in the



business sense to give efficacy to the contract" (see *Reigate v Union Manufacturing Co (Ramsbottom) Limited* [1918] 1 KB 592).

58. An example of terms being implied to give business efficacy to the contract is *Jones v Associated Tunnelling* [1981] IRLR 477, EAT, which was a case where the contract failed to stipulate the employee's place of work, and the EAT held that the requirements for implying a term into the contract were met, as set out below.

"As we have sought to show, it is essential to imply some term into the contract in order to give the contract business efficacy: there must be some term laying down the place of work. In such a case, it seems to us that there is no alternative but for the tribunal or court to imply a term which the parties, if reasonable, would probably have agreed if they had directed their minds to the problem. Such a term will not vary the express contractual terms".

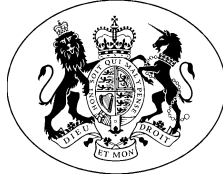
59. In *Autoclenz Limited v Belcher* [2011] IRLR 820, SC, which concerned the issue of whether or not workers were working under a contract of employment, the Supreme Court held that *"the relative bargaining power of the parties must be taken into account in deciding whether the terms of any written agreement in truth represent what was agreed and the true agreement will often have to be gleaned from all the circumstances of the case, of which the written agreement is only a part"* (paragraph 35).

Submissions of Respondent

60. The Respondent submitted that the parts of the Claims in relation to which the striking out application was made were separate and standalone matters. The simple point was that there was no legal basis for the parts of the Claims which were in issue.

61. Given the terms of the Volunteer Agreement (and the letter that accompanied the Agreement), there was no need to imply a term for the payment of wages nor would a bystander say *"of course"* there should be such a term. Through the Volunteer Agreement, the Claimants had agreed that they were not entitled to any remuneration. However, if the Claimants were found to be employees or workers, then the effect of the NMWA 1998 would give them a contractual entitlement to the National Minimum Wage. There was no basis for implying a salary at a different rate.

62. The effect of the 2014 Regulations was that, if the Claimants were found to be employees or workers, any head of claim in respect of unpaid wages (which, as above, would be limited to the National Minimum Wage) could only be backdated for two years from the applicable date. The principles applied in *King v Sash Window Workshop Limited* were to give effect to rights arising under the Working Time Directive 2003 in relation to annual leave and could not be extended to different rights arising under domestic legislation.



Submissions of Claimant

63. The Claimant submitted that the threshold for striking out a case as having no reasonable prospects of success was high in that, in *Ezsias v North Glamorgan NHS Trust*, the Court of Appeal held that where there are facts in dispute, it would only be "very exceptionally" that a case should be struck out without the evidence being tested. This was not such an exceptional case. It would be sufficient if the Claimants were able to establish a plausible line of argument.
64. There was a further issue as to whether the heads of claim in issue could be struck out as this part of the Claimants' case "*deals with the method of calculation for a remedy as opposed to the entitlement to a remedy itself*".
65. As the Claimants in the roles that they undertook under the Volunteer Agreement had "*varying levels of seniority and varying levels of experience*", it followed that, if they were workers or employees entitled to remuneration, it would be "*unconscionable to suggest that an individual would take a more senior almost managerial role (including managing and supervising other members of staff) with no expectation of enhanced remuneration*". In the circumstances it falls to the Tribunal to assess the amount of remuneration which would be "*reasonable*", and given the length of time and the nature of the employment, "*the only sensible way to do so would be to imply a rate of pay in the agreement*". This would be "*not simply implying a term so as to do fairness to the Claimants but to give a commercial reality to the nature of the agreement*". Such a term should be implied whether the test used was the business efficacy test or the officious bystander test.
66. The issue as to the regular benefits to which the Claimants would have been entitled as workers or employees was a fact dependant issue which hinged on the witness evidence due to be heard and the documentary evidence which was still being disclosed.
67. In oral submissions, reliance was placed on *Autoclenz Limited v Belcher*, on the basis that the purposive approach described in paragraph 35 (see above) was applicable.
68. As far as the limit of two years on back pay was concerned, the Claimant contended that the principle established in *King v Sash Window Workshop Limited* could be applied by analogy, with further support for such an approach being provided by the decision in *Smith v Pimlico Plumbers Limited*. The 2014 Regulations pre-dated these decisions, and arguably need to be seen through the lens of these authorities, as the legal landscape had changed. Because the Claimants had been misled as to their status, they should be able to claim the full extent of any back pay, as otherwise the Respondent would benefit from its deception. Further, there was an inconsistency between the Claimant being able to recover holiday pay going back more than two years but not wages, which needed to be reconciled. As such, it was a matter of statutory interpretation as to



whether or not the 2014 Regulations applied where the Claimants had been deliberately prevented from recovering wages and benefits to which they were entitled. Applying a literal interpretation to the 2014 Regulations “*produces the absurd result in denying the Claimants justice for multiple years (and in some cases decades) of incorrect status*”. As such, the Tribunal should adopt a purposive approach to interpreting the relevant statutory provisions which were intended to protect employees and workers from being denied their statutory rights.

69. Essentially, the Claimants contended that the prospects of success in relation to the arguments set out above were such that the test for striking out the parts of the Claims concerned or for ordering the payment of deposits were not met.

Discussion

70. The Respondent’s essential argument is that there are no reasonable prospects of success because there is no legal basis for the relevant parts of the Claims of the Claimants. The Respondent has set out the parts of the Claims to which this applies, namely those parts claiming wages in addition to the National Minimum Wage, and those parts claiming National Minimum Wage payments (save in respect of holiday pay) extending beyond two years’ back pay.
71. The Claimants’ case is that, as a consequence of “*miscategorising*” the Claimants as volunteers, in addition to not receiving statutory entitlements such as pay at the rate of the National Minimum Wage and holiday pay, the Claimants “*should have received ... other regular benefits the University applies to all employees*”, (paragraph 15 of the Rider) and that the pay claimed is “*to be calculated by reference to the reasonable pay for like work at the University with reference to the new employment contracts for work of a directly similar type*” (paragraph 18 of the Rider) to include “*all other benefits and entitlements of an employee of UoW*” (paragraph 2 of the Schedules of Loss),
72. I note that, whilst it might be said that the issue as to what benefits might have been available to the Claimants, were they in a position to compare themselves with other employees, was a matter for evidence, the Claimants need to establish a legal basis for claiming such benefits in the first place, before any evidence as to such benefits is needed.
73. The Schedules of Loss further made it clear that the Claimants are claiming the “*unpaid wages covering their full tenure as members of the RLT, at a rate commensurate with the roles and responsibilities undertaken (or NMW in the alternative)*” (paragraph 5 of the Schedules of Loss) and with the sums claimed being “*benchmarked against comparable roles at UoW*” so as “*to establish a suitable grade-equivalence to the main university pay scale*” (paragraph 16 of the Schedules of Loss). The Schedules of Loss place each Claimant on a point on the University pay scale over the years claimed, with additional sums for standby and on-call uplifts (paragraphs 34 to 40 of the Schedules of Loss), overtime paid



at time and a half (paragraph 41 of the Schedules of Loss), and a Covid bonus (paragraphs 51 to 52 of the Schedules of Loss).

74. The purported legal basis for pursuing these sums is that the “*parties must be assumed to have intended their contract to be workable*”, so that, consequently, “*the Claimants submit that the implication of a term relating to salary / wage is necessary in the business sense to give efficacy to the contract and in any event would have been included by the officious bystander*” (see paragraph 13 of the Schedules of Loss).
75. Whilst terms may be implied into a contract in fact or in law, the Claimants do not appear to have put forward a case that the terms that they are seeking to introduce into the contract of employment should be implied by law. However, the Claimant’s submissions effectively seek to contend that the proposed implied terms would be necessary to make the contract work, whether applying the test of the notional officious bystander or that of business efficacy.
76. At one point during the oral submissions on behalf the Claimants, it seemed to be being suggested that the implied terms were necessary on the basis that this would be just and equitable. Moreover, the written submissions of the Claimants maintained that it would be “*unconscionable*” to suggest that an individual would undertake a role which was more senior than others with no expectation of enhanced remuneration. This appeared to be arguing that fairness made it necessary to distinguish between the various different roles that the Claimants fulfilled so that there should be different rates of pay.
77. However, the Claimants maintain that this is not simply implying a term so as to do fairness to the Claimants but to give a “*commercial reality*” to the nature of the agreement between the parties. The Claimants maintain that they would be successful on this point regardless of whether the Tribunal opted to use the business efficacy test or the officious bystander test
78. Clearly, the principles established in the judgment of the Privy Council in *Ali v Petroleum Company of Trinidad and Tobago*, specifically state that necessity is not established by showing that the contract would be improved by the proposed addition and make clear that the fairness or equity of a suggested implied term is an essential but not a sufficient pre-condition for inclusion. Thus, the fact that it might be fair for the Claimants, if they were employees, to be paid by reference to the same pay scale as that applying to other employees, and to be paid by reference to some kind of job evaluation, would not be sufficient. Similarly, it is not for the Tribunal to impose on the parties, through the introduction of implied terms, an agreement which it considers to be more akin to commercial reality.
79. Moreover, if there is an express term in the contract which is inconsistent with the proposed implied term, then *Ali v Petroleum Company of Trinidad and Tobago* makes it plain that the proposed implied term “*cannot, by definition, meet these tests, since the parties have demonstrated that it is not their agreement*”.



80. In the present case, the Claimants are effectively seeking to introduce the proposed implied terms into the Volunteer Agreement agreed by the Claimants. This specifically provided that the Claimants would not receive payments in the form of wages but would receive various other benefits. On the face of it, the proposed implied terms are inconsistent with these terms. The fact that, if the Claimants are found to be employees or workers, the existing terms as to pay will effectively be in breach of the NMWA 1998 does not, in itself, cause it to be necessary to introduce the proposed implied terms of the contract, since section 17 of the NMWA 1998 specifically provides that the employees or workers would become contractually entitled to the National Minimum Wage (or National Living Wage).
81. The Respondent's position, in its written submissions, was that there was no evidence whatsoever that it is necessary to imply a term into the Claimants' contract entitling them to pay comparable to other employees of the Respondent in order for the contract to function. In fact, the Respondent's written submissions asserted that the "*evidence is quite the opposite*".
82. I was a little concerned that, whilst, for the sake of argument, this submission may have force, it might be interpreted as suggesting that it would be necessary for evidence to be considered by the Tribunal in order to determine whether or not it was necessary to imply the proposed terms into any contract. Indeed, whilst the submissions of the Claimant could not exactly have been said to have referred the Tribunal to the existence of evidence which supported their case in respect of necessity, other than the fact of other employees being paid by reference to the Respondent's pay scales and receiving various benefits, the Claimant's submissions did seem to be hinting at the process of gathering or evaluating evidence still being ongoing.
83. However, when I probed this point further with the Respondent in the course of oral submissions, it became clear that the Respondent's position was that this was essentially not a factual issue but a legal issue involving the interpretation of the existing contract into which the Claimant was seeking to introduce the proposed implied terms. The Respondent's position was that the proposed implied terms were quite clearly inconsistent with the express terms of the contract so that, applying the Judgment of the Privy Council in *Ali v Petroleum Company of Trinidad and Tobago*, the issue of necessity did not arise as the test could not be met where there were express terms which are inconsistent with the proposed implied terms. This simply involved the construction of the contract.
84. In this regard, the Respondent sought to make the point that the contracts signed by the Claimants were expressly Volunteer Agreements and set out that the "*University wishes to assure the volunteer of its appreciation of them volunteering with the University and will do the best it can to make their experience of volunteering with the University enjoyable and rewarding*". The Volunteer



Agreement set out the “*tasks of this voluntary role*” and that accommodation was provided for this “*volunteering role*”.

85. The Respondent also placed reliance upon the Claimants having received letters alongside the Volunteer Agreements to the effect that that they were being offered a “*volunteer position*”, with a “*Volunteer Agreement*” and “*Volunteer Pack*” being enclosed. A residency licence for their rent-free accommodation was also included. The recipients were told that upon “*agreeing to become a volunteer*” they would be provided with a mobile phone; and as “*a volunteer*” in the Residential Life Team, the Respondent would operate as a data processor and controller. On this basis the individual was asked to sign and return an online acceptance form “*if you are willing to accept the offer of a volunteer position*”.
86. This appeared to be arguing that the proposed implied terms could not be implied into the agreement because they were inconsistent with the volunteer status of the Claimants under the agreement, with this having also been made plain and the accompanying documentation. If this was the extent of the argument then it seemed possible to me that it was vulnerable to the counter-argument to the effect that any determination of the preliminary issue as to status might theoretically result in a finding that, although the Claimants may well have been volunteers, their status was that of employees.
87. However, the Agreement also expressly made it clear that the Claimants were not just volunteers in the sense of having freely put themselves forward, but also in the sense of not seeking or being entitled to wages. The Respondent also placed reliance on clause 5.1 of the Volunteer Agreement, which was to the effect that, in “*accordance with section 44 of the NMWA 1998, the volunteer shall not be entitled to receive any remuneration nor (subject to clause 4) any benefits in kind for the performance of their tasks under this Agreement*”.
88. As such, it can be seen that the proposed implied term as to salary is inconsistent with the express terms of the Volunteer Agreement. Given the terms of the Volunteer Agreement (and the letter that accompanied the Volunteer Agreement), there can be no necessity to imply a term for the payment of wages, nor would a bystander say “*of course*” there should be such a term. Indeed, clause 5.1 of the Volunteer Agreement could not be clearer: the Claimants agreed that they were not entitled to any remuneration (subject to clause 4 which dealt with the provision of accommodation).
89. Whilst this also involved placing reliance upon section 44 of the NMWA 1998, if, for the sake of argument, section 44 of the NMWA 1998 did not apply, then the Respondent’s position, as set out above, would need to be qualified on the basis that, if the Claimant’s status was found to be that of a worker or employee, then, an entitlement to the National Minimum Wage would be implied into any agreement pursuant to NMWA 1998 section 17. However, that would be the extent of it. The Respondent was not seeking to argue that the Claimants should



not be entitled to pursue wages at the rate provided for under the NMWA 1998 in the event that the Claimants were found to be employees or workers.

90. The Claimants though are effectively seeking to suggest that a term for payment beyond the National Minimum Wage should be implied as a legal incident of an employment relationship. The Respondent sought to rely on there being no case law whatsoever suggesting that such a term should be implied in law. It was further contended by the Respondent that such a term would render the entire scheme of the NMWA otiose because there would never be a need for a person to claim the National Minimum Wage as he or she would simply need to find an individual in the business being paid more than that and compare themselves to that person. I would add that there are circumstances in which individuals can specifically compare their pay to that of another individual in the same business (such as through an implied equality clause), but those circumstances are specifically provided for by statute and give rise to a separate specific cause of action not being pursued in this case. Indeed, on one view, the statutory provisions as to equal pay would be otiose if employees could compare themselves with anyone who was doing like work and could become entitled to the same pay as that person on the basis of a term being implied into the contract of employment.
91. The Claimants' case, as set out in their written submissions, was that the Respondent knew or ought to have known that the Claimants were employees. Additionally, the Claimants maintain that they were negligently or recklessly misled as to their status. It was as a result of this deception and / or misrepresentation that the Volunteer Agreement was silent as to any level of remuneration (although, in fact, it was not silent, but provided for the position to be as set out in clause 5.1 referred to above).
92. The Claimants' argument appeared to be that this was a case where the principles to be applied were those in *Autoclenz Limited v Belcher*. It was contended that this meant that the relative bargaining power of the parties must be taken into account in deciding whether the terms of any written agreement represent what was agreed (see paragraph 35 of *Autoclenz Limited v Belcher* quoted above).
93. Certainly, this was potentially the case in relation to the issue of status. However, even if the status issue was decided in the Claimants' favour, the Tribunal then had to go on and consider whether the implied terms argued for by the Claimants should be inserted into the agreement between the parties. In this regard, the Claimants' case was that the proposed implied terms could be inserted into the Volunteer Agreement once it had been established that their true status was that of employees or workers. The position of the Respondent was that *Autoclenz Limited v Belcher* does not cause the orthodox principles in relation to implying terms into a contract to cease to apply. Indeed, this was the route which seemed to be taken by the Claimants in the narrative to the Schedules of Loss which set

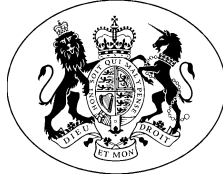


out the case of the Claimants as being (1) the Volunteer Agreements formed “*the basis of what should be considered their employment contracts with UoW*” (paragraph 11), (2) the Tribunal “*will be seized of assessing the true nature of the parties’ agreement in line with Autoclenz Ltd v Belcher ... including looking behind the written terms*” (paragraph 12), and (3) the parties “*must be assumed to have intended their contract to be workable*” so that, consequently, the Claimants “*submit that the implication of a term relating to salary / wage is necessary in the business sense to give efficacy to the contract and in any event would have been included by the officious bystander*” (paragraph 13). In other words, the route advanced for looking behind the agreed terms is that of implying a term as to salary.

94. In the circumstances of the status of the Claimants being held to be that of employees or workers, the implication or introduction of an entitlement to the National Minimum Wage would be necessary, on the basis that is the effect and requirement of NMWA 1998 section 17.
95. However, beyond this, I was not satisfied that *Autoclenz Limited v Belcher* provided a legal basis for the Claimants to be entitled to wages beyond the National Minimum Wage. The route to introducing a higher rate of pay remained that of implying such a term. For the reasons previously given, I was satisfied that that this was a route which had no reasonable prospects of success. I was not satisfied that there was anything in the principles established or confirmed in *Autoclenz Limited v Belcher* to cause the analysis, as to whether the implied terms being argued for by the Claimants should be inserted into any contract, to result in a different outcome from that argued for by the Respondent.
96. It was also contended by the Claimants that, applying the guidance provided by the Court of Appeal in *Ezsias v North Glamorgan NHS Trust [2007]*, to the effect that, where are facts in dispute, it would only be “*very exceptionally*” that a case should be struck out without the evidence being tested, this was not such an exceptional case, and striking out was not appropriate. However, the Court of Appeal also said that “*what is important is the particular nature and scope of the factual dispute in question*” (paragraph 27) with that case described on the basis that “*there is a crucial core of disputed facts in this case that is not susceptible to determination otherwise than by hearing and evaluating the evidence*” (paragraph 29).
97. In so far as this submission involved relying upon striking out being exceptional where facts were in dispute, it appeared to be seeking to rely upon there being facts in dispute in relation to the issue of status, or as to the availability of certain benefits to existing employees, and did not really identify the facts which were in dispute in relation to the part of the Claim which involved the Claimants seeking to claim wages going beyond the National Minimum Wage on the basis of implied terms.



98. It was argued that it was premature to be considering striking out when the questions of status were yet to be determined. However, it was not clear how the fact that the determination of this issue was still outstanding prevented a consideration of whether the legal argument being pursued by the Claimant's had any prospects of success, given that the Respondent's submissions potentially applied in the event that the Tribunal had found the status of the Claimants to be that of employees or workers.
99. Ultimately, on the basis of the analysis set out above, I was not satisfied that there was any legal basis for that part of the Claims of the Claimants which involved seeking to claim wages beyond the National Minimum Wage. As such, I was satisfied that this part of the Claims had no reasonable prospect of success.
100. The second part of the Respondent's application related to that part of the Claimant's case which involved claiming back pay for more than two years.
101. In the Rider to the ET1 Form of Claim, this part of the Claim was put forward on the basis that the "*Claimants could not have reasonably known that there was any entitlement to pay or holiday pay which they should have claimed*", so that "*applying the principle in Sash Windows the Claimants seek their pay backdated to the beginning of their employment*". The legal basis for this part of the Claim was stated to be that the "*Claimants submit that the principle established by King v Sash Window Workshop Ltd (C-214/16) relating to past recovery of holiday pay applies by analogy to wages in circumstances where Claimants were prevented from exercising their rights*".
102. The basis for any analogy which was being put forward appeared to have been developed further in the written submissions of the Claimants which appeared to be to the effect that the Claimants were maintaining that they "*have been deliberately misled and misrepresented as to their status and to impose the current statutory deadline would be effectively to allow the Respondent to benefit from that deception*". Put simply, the Claimants were arguing that they had been prevented from exercising their rights.
103. Obviously, the Respondent would not agree with such an interpretation of the circumstances, but any such enquiry as to whether this could be said to have been any dealings between the parties which amounted to a misrepresentation or deception or the Claimants being misled, would potentially involve considering evidence.
104. Effectively, the Tribunal would then be invited, if it was satisfied that there had been such a deception or that the Claimants had been prevented from exercising their rights, to disapply the provisions in the section 23 of the Employment Rights Act 1996 which were introduced by the Deduction from Wages (Limitation) Regulations 2014. The Tribunal was being invited to adopt a purposive approach to interpreting the relevant statutory provisions, rather than



a literal interpretation, to avoid the Claimants being denied their statutory rights going back many years.

105. The 2014 Regulations impose a two year backpay limit on all sums claimed under ERA 1996 section 27(1)(a) which are “*any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise*”.
106. Consequently, the 2014 Regulations make clear that any complaint claiming the National Minimum Wage would be limited to two years. This would similarly be the case in respect of any complaint as to unlawful deductions from wages brought on the basis of any implied term giving rise to a contractual right to pay beyond that of the National Minimum Wage.
107. The Claimants’ position was that it ran contrary to the purpose of the provisions protecting employees’ rights in respect of wages that they should be excluded from recovering wages which went back more than two years where they had been prevented from exercising their right to do so. Thus, the Tribunal was being invited to adopt a purposive interpretation of the ERA 1996, effectively so as to disapply the two-year limitation in cases where Claimants had been prevented from exercising their rights.
108. Clearly, Parliament could have included provisions which disapplied the two-year limitation period. In other circumstances, equivalent provisions have been introduced by Parliament, such as those in respect of deliberate concealment in equal pay cases. On the face of it, Parliament has chosen not to do so in relation to the provisions introduced into ERA 1996 section 23.
109. The route to such an outcome that was being suggested was that of applying *King v Sash Window Workshop Limited* by analogy. Thus, it was being argued that the principle that a worker must be able to carry over and accumulate unexercised rights to paid annual leave if the employer did not put that worker in a position in which the worker was able to exercise his or her right to paid annual leave, similarly applied, by analogy, to other wages capable being claimed on the basis of there having been unlawful deductions from wages.
110. I was satisfied that the argument being put forward by the Claimants appears to be relying on a fundamental misunderstanding of *King v Sash Window Workshop Limited*.
111. The question before the ECJ was “*whether Article 7 of Directive 2003/88 must be interpreted as precluding national provisions or practices that prevent a worker from carrying over and, where appropriate, accumulating, until termination of his employment relationship, paid annual leave rights not exercised in respect of several consecutive reference periods because his employer refused to remunerate that leave*” (paragraph 48).



112. The entire rationale of *King v Sash Window Workshop Limited* arises from the ECJ's interpretation of the EU Directive. It is not based on any domestic law provisions. The Judgment in *King v Sash Window Workshop Limited* is to give effect to the Working Time Directive 2003.
113. I accept the Respondent's analysis, namely that there can be no carry over from the interpretation of an EU Directive on working time to domestic statutory legislation where those domestic provisions do not have their roots in an EU Directive. Thus, the argument that *King v Sash Window Workshop Limited* entitles the Claimants to back pay of National Minimum Wage beyond the extent provided for in domestic legislation is completely without foundation. Put simply, *King v Sash Window Workshop Limited* applies to paid annual leave rights (which may give rise to a right to holiday pay) but cannot apply to wages complaints more generally.
114. In the Claimant's written submissions, it was suggested that the principle contained within *King v Sash Window Workshop Limited* had been further applied in *Smith v Pimlico Plumbers Limited [2022] EWCA Civ 70, CA*.
115. However, the paragraphs in *Smith v Pimlico Plumbers Limited [2022] EWCA Civ 70, CA*, to which I was referred were in relation to the issue of whether there could be a series of deductions in circumstances where there was a gap of more than three months in the purported series. This reasoning (which was not essential to the decision) was based on interpreting the relevant provisions of ERA 1996 section 23. The reasoning did not involve disapplying any time limit; rather it involved setting out the way in which the time limit was to be correctly applied. It is to be noted that the Court of Appeal did not adopt a purposive approach to interpreting the statutory provisions but applied a literal interpretation. In any event, I was not satisfied that there was anything in the reasoning in the *Smith v Pimlico Plumbers Limited*, in relation to this issue, which could be extended to the issue of whether Claims could go back more than two years, which is a separate issue. Similarly, the decision in *Smith v Pimlico Plumbers Limited* related to a complaint of being denied paid annual leave. It could not be said to extend the principle established in *King v Sash Window Workshop Limited* beyond the scope of rights in respect of annual leave derived from the Working Time Directive 2003.
116. Based on the analysis set out above, I considered the Respondent's position to be correct. There is no basis for the Tribunal extending the principle in *King v Sash Window Workshop Limited* to Claims outside the scope of the specific causes of action to which the principle was stated to apply in that case. In my analysis, there is no reasonable prospect, on the basis of the arguments advanced, of the Claimant being able to succeed with that part of their Claims which involved claiming back pay (other than as holiday pay) for more than two years.



Conclusion

117. I did not accept that the issues raised by the Respondent should be treated as purely remedy issues and, as such, as the Claimant's argued, should be treated as being outside the scope of the provisions in respect of striking out Claims. Those provisions applied to parts of Claims. A complaint in respect of a particular period or a complaint seeking pay beyond a certain rate, amounted to a part of a Claim, even if the other part of any complaint, for example that in respect of the National Minimum Wage for a period of two years, was outside the scope of the striking out application because it needed to be resolved through evidence being heard as to status. Viewed another way, the fact that there might be an arguable basis for claiming certain sums did not cause the Claimants to be immune from the striking out provisions in respect of those parts of their Claims which sought to claim sums for which there was no arguable basis with any reasonable prospects of success.
118. I was satisfied that there was simply no legal basis for pursuing those parts of the Claims of the Claimants seeking wages of more than the National Minimum Wage or for wages extending beyond two years' back pay, save in respect of holiday pay. In this regard, and to this extent, these parts of the Claims are unsustainable. They have no reasonable prospect of success.
119. Whilst it is tempting to allow a novel point of law to be argued further before the Employment Tribunal, particularly given the amounts at stake, I was not satisfied that this would be a proper exercise of any discretion under rule 37 of the Tribunals Rules, particularly since, as the Respondent argued, the effect of introducing these elements into the Claimants' claims was to exaggerate grossly the value of the Claimants' Claims against the Respondent. I was not satisfied that this was consistent with the overriding objective, particularly since it was likely to frustrate any attempts to resolve the issues between the parties in a way which might potentially reduce the use of the Tribunal's resources and time. Given the focus in the Schedules of Loss on identifying the employees with whom the Claimants might compare themselves, and the sums to which they might be entitled, going back many years, it was clear that the effect of the Claimants pursuing this part of the cases would be to substantially increase the areas of enquiry which would need to be undertaken as part of the proceedings and any hearing to deal with these issues. As such, I was satisfied that, the grounds for striking out the relevant parts of the Claims having been established, the Tribunal should exercise its discretion to do so.
120. I gave consideration to whether, in the alternative, the payment of deposits should be ordered as a condition of continuing the proceedings which would obviously have the effect of putting the Claimant's on notice as to the



potential costs implications. However, ultimately, I decided that this would be an inappropriate exercise of any discretion in circumstances where I am satisfied that there are no reasonable prospect of success, in that it would simply leave the position as being one for the Claimants to decide as to whether they pursued these parts of their Claims or not.

Outcome

121. Accordingly, the Judgment of the Tribunal was that (1) those parts of the Claims of the Claimants claiming wages in addition to the National Minimum Wage are struck out as having no reasonable prospects of success, and (2) those parts of the Claims of the Claimants claiming wages extending beyond two years back-pay are struck out as having no reasonable prospects of success.

122. For the avoidance of doubt, this Judgment does not extend to complaints seeking the National Minimum Wage either on the basis of being backdated for two years or as holiday pay.

Costs

123. After the decision on the Respondent's application was given, together with oral reasons, the Respondent made an application for its costs arising out of the decision on the applications to strike out parts of the Claims. The application was made under rule 76(1)(a) and (b) of the Tribunals Rules on the basis of the Claimants having acted unreasonably in bringing and pursuing those parts of the Claims which had now been struck out by the Tribunal and / or on the basis that those parts of the Claims had had no reasonable prospect of success. The costs application was limited to the costs of attending and preparing for the hearing at which the application had been considered. The total costs being claimed (as set out and itemised in a schedule of costs) were £13,710 inclusive of VAT which included counsel's fees in addition to the solicitor's costs incurred. The application was resisted on behalf of the Claimants. In resisting the application, it was requested that the means of the Claimants should be taken into account. However, instructions were not immediately available in relation to the means of the Claimants for these purposes and it would not have been feasible to have considered the means of the Claimants in detail in the time remaining of the hearing.

124. In the circumstances, both parties requested that the Tribunal determine the costs application, in principle, in terms of whether the grounds for ordering costs to be paid were met under rule 76(1) of the Tribunal Rules and whether the Tribunal should exercise its discretion to order costs subject to considering the means of the Claimants. I was not being invited, at this stage, to give any consideration as to the amount being claimed by the Respondents, in terms of whether the sums claimed were reasonable and proportionate.



125. I was satisfied, having heard the substantive applications to which the costs application related, and since the costs application was a consequential issue arising out of the outcome of that application, that it made sense, and was in accordance with the overriding objective, to utilise the time remaining of the hearing (the afternoon of the second day) to consider the costs application on the basis upon which I was being invited to consider it by both parties.

126. Having heard the submissions made on behalf of both parties, and having considered a separate bundle of correspondence which had been submitted, I determined that the grounds for making a costs Order were met under both rule 76(1)(a) and 76(1)(b) of the Tribunal Rules on the basis of the Claimants having acted unreasonably in bringing and pursuing those parts of the Claims which had now been struck out by the Tribunal and / or on the basis that those parts of the Claims had had no reasonable prospect of success, and that, subject to any consideration of the Claimants' means, the Tribunal should exercise its discretion to order costs. Detailed oral reasons were provided for this decision. Written reasons are now provided as below.

127. Rule 76(1) of the Tribunal Rules is in the terms set out below.

“A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that—

(a) a party (or that party's representative) has acted unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted;

(b) any claim or response had no reasonable prospect of success”.

128. I agreed with the Respondent that the test under rule 76(1)(b) of the Tribunal Rules was the same as that which was applicable for the striking out application under rule 37(1)(a) of the Tribunal Rules in that there is the same wording in respect of *“no reasonable prospects of success”*. I was satisfied that the power to order that costs be payable under rule 76(1)(b) effectively applies where a part of the Claim has no reasonable prospects of success (see the definition of *“claim”* in rule 1 of the Tribunals Rules). As such, I was satisfied that the grounds for ordering costs were made out for the purposes of rule 76(1)(b) in that there were no reasonable prospects of success or the parts of the Claim which had now been struck out by the Tribunal. In other words, I was satisfied that the grounds for ordering costs under rule 76(1)(b) were met for the reasons previously given in relation to the striking out application.

129. There is scope for some overlap between the grounds for ordering costs under rule 76(1)(a) and the grounds under rule 76(1)(b) in that bringing a Claim (or part of a Claim) which has no reasonable prospects of success (for the purposes of rule 76(1)(b)) might be argued to involve acting unreasonably for the



purposes of rule 76(1)(a), both in bringing that part of the Claim in the first place, and then through continuing to pursue that part of the Claim.

130. The submissions on behalf of the Claimants had sought to contend that it was necessary for the Claimants to seek to pursue the parts of the Claim concerned, notwithstanding the conclusion of the Tribunal that there was no obvious legal basis for doing so, as otherwise they would be potentially under-compensated. In other words, a lack of reasonable prospects did not necessarily equate with acting unreasonably.
131. However, I was satisfied that bringing and pursuing the parts of the Claims concerned also involved acting unreasonably for the purposes of rule 76(1)(a), for the reasons set out below.
132. As already stated above, I considered that the effect of introducing the elements concerned into the Claimants' Claims was grossly to exaggerate the value of the Claimants' Claims against the Respondent, in a way which was not consistent with the overriding objective, particularly since it was likely to frustrate any attempts to resolve the issues between the parties in a way which might potentially reduce the use of the Tribunal's resources and time.
133. Similarly, it is also relevant in this context that, given the focus in the Schedules of Loss on identifying the employees with whom the Claimants might compare themselves, and given the focus on identifying the sums to which they might be entitled (had there been a sound basis to this part of their Claims) going back many years, it was clear that the effect of the Claimants pursuing these parts of their Claims would be to increase substantially the areas of enquiry which would need to be undertaken as part of the proceedings and as part of any hearing to deal with these issues. In other words, as the Claimants must have known, seeking to pursue these parts of their claims going to add significantly to the time and cost expended on the case.
134. I was also referred to the correspondence in which the Respondent effectively pointed out to the Claimants that the parts of the Claims which were the subject of the striking out applications were misconceived and warned the Claimants as to the costs consequences if they chose to continue to pursue these parts of their Claims. I appreciate that costs warning letters are sometimes overused as a tactical device, but they are a legitimate tactical device where a Claim or part of a Claim is misconceived or has no reasonable prospects of success. In such circumstances, Claimants ignore such letters at their peril. The onus is on a Claimant to review the legal basis for the relevant part of the Claim. As such, it has to be assumed that the Claimants decided to go ahead with these parts of their case with their eyes wide open as to the potential costs risks involved.
135. I then turned to the second stage of the exercise involved in considering the Respondent's costs application. I reminded myself that, even where a



Tribunal concludes that the grounds for ordering costs under rule 76(1)(a) and / or (b) are met, the Tribunal still has a discretion whether or not to award costs and is not obliged to do so. Ordering costs to be paid is the exception rather than the rule in the Employment Tribunals. However, although the grounds relied upon are discretionary, the effect of rule 76(1) of the Tribunals Rules is that when the grounds are satisfied, the Tribunal is under a duty to consider making an Order.

136. However, based on the factors identified above in terms of the effect of the Claimants pursuing those parts of their case which had no reasonable prospect of success, and in doing so in the face of a number of costs warnings, I was satisfied that this was a case where, subject to any consideration as to the means of the Claimants, it would be appropriate for the Tribunal to exercise its discretion to order that costs be payable.

137. However, I made it clear that the Tribunal would need to take account of the Claimants' ability to pay before making any Order as to costs, as this was a relevant factor. In this regard, I noted that the effect of rule 84 of the Tribunals Rules was that the Tribunal was not obliged to have regard to the issue of ability to pay. However, it is well established that the Tribunal must enquire as to a party's ability to pay when the issue has been raised by the party's representative. This issue had been raised on behalf of the Claimants. At this stage, I did not have any meaningful information as to the means of the Claimants other than that I had been told, in so far as it might be relevant, that one of the Claimants had the benefit of legal insurance cover. It was made clear that information as to the means of the Claimants could not be provided to enable the issue to be considered in the time that remained on 26 June 2024. Indeed, it seemed that some thought would need to be given to the practicalities of dealing with this issue, given the number of Claimants involved.

138. I note that the amount being claimed as costs is £13,710. I have not been addressed as to whether this sum is reasonable and / or proportionate, which might also be an issue for another day. However, on the basis of the figure being claimed, I note that that figure would be realised if each Claimant paid £391 each. However, I also note (as was pointed out to me) that I had also not been addressed as to the way in which any Order as to costs, if made, should be made as between the Claimants. Clearly, this may depend upon the position as to means. A further potential issue arises as to whether, if only some of the Claimants have the ability to pay any sums ordered, whether that should have the effect of increasing the potential amount of share or contribution payable by any other Claimant. At this stage, I am simply identifying the issues which may need to be considered on a future occasion.

139. Accordingly, no Order as to costs has been made at this stage, due to the need to give further consideration to the means of the Claimants and as to the amount being claimed. It was agreed by the parties that any further consideration



of this costs issue should be reserved until the end of the preliminary hearing listed to consider the issue of status.

140. I repeat the closing remarks made at the end of the hearing to the effect of encouraging the parties to find some way of dealing with the costs issue which avoids enquiry as to means of 35 Claimants which may be an exercise which is time consuming and possibly disproportionate having regard to the sums at stake.

Signed

Employment Judge Kenward

Dated 19 September 2024