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Case No: KB-2023-001325

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/05/2024

Before :

THE HONOURABLE MR JUSTICE BOURNE

- -

Between :

(1) DAN CORNEL NISTOR
(2) DAN GABRIEL NISTOR **Claimants**

- and -

UNION OF SHOP, DISTRIBUTIVE AND ALLIED WORKERS ("USDAW") **Defendant**

- -

Claimants acting in person
Sheryn Omeri KC (instructed by **Kennedys Law LLP**) for the **Defendant**

Hearing dates: Monday 22 April 2024

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Approved Judgment

This judgment was handed down remotely at 10am on Thursday 16 May 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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THE HONOURABLE MR JUSTICE BOURNE

The Honourable Mr Justice Bourne :

Introduction

1. This is an application by the defendant, the Union of Shop, Distributive and Allied Workers ("USDAW") to strike out the claimants' claim and/or for summary judgment on that claim. The claimants are a father and son who are members of the defendant and who, from May 2017 until March 2021, were employed by the Tesco supermarket company at its Lichfield Distribution Centre.

2. I shall say more about the facts below but in summary, this claim arises from the fact that, some years ago, Tesco reorganized the workforce in some of its regional distribution centres ("DC"). In particular employees who, prior to 2011, were based at its DC in Crick, Northamptonshire and who agreed to be transferred to the Lichfield DC, benefited from enhanced terms and conditions and were given a contractual benefit called "retained pay". Their colleagues who, like the claimants, were employed only after 2012 did not receive these benefits. The claimants object to this inequality and make various claims against their trade union in respect of it.

3. The present claim was issued on 19 March 2023 by the claimants, acting in person. The "brief details of claim" specified in the Claim Form state:

> "1. PROFESIONAL NEGLIGENCE (GROSS NEGLIGENCE-FRAUD).
> 2. BREACH A STATUTORY DUTY, BREACH A FIDUCIARY DUTY.
> 3. BREACH A CONTRACT (SECTION 20, FROM TRADE UNION ACT 1992).
> 4. ILLEGAL USE OF UNION FUNDS, BY NOT COMPLYING WITH STATUTE.
>
> REMEDY: We want all those guilty to be excluded for life from Usdaw and to return all the salaries, benefits and other money they illegally took from the union funds, we want to recover the damage caused around 55,000 pounds for each and we also want aggravating damages for the gravity of this case, unique in the entire history of trade union activities, damages of 1 million pounds for each, according to section 22 of the Trade Union Act 1992."

4. The Particulars of Claim run to 19 pages and are somewhat discursive. They state the following. During pay negotiations in 2019 the claimants found that different workers at the Lichfield DC had different hourly pay rates and that there was a collective labour contract whose agreement had not been revealed to them by their senior steward. With some difficulty they obtained a copy of a collective agreement called "Six Book" which is negotiated annually by collective bargaining and applies to six DCs including Lichfield. It provides pay terms including uplifts for weekend and night work which in some respects are more generous than those which the claimants receive. It also provides for some 42 individuals to receive "retained pay". From the information the claimants have, the Six Book agreement "only applies to 29% of the employees of these 6 Tesco warehouses".

5. Essentially the claimants accuse USDAW and a number of its officers (who are not named as defendants) of failing to protect the interests of members and of having

entered into one or more unlawful agreements. The alleged unlawfulness is identified in scattergun manner and may be summarised as follows:

a. senior stewards "don't do their duty of care" and "do not comply with the provisions of the Usdaw statute and the provisions of UK laws" (para 16);
b. failures by senior stewards to act in the financial interests of members "are crimes on what falls under the Fraud Act 2006, sections 2, 3 and 4" (paras 17, 34);
c. various officers and the National Executive Council "breached the fiduciary duty that they have through their positions" (para 20);
d. the agreement(s) for retained pay "violates the provisions of the Equality Act 2010 and the provisions of the Usdaw Statute";
e. retained pay is paid to some but not all workers, and "a term from the collective agreement must be applied to all workers from the same workplace there can't be differences between workers in the same position if this is happening it is breaking the provisions of the statute of Usdaw and the Equality Act 2010 sect 39 and 57" (para 24);
f. this unequal treatment breaches section 3 of the Usdaw Rule Book, and sections 39 and 57 of the 2010 Act in conjunction with section 13(1) and (5). Agreeing for retained pay to be paid to 42 colleagues out of 15,000 workers is gross negligence by the defendant (para 25).
g. This term of the collective agreement is void under section 145 of the EA 2010 (para 27).
h. Not applying the Six Book agreement to the claimants and others "is an act of fraud" (para 28).
i. They seek aggravated damages for fraud under "section 22 of Trade Union Act 1992" (para 35);
j. They complain of "Professional Negligence (Gross negligence-Fraud), Breach a fiduciary duty, Breach a statutory duty, Breach a contract (collective agreement Six-Book 'Premium Pay') section 20 from Trade Union Act 1992, Breach Equality Act 2010 section 57, Breach Equality Act 2010 section 13(1),(5), Illegal use of union funds by not complying with statute" (para 37);
k. Officers have acted "against the financial interest of union members in breach of the union statute and all UK laws, including the Bribery Act 2010 and Fraud Act 2006 criminal laws" (para 42).

6. Further criticisms are directed against various officers, but it seems to me that the legal scope of this High Court claim is to be found in the paragraphs summarised in the preceding paragraph.

7. By this application the defendant, represented by Sheryn Omeri KC, argues that the case should be struck out under CPR 3.4(2) and/or that summary judgment should be given under CPR Part 24.

Legal framework

8. CPR rule 3.4(2) states:

> "(2) The court may strike out a statement of case if it appears to the court-

(a) that the statement of case discloses no reasonable grounds for bringing or defending the claim;
(b) the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings; or
(c) that there has been a failure to comply with a rule, practice direction or court order."

9. CPR 24.3 states:

> "The court may give summary judgment against a claimant or defendant on the whole of a claim or on a particular issue if-
> (a) it considers that the party has no real prospect of succeeding on the claim, defence or issue; and
> (b) there is no other compelling reason why the case or issue should be disposed of at a trial…"

The facts

10. It is not possible to resolve significant factual issues on an application of this kind where the only witness evidence is written and the parties have not prepared for a trial. The Defendant must make good its application, if it can, on the basis of such facts as are agreed or clearly established.

11. Some significant background facts can be gleaned from a judgment of the Court of Appeal in *USDAW and others v Tesco Stores Ltd* [2022] EWCA Civ 978, a claim brought by the trade union and three employees. Neither party to the present claim has contested any of the facts set out there.

12. Bean LJ, with whose judgment Newey and Lewis LJJ agreed, explained that in 2007 Tesco planned an expansion and restructuring of its distribution centre network. Some sites opened and others closed. To avoid losing experienced staff through redundancy, it sought to persuade employees at the Crick DC to move to Lichfield or Daventry by giving them the extra benefit of retained pay. This was achieved in 2010 by a collective agreement which, though itself not legally binding, was incorporated by custom and practice into individual employees' contracts of employment when it was signed. The collective agreement was negotiated by USDAW, which is the trade union with sole recognition by Tesco for collective bargaining in respect of the sites to which this case relates.

13. The *USDAW* litigation is different from the present claim. It was based on the inclusion in the Site Agreement of a term whereby retained pay was to remain "a permanent feature of an individual's contractual eligibility" and could only be changed by mutual consent, save that it would cease on promotion to a new role and be adjusted where an employee requested a change to working patterns. In 2021 Tesco announced its intention to remove retained pay on the basis that it was a contractual term like any other which it was entitled to review, and stated that, where employees would not agree to its removal, it would terminate individual contracts and offer re-engagement on different terms. The issue, which is not relevant to the claim before me, was whether Tesco was entitled to do this in spite of the earlier agreement that retained pay was to be permanent. The employer lost at first instance but won on

appeal. An onward appeal to the Supreme Court was heard in the same week as the hearing before me.

14. The defendant's application was supported by a witness statement from Erica Aldridge, a solicitor at Kennedys Law LLP instructed by the defendant. She states that Tesco's warehouse operatives are party to one of two employment contracts depending on whether they commenced employment before or after 2012, and that Tesco also applied a Site Agreement, made in 2009 and known as the "Six Book Agreement" to a number of its DCs including the Lichfield DC, that this applies "regardless of the terms of the individual employment contracts of employees" and that the Six Book Agreement "contains a Pay and Conditions Agreement which applies to workers at the Lichfield DC regardless of to which individual employment contract they are a party".

15. I have also received a witness statement from Darren Miller, the Defendant's Head of Legal Services, from which I derive the following.

16. There is a collective agreement which, when made, was called the Six Book Agreement. Its name has since changed but that does not matter for present purposes. It contains collectively agreed terms and conditions for employees at the relevant sites and is amended from time to time. There are also separate collectively bargained agreements for each site. During their employment the claimants were subject to the Six Book Agreement and the Lichfield Site Agreement. All collective agreements are passed by a majority vote of the relevant members of the defendant.

17. One working day before the hearing of this application, the claimants filed two further bundles of documents. These included individual written terms and conditions documents for both of them, dating from the start of their employment in May 2017. Those documents specified their hourly pay rates, including uplifts for working at nights, weekends, bank holidays and on overtime. The claimants also provided extracts from a document entitled "Site Agreement, Lichfield". The footer of each page indicates that that document came into existence in September 2008. It states a basic hourly rate for each role including that of flexible warehouse operative, the role held by each claimant. It also identifies "premium payments" or uplifts for weekends, bank holidays, nights and overtime. The uplifts for bank holidays, weekends and nights are more generous than those indicated in the claimants' individual terms and conditions. The overtime rate is the same. The document then records that "certain staff under the arrangements for moving to Litchfield [sic] from other Tesco sites may receive retained pay" which would be "individually calculated and confirmed in individual statements of employment".

18. Each claimant has also produced a payslip dating from 2021. Their hourly rates identified in those payslips are higher than those specified in the terms and conditions which they also produced. I conclude that there have been further pay negotiations post-dating the terms and conditions document.

19. The defendant's bundle for the hearing includes the most recently negotiated versions of the Six Book Agreement and the Lichfield Site Agreement, dating from 2022. As this post-dates the claimants' employment, it is of limited assistance. Unlike the claimants' copy of the Site Agreement dating from 2008, it sets out separate hourly

rates for those employed pre-2012 and post-2012. But it also specifies the different uplifts for bank holidays, weekends and nights for those categories of employee, reflecting the difference between the claimants' individual terms and those in their 2008 version of the collective agreement. It also repeats the separate reference to retained pay.

20. Combining these sources of information, it is clear that changes were collectively negotiated and made between 2007 and 2012 with the effect that the pre-2012 employees were given more favourable terms, and that the claimants were therefore in the less favoured category.

21. So, although the claimants contend that they were contractually entitled to the more favourable terms contained in the copy of the Site Agreement which they have produced, it is clear that they are mistaken about this.

22. Mr Miller's statement also records that the claimants pursued a grievance and complaint procedure with the defendant relating to these matters but were unsuccessful.

23. The claimants also recount that after they sent two grievance letters to their employer, the dispute escalated, each of them made four Employment Tribunal ("ET") claims against Tesco and they "constructively resigned" from their employment on 18 March 2021. They confirmed to me that their ET claims included discrimination claims under the Equality Act 2010. The ET litigation was settled through conciliation by an agreement recorded on an ACAS form "COT3" on 9 June 2022. I have not been told the terms of the agreement but the claimants say that they received some financial compensation and, in return, "renounced" their complaints against Tesco.

The application

General

24. Ms Omeri has focused on each of the four headings in the Claim Form as quoted at paragraph 3 above and has contended that each of the types of claim there identified falls foul of at least one of the relevant parts of CPR 3.4(2) and/or is suitable for summary judgment.

25. I will adopt the same approach because, in my judgment, all of the points of law listed under paragraph 5 above fall within the wider headings quoted in paragraph 3. In that process it is however necessary to ensure that regard is had to each of the claims advanced by the claimants.

Negligence

26. Ms Omeri first submits that the claims variously put as negligence, professional negligence or gross negligence disclose no reasonable grounds because they are unreasonably vague, incoherent, scurrilous and/or obviously ill-founded.

27. In particular she submits that the claimants have not shown and cannot show the existence of a relevant duty of care owed by the defendant or its shop stewards to the claimants, that being the first indispensable requirement of any negligence claim.

28. I accept Ms Omeri's submission that any duty of care towards individual union members who might be disadvantaged by a collective agreement would contradict an equivalent duty of care towards members who would be advantaged. It seems to me that in collective bargaining, a trade union should act broadly in the interests of its members as a whole and in accordance with members' wishes as evidenced in any ballot. That is inconsistent with owing a duty of care towards any individual members who might be disadvantaged by a particular agreement.

29. The claimants referred me to *Langley v GMB & Ors* [2020] EWHC 3619 (QB). There, a trade union accepted that it owed a duty of care to an individual member when advising and representing him in legal proceedings. That was because it had assumed a degree of responsibility towards him voluntarily by providing those services (see [9] per Stacey J).

30. That case is of no assistance to me in deciding whether a trade union owes a duty of care to members who may be affected by a collective agreement, which is a wholly different situation.

31. I am satisfied that the claimants have no real prospect of establishing the existence of the necessary duty of care and therefore that claims in negligence cannot possibly succeed. Those claims fall squarely within rules 3.4(2)(a) and 24.3(a).

Breach of fiduciary duty

32. I have already referred to the "scattergun" method of advancing claims. Having explained why they are unhappy with one or more collective agreements into which the defendant entered, the claimants have attached various legal labels to their complaint, in some cases without any explanation or any clear basis.

33. In *Bristol and West Building Society v Mothew* [1998] Ch 1 at 16, Millett LJ quoted, with approval, these words from *Girardet v. Crease & Co*. (1987) 11 B.C.L.R. (2d) 361, 362:

> "The word 'fiduciary' is flung around now as if it applied to all breaches of duty by solicitors, directors of companies and so forth. …That a lawyer can commit a breach of the special duty [of a fiduciary] …by entering into a contract with the client without full disclosure …and so forth is clear. But to say that simple carelessness in giving advice is such a breach is a perversion of words."

34. This case is an example of that tendency. The word "fiduciary" is used a number of times in the Particulars of Claim but there is no explanation of what fiduciary duty was owed to whom, or why, or of why the matters complained of are or were a breach of fiduciary duty.

35. In *Bristol and West* Lord Millett explained at 18:

> "A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary. This core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal.
> …
>
> The nature of the obligation determines the nature of the breach. The various obligations of a fiduciary merely reflect different aspects of his core duties of loyalty and fidelity. Breach of fiduciary obligation, therefore, connotes disloyalty or infidelity. Mere incompetence is not enough. A servant who loyally does his incompetent best for his master is not unfaithful and is not guilty of a breach of fiduciary duty."

36. In their oral submissions the claimants showed that they do have some understanding of the nature of a fiduciary duty. Reading the Particulars of Claim as generously as I can, I recognise that the claimants assert that the defendant undertook to act loyally on behalf of its members and therefore that it may have owed one or more fiduciary duties to its members. However, I see no claim, or no claim which conceivably has any basis in fact, that the defendant acted in bad faith, or made an improper profit, or placed itself in a conflict of interest with its members, or acted for its own benefit without consent.

37. Instead, the complaint is fairly and squarely that the defendant entered into collective agreements which unfairly benefited some members and not others. But collective agreements by their very nature can be expected to have different impacts on different members. Whatever else that allegation may be, I do not consider that it is, properly speaking, an allegation of a breach of fiduciary duty. Like the negligence claims, it has no real prospect of success.

Breach of statutory duty

38. A number of statutory provisions are mentioned in the Particulars of Claim, as per my summary at paragraphs 3 and 5 above. I have considered each in turn.

39. Sections 2-4 of the Fraud Act 2006 define a number of criminal offences. They do not create any civil liability and no civil claim can be founded on them.

40. Nor, for the avoidance of doubt, is there any other allegation of fraud in the Particulars of Claim which makes sense. Fraud, or the tort of deceit, is committed where a defendant makes a false representation, knowing it to be untrue or reckless as to whether it is untrue, intending that the claimant should act in reliance on it. If the claimant does so and suffers loss, the defendant is liable. See the well known example of *Derry v Peek* (1889) 14 App Cas 337. In this claim I am unable to detect those elements or anything resembling them. The claim is that the union acted contrary to the interests of some members while, perhaps, trying to conceal the fact that it had

done so. Even if that allegation could be made out, it is not an allegation of making an untrue representation which caused the claimants to suffer loss as a result of relying on it.

41. The claimants contend that unequal treatment in the collective agreement infringes sections 39 and 57 of the Equality Act 2010. However, section 39 prohibits various kinds of discriminatory conduct by employers, and the defendant here is not being sued as an employer.

42. Section 57 at first glance has more relevance because it applies to "trade organisations" such as a trade union. By section 57(2) such a body must not discriminate against a person by subjecting him or her to any detriment. Discrimination, however, as defined in Part 2 of the Act, refers to discrimination because of any of several protected characteristics of the person such as age, disability, sex, race and others. I do not reproduce the full list of protected characteristics because the claim does not contain any allegation of discrimination because of a protected characteristic. Instead, the claimants object to a lack of "equality" arising from the fact that retained pay is given to some workers and not to others. But the Equality Act 2010, despite its name, does not guarantee equal treatment of all workers. Many types of discrimination between workers, that is to say different treatment of different workers, remain perfectly lawful. The 2010 Act only prohibits discrimination on specific grounds, as I have said, and the Particulars of Claim in this case do not contain any intelligible allegation of any such prohibited conduct.

43. In oral submissions the claimants alleged that some, or many, of the disadvantaged workers, including themselves, are Romanian, so that the unequal treatment may have been on the ground of the protected characteristic of nationality.

44. Putting on one side the fact that such an allegation is neither pleaded nor supported by any evidence, a further fundamental obstacle to this part of the claim is that jurisdiction to hear specific types of discrimination claims is conferred by sections 114 and 120 of the 2010 Act. I have not been shown any provision which gives the High Court jurisdiction other than in judicial review proceedings. By section 120, jurisdiction to determine claims arising under Part V, which includes sections 39 and 57, is given to Employment Tribunals. So even if the claimants did identify some conduct which was contrary to the Equality Act 2010, this Court would not have the power to hear the claim. And, as Ms Omeri further observed, any claim under section 120 would also now be far out of time.

45. The claimants then contend that the collective agreement is void under section 145 of the EA 2010. That section provides:

> "(1) A term of a collective agreement is void in so far as it constitutes, promotes or provides for treatment of a description prohibited by this Act.
>
> (2) A rule of an undertaking is unenforceable against a person in so far as it constitutes, promotes or provides for treatment of the person that is of a description prohibited by this Act."

46. Section 146 provides that a complaint may be made under section 145 to an Employment Tribunal. There is no provision for a claim to the High Court. That is a complete answer to that part of the claim.

47. Moreover, any claim under section 145 depends on showing that there is "treatment" of a kind prohibited by the 2010 Act – i.e. by some other provision of the 2010 Act than section 145. As I have already said, the claim identifies no such treatment and merely makes ineffectual references to sections 39 and 57.

48. There are repeated references to "section 20 Trade Union Act 1992". There is no such Act. It seems that the intention was to refer to section 20 of the Trade Union and Labour Relations (Consolidation) Act 1992 ("TULRCA"). Briefly summarised, that section provides that a trade union may be liable for the tort of inducing another person to break a contract or threatening that there will be such a breach, if that act was done, authorised or endorsed by a committee or officer of the union or by any person empowered to do, authorise or endorse such acts under the union's rules.

49. That section is clearly intended to deal with industrial action by workers which an employer claims may be a breach of their contract of employment. In some circumstances a trade union can become liable for the specified conduct. But that has nothing to do with the present situation, where it is workers who appear to be alleging some sort of tort or breach of contract. Section 20 certainly has no stand-alone relevance to this claim, though I shall return to it when I discuss breach of contract below.

50. Section 22 of the 1992 Act is also mentioned but does not assist the claimants at all. That section places a ceiling on amounts which can be awarded against a trade union in an action in tort. It does not create any liability. The reference to it may have been a simple typographical error.

51. The claim also makes references to the Bribery Act 2010. Essentially the allegation is that Tesco gives various particular benefits to USDAW officials to reward them for illegally depriving the claimants and other workers of the benefit of the Six Book agreement, and that this amounts to bribery. The claimants would like the union officials to be duly punished for this conduct.

52. Like the Fraud Act 2006, with which I have dealt above, the Bribery Act 2010 creates and deals with a number of criminal offences. It does not create any civil liability which could be the basis for a claim to the High Court.

53. For all of these reasons, the Particulars of Claim disclose no justiciable or remotely arguable claim for breach of statutory duty.

Breach of contract

54. The Particulars of Claim contend that under the Six Book agreement, employees are entitled to various benefits which the claimants in fact do not receive. At paragraph 10 they state that this collective agreement "contains rights at a higher level than our individual contracts" and that from 2011 onwards, all individual contracts for new workers were unlawful because they did not respect the collective agreement.

55. If that allegation could be made good, it would presumably reveal a breach of contract by Tesco as employer.

56. That no doubt explains the deployment by the claimants of section 20 of TULRCA because, as I have said above, that section can in certain circumstances make a trade union liable for the tort of inducing another person to break a contract.

57. So this part of the claim, properly speaking, is not for breach of contract. It is a claim in tort, for inducing a breach of contract.

58. As I have said, section 20 was not intended to deal with this type of situation. However, I have considered whether it could nevertheless be applied. The words used in section 20 are sufficiently general, it seems to me, to be applied where a trade union induces another person to break a contract even if this is not in the circumstances for which the section was designed.

59. However, the elements of a section 20 claim cannot be found in the Particulars of Claim.

60. The claimants do not appear to be alleging that they have contractual rights under the Six Book agreement. On the contrary, their pleading repeatedly complains that the Six Book agreement does not apply to 71% of the workforce including themselves. They attempt to give legal reasons why the Six Book agreement should apply to all the workforce. However, they have not identified any statutory provision or any other law which has that effect. They therefore cannot show any arguable case of a breach of the Six Book agreement – which they admit does not apply to them – and therefore cannot show that the trade union induced any such breach.

61. The only other conceivably relevant contractual instrument is the defendant's Rule Book. This is sometimes referred to in the Particulars of Claim as the "Usdaw Statute" although it is not a statute. The claim repeatedly asserts that making collective agreements for unequal treatment is a breach of that instrument.

62. I have been shown the Rule Book (dated 2017). The only provision relied on by the claimants is one sentence in rule 3. Rule 3 sets out the Defendant's Objects. I quote it in full and have underlined the relevant words:

> "The objects of the Union shall be to secure the complete organisation of all workers eligible for its membership within the United Kingdom; to improve the conditions and protect the interests of its members; to obtain and maintain reasonable hours of labour, proper rates of wages, and general conditions of service; to settle disputes between its members and their employers, and to regulate the relations between them by the withholding of labour or otherwise. To promote equal opportunities and equal treatment for all members and oppose discrimination on grounds of sex, race, ethnic origin, disability, age, sexual orientation or religion. To work consistently towards securing the control of the industries in which its members are employed. To further the interests of its members by representation in the United Kingdom, European and Scottish Parliaments or the Welsh Assembly or on Local Governing Bodies, and to

> employ such portion of the Funds of the Union as may be subscribed in procuring such representation. To provide assistance to members when out of employment through causes over which they have no control, or through unjust treatment, or through any dispute existing between an employer and a member or members of the Union. To provide legal or other assistance when necessary in matters pertaining to the employment of members, or for securing compensation for members who suffer injury by accidents in their employment. To provide educational facilities for members. To make grants to, and share in the management, or take control of any institution from which members may derive benefit, and to have power to render, as occasion may arise, assistance to other trade unions, and for other lawful purposes; also to provide funds for the relief of members in sickness, disablement, distressful circumstances and for their interment. To compile and keep a register of all members out of employment or desirous of a change of situation and submit names to employers who are making appointments. To aid in, and join with any other union or group of unions having for their objects, or one of them, the promotion of the interests of workpeople within the scope of the Trade Union Acts."

63. I have quoted the entire rule in order to make clear the breadth of the union's objects and its duties towards all of its members.

64. The claimants argue that entering into different terms and conditions for different categories of worker is a violation of the duty to promote "equal treatment for all members".

65. In my judgment it is not arguable that that duty barred the Defendant from negotiating any collective agreements involving different terms and conditions for different workers. Instead it seems to me from the underlined words that the intention was to reflect the generally applicable equality legislation, at least in part, by identifying seven protected characteristics on the grounds of which discrimination would not be permitted. But that was not a promise to union members that every one of them would experience identical treatment in all circumstances.

66. I therefore conclude that no reasonable ground is disclosed for bringing the claims for or relating to breach of contract and those claims have no rea prospect of success.

Illegal use of union funds by not complying with statute

67. It seems to me that the particulars of this allegation are found in a phrase at paragraph 42 of the Particulars of Claim where union officers are said to have acted "against the financial interest of union members in breach of the union statute and all UK laws, including the Bribery Act 2010 and Fraud Act 2006 criminal laws".

68. This allegation does not assert that there is any legal cause of action other than those which I have already discussed. As I have already said, there has been no arguable breach of the Rule Book and no breach of any other identified law which could give rise to civil liability. I have already dealt with the references to the Bribery Act 2010 and the Fraud Act 2006.

<u>Decision on the application</u>

69. I accept Ms Omeri's submission that the whole of this claim falls within the terms of CPR rule 3.4(2) and rule 24.3. The allegations are hopeless. They also, in my judgment, cannot be saved by any amendment. Instead, it is impossible to identify any rule of law which could lead to a judgment in the claimants' favour based on the ascertainable facts or on any facts which the claimants have any prospect of establishing. There are therefore no reasonable grounds for bringing the claim, and maintaining the claim is an abuse of the Court's process. The claimants have no real prospect of succeeding on any part of the claim.

70. In *Piepenbrock v Michell and others* [2024] EWHC 544 (KB), Tipples J accepted a submission that CPR 3.4(2)(a) focuses on whether the relevant statement of case, without reference to evidence, discloses reasonable grounds for bringing the claim, whereas under CPR 24.3 an applicant may rely on extrinsic evidence to establish that the claim has no real prospect of success.

71. In my judgment the defendant is entitled to orders under both rules. Whilst some extrinsic evidence has been of assistance to the Court in understanding the factual matrix, the contents of the Claim Form and Particulars of Claim fall within the terms of CPR 3.4(2)(a) and/or (b) and, having regard to the evidence, the test under rule 24.3 is satisfied.

72. There will therefore be orders striking out the Claim Form and Particulars of Claim and, further or in the alternative, giving judgment for the Defendant. Before making the latter order I have asked myself whether there is any "other compelling reason why the case or issue should be disposed of at a trial". No such reason has been identified to me and I find that no such reason exists.

Application for Civil Restraint Order

73. For all the reasons set out above, I also conclude that the claim is totally without merit. CPR 3.4(6) requires me to record that in the Court's order and thereupon to consider whether it is appropriate to make a civil restraint order under CPR 3.11 and Practice Direction 3C.

74. A Limited Civil Restraint Order restrains a party from making any applications, without permission, in the proceedings in which the order is made. The power to make that order is not relevant in the present case.

75. Ms Omeri invites me to make an Extended Civil Restraint Order ("ECRO"). Under PD 3C 3.1, an ECRO may be made "where a party has persistently issued claims or made applications which are totally without merit". Under paragraph 3,2 the effect of an ECRO made by a judge of the High Court is that the person is restrained from issuing claims or making applications in the High Court or the County Court "concerning any matter involving or relating to or touching upon or leading to the proceedings in which the order is made without first obtaining the permission of a judge identified in the order".

76. What is meant by "persistently"? The making of three unmeritorious claims or applications has been described as the bare minimum needed to constitute persistence,

and the Court must in any event ask itself whether persistence has been proved. See *Sartipy v Tigris Industries Inc* [2019] EWCA Civ 225, [2019] 1 WLR 5892.

77. Ms Omeri invites me to infer that the ET claims, of which each claimant brought four, must have been either withdrawn on the basis that the claimants accepted that they were without merit or struck out by the ET for having no reasonable prospect of success. She interprets the relevant passage of the Particulars of Claim in the present case as revealing that the COT3 settlement, to which I have referred above, must have arisen from a fifth claim by each, based on issues similar to those in the present proceedings, and not from their first four claims.

78. I cannot be confident that that interpretation is correct and that the COT3 settlement was not referable to the four claims by each claimant to which they refer at paragraph 30 of their Particulars of Claim.

79. Unfortunately nothing more is known about the ET litigation. The defendant is not able to gainsay the assertion by the claimants that they benefited from a financial settlement.

80. In those circumstances I cannot conclude with confidence that any of those ET claims was totally without merit.

81. The defendant has also informed the Court that the claimants are pursuing a sex discrimination claim against a recent employer in the Birmingham ET. I have been shown an order made in those proceedings on 13 November 2023, dismissing claims for "automatic" unfair dismissal (i.e. dismissal because they made a protected disclosure under the whistleblowing provisions of the Employment Rights Act 1996) on the grounds that those claims had no reasonable prospects of success.

82. The ET Rules of Procedure do not contain provisions echoing those in the CPR about certifying claims as "totally without merit". It can be inferred that the automatic unfair dismissal claim was totally without merit although the ET's order does not spell that out.

83. The present claim is therefore the second totally without merit claim or application made by the claimants. The threshold for proving persistence has not yet been reached and I am not persuaded to make an ECRO.

84. Nevertheless, having regard to the fact that the claimants have formed what I consider to be a misconceived view of their rights in their employment by Tesco, that they made claims in the ET and then followed those with a wholly unmeritorious claim in the High Court, and that they have pursued other ET litigation some of which has had to be struck out, there is a danger that they will engage in further vexatious litigation. I hope that they will not do so. That hope is supported by the fact that, before me, they made focused and courteous submissions which, though they are not lawyers, were directed to the issues. It is only fair to warn them that if there is any other claim or application which is adjudged to be totally without merit, the Court is highly likely to make an ECRO.

85. I mention two final matters by way of postscript.

86. First, the claimants contended that the applications before me were a nullity because the defendant's solicitors had no power to act. That was on the basis of the defendant's financial statements for the year ended 31 December 2023. That document contains a list of advisers who act for the defendant including four firms of legal advisors. That list does not include Kennedys Law LLP who act in the present matter. However, I have not been told of any legal reason why Usdaw cannot change its choice of solicitors at any time. I am assured by Ms Omeri that she and her instructing solicitors have their client's authority to act, and the evidence filed includes a witness statement by the defendant's Head of Legal. In the circumstances I accept the assurance.

87. Second, Ms Omeri argued in the alternative that the claims were an abuse of process because the claimants had only paid the level of Court Fee which was referable to the amount of earnings which one of them had allegedly lost as a result of the matters complained of. The Claim Form also sought aggravated damages of £1 million, and a claim of that size would entail a much higher Court Fee. In view of my decision on the applications I do not need to determine that point but if the claims had survived, the claimants would have had to clarify the true size of their claims and pay the appropriate fee.