EMPLOYMENT TRIBUNALS

London Central Employment Tribunal

EMPLOYMENT JUDGE: Dr S J Auerbach

JUDGMENT ON RECONSIDERATION APPLICATION

Paragraph 4 of the judgment of the Tribunal promulgated on 23 November 2016 (arising from the hearing on 15 – 17 November 2016) is, upon reconsideration, varied, by way of partial revocation of the strike out of those of the complaints referred to there that are the subject of this application (as to which see paragraph 6 of the reasons below) to the extent set out at paragraph 47 of the reasons below.

REASONS

Introduction

1 At a preliminary hearing (PH) on 15 – 17 November 2016 I decided several matters. Written judgments were promulgated on 23 November. Written reasons were requested by the Claimant in respect of certain of the decisions, and these were promulgated on 8 December.

2 The Claimant subsequently wrote indicating that he wished to apply for a reconsideration. A series of extensions of time to do so were granted, and on 30 January 2017 he emailed his substantive reconsideration application.

3 Upon preliminary consideration, pursuant to rule 72(1), I did not consider that there was no reasonable prospect of the decision in question being varied or revoked. Accordingly, I did not reject the application at that preliminary stage. Instead, the Respondents were directed to enter a response. As permitted by that sub-rule, the letter informing the parties of this set out my provisional views on the application.

4 A response was then tabled by the Respondents' solicitors on 22 February 2017. In the course of another PH, and of correspondence, the parties agreed (and I

directed pursuant to rule 72(2)) that the application could fairly be disposed of without a hearing, with written representations to be tabled by the Claimant, the Respondents' solicitors, and then the Claimant in further reply (if any). Such written representations have now been received, from the Claimant on 14 March, the Respondents' solicitors on 17 March, and then the Claimant in reply on 29 March 2017.

5 Having considered the application, response and all further written representations, I now give my decision. Some of the written materials presented to the Tribunal have been very detailed and wide-ranging in their arguments. I have considered them all. In the interests of proportionality and clarity, I focus in what follows on those that seem to me to have been most pertinent and decisive, and my consideration of which serves to explain the reasons for my decision.

6 The particular judgment to which the application relates is at paragraph 4 of the written record of judgments arising from the November PH, striking out as having no reasonable prospects of success, the complaints listed there, on the basis that they do not raise matters within scope of section 53 Equality Act 2010. Reconsideration is sought in relation to the striking out of all the complaints referred to there, save for the reasonable adjustment complaints that had been brought by reference to the PCP of the First Respondent (IFA) not having an equality and diversity policy.

7 Rule 71 provides that the Tribunal may reconsider a judgment "where it is necessary in the interests of justice to do so." The fact that a party considers that the Tribunal's decision is wrong and wishes to reargue the matter is not, by itself, sufficient ground for a reconsideration. However, the Claimant indicated in his application that, at the November PH, he had difficulty keeping up with the arguments, which did not entirely follow the lines of the Respondents' skeleton argument. He also submitted that (as explained below) a relevant provision of the 2010 Act was simply overlooked on that occasion, so that the original decision was reached on a mistaken basis. Having regard particularly to this latter point, I have considered it just to review the decision in question through the mechanism of reconsideration.

The Original Decision

8 References to paragraph numbers in what follows are to the paragraphs of the Tribunal's reasons for the original decision.

9 As the reasons explain, there are two routes by which the Claimant seeks to argue that the complaints in question are in scope of section 53. For him to succeed by route 1, the Tribunal would have to find (inter alia) that the alleged conduct concerned arrangements for deciding upon whom to confer a relevant qualification. For him to succeed by route 2, the Tribunal would have to find (inter alia) that he is a person upon whom a relevant qualification "has been" conferred, *and* that the

treatment concerned amounted to subjecting to him to any other detriment in the manner required by the relevant provision.

10 As to route 1 I concluded in my original decision that there was no reasonable prospect of the Tribunal finding that the complaints in question related to "arrangements" that the IFA made for deciding upon whom to confer a relevant qualification (paragraphs 48 – 53 refer).

11 As to route 2, I accepted in my original decision that the exams in question amount to a relevant qualification, but found, construing the ordinary meaning of "qualification", that enrolment in the IFA, in the sense of merely becoming a member of it, as such, does not. I also found that the Claimant faced an additional obstacle to success by route 2. I found that, on a correct interpretation of these provisions, a *further necessary condition* to get within scope of section 53 by route 2, is that the detrimental treatment complained of must *relate* to the holding of the qualification in question; but that was not reasonably arguable in this case (paragraphs 59 – 62).

12 Accordingly, for my original decision now to be revoked or varied, upon reconsideration, I would need to find *either* (a) that there are better than no reasonable prospects of the Tribunal finding that the complaints in question did relate to arrangements for deciding upon whom to confer a relevant qualification, and hence of success by route 1; *and/or* (b) that there are better than no reasonable prospects of the Tribunal finding (i) that becoming a member of the IFA amounts, for these purposes to a relevant qualification, *and* (ii) that the complaints in question do not lack a legally necessary connection between the detriment complained of and the relevant qualification relied upon.

13 In what follows I call (a) the "arrangements point"; I call (b)(i) the "membership point"; and I call (b)(ii) the "connection" point. I consider each in turn.

The Arrangements Point

14 The Claimant argues that the principle of non-regression means that the 2010 Act should be interpreted to provide no lesser protection than the Disability Discrimination Act 1995; and that the wording of the corresponding provision of the 1995 Act – referring to arrangements "for the purposes of determining" upon whom to confer the qualification – is wider than that of section 53 of the 2010 Act – referring to arrangements made for "deciding" upon whom to confer the qualification.

15 My provisional view, on preliminary consideration, was that I did not think it reasonably arguable that there is a material difference between the two formulations. In a number of instances, the 2010 Act adopts a tighter drafting style, which is perhaps intended to be more user-friendly. This appeared to be no more than an instance of that. In any event, even considering the natural meaning of the phrase used in the 1995 Act, I was not persuaded that the conduct complained of could arguably be described as "arrangements which (the IFA) makes for the purpose of

determining upon whom to confer the qualification". The qualification in question here is that conferred on those who take and pass the exam. Such arrangements could, I thought, reasonably be said to include the content of the exam, the criteria for achieving a pass, arguably the exam conditions, timing and so forth; but my provisional view was that it is not reasonably arguable that they extend to the subject matter of these complaints: matters to do with the point of contact with administrative staff, for dealing with complaints or Ms Harriman's report to the Education Committee.

16 The Respondents' reply to the application adopts that reasoning as correct.

17 The Claimant's subsequent written representations do not develop his arguments any further on this specific point.

18 My provisional view has not altered. For the reasons already given, I do not think it reasonably arguable that the conduct complained of in these complaints can be described as "arrangements which (the IFA) makes for the purpose of determining upon whom to confer the qualification". It remains my view, therefore, that the complaints in question have no reasonable prospect of succeeding by route 1.

The Membership Point

19 In my original decision, I considered the ordinary natural meaning of "qualification". I concluded that merely being admitted to membership of an organisation such as the IFA did not amount to conferral of a qualification, in itself.

20 The reconsideration application, however, draws attention to section 54(3), which *defines* a relevant qualification. That provision was entirely overlooked at the PH. It was neither cited to, nor considered by, the Tribunal. To that extent, the original decision was reached on a mistaken basis, and in view of this it is right to reconsider.

21 The Claimant's case is that the definition makes all the difference, because it includes, within the concept of a relevant qualification "an enrolment needed for, or facilitating engagement in", the trade or profession in question. That, he argues, covers being a member of an organisation such as the IFA.

22 My provisional view, on preliminary consideration, was that consideration of this feature of the definition does point to the conclusion that enrolment in the IFA, in the sense of becoming a member, should be treated as a relevant qualification.

23 In the response subsequently filed by them, however, the Respondents' solicitors argued that the reference to "enrolment" must be construed as having a similar meaning to the other words on the list in which it appears. Taking that approach, they argued, points to the conclusion that "enrolment", refers to the

process by which some organisations formally confer the relevant professional qualification, by entering the individual onto a roll of qualified persons, or otherwise formally "enrolling" them into the profession. But it should not, they argued, be construed as also covering mere membership of the organisation in question.

24 It is the fact that the Claimant had joined, or become a member of, the IFA, that he seeks to rely on to get him home through route 2 in relation to the complaints in question. If the foregoing argument be right, this would not amount to "enrolment", and hence not a relevant qualification, so his route 2 case would fall at this hurdle.

25 In his written representations, however, the Claimant cited **McDonagh & Ors v Ali & Another** [2001] UKEAT 1386/00, 10 April 2001. That concerned one of the predecessors of section 53, section 12 of the Race Relations Act 1976, but the relevant wording of the particular sub-provisions of the two sections is to similar effect. Having considered that decision, the Respondents' solicitors, in their written representations in reply, withdrew their argument that membership of the IFA does not amount to "enrolment" for the purposes of section 53(4), and hence is not a relevant qualification.

26 In light of both section 53(4) and **McDonagh v Ali**, I agree, on reconsideration, that it cannot be said that the Claimant has no reasonable prospect of overcoming *this* requirement of route 2. But I return to consider that decision more closely below.

The Connection Point

27 The Respondents' solicitors also argued in their response to the reconsideration application that, as he had not sought, in that application, to challenge the reasoning, at paragraphs 59 – 62 of the original decision, on the connection point, the Claimant should not now be permitted to seek to revisit that aspect in his written representations. In their written representations replying to those of the Claimant, however, the Respondents' solicitors no longer maintained that position.

28 This part of the original decision, itself, consisted of two components. The first is the conclusion, as a matter of *law*, that for the purposes of route 2, the detriment claimed must *relate* to the relevant qualification relied upon. The second is the conclusion that, in this case, the argument that this link is, in *fact*, forged, has no reasonable prospect of success.

29 In his initial written representation, the Claimant did not challenge the proposition of law. However, he argued that the detriments claimed in this case do in fact relate to the relevant qualification relied upon. The Respondents' solicitors, in their representations in reply, maintained that they do not. The Claimant, in further reply, develops his arguments on the point of law as well.

30 I turn, then, first, to the first component: the point of law. This requires some further consideration of the decision in **McDonagh**.

31 In that case the alleged act of discrimination was that the Labour Party had partially suspended the complainants' membership, thereby rendering them ineligible to be included in a panel of prospective candidates in local government elections. At EAT level, the conclusion that being a Labour councillor amounted to a relevant qualification was not challenged.[1] The issue was whether membership, as such, was a relevant qualification.

32 Among the authorities considered by the EAT was **McLoughlin v Queens University Belfast** [1995] NICA 82. There, construing a similarly worded order, the Court had accepted the argument that "enrolment" refers to the conferring of a substantive qualification, but does not embrace the conferring of membership of an organisation. The EAT did not consider themselves bound to follow that authority. They concluded that it would be anomalous if there was jurisdiction to entertain a complaint of discrimination about the final step of conferral (or not) of the substantive qualification, but not about the status of membership, or any other status necessary to be eligible for the qualification.

33 At paragraph 34 the EAT concluded:

> In the premises we do not regard **McLoughlin** (which in any event does not bind us) as requiring us to depart from the conclusion at which, that authority apart, we had arrived, namely that the Labour Party is a body which, in relation to some of its functions and in relation to some of its members and their rights as such, can make a conferral which falls within the opening words of **section 12**. The functions relevant to Mr Ali's and Mr Sohal's complaints are those of its functions which operate to permit or to bar a member's progression or possible progression from mere membership towards the occupation of being a Labour Councillor; we see the Labour Party as falling within **section 12** in its exercise of such selection functions, which we shall next describe in more detail.

34 At paragraphs 38 – 40 they continued:

> 38. We have failed to detect error of law in the Employment Tribunal's extended reasons. We make three points. Firstly, we would not think it right to allow the conferral of such qualification, recognition or approval as **section 12** is concerned with to be capable of being sub-divided in such a way that discrimination in relation only to a preliminary part or stage should be beyond the reach of the Act whereas the whole or final entity should be within it. It will often be that discrimination at a preliminary stage or as to a part only would be as hurtful and as effective a bar to an applicant as would be discrimination in the qualification as a whole and the possibility of such sub-division - the anomaly identified by Counsel in **McLoughlin supra**, - if unchecked, would represent little short of a repeal of **section 12**. For example, if no-one could be called to the Bar by an Inn of Court unless he had become and remained a member of the Inn, had eaten dinners and had passed exams, a student would be no more affronted and harmed by his Inn's refusal, on racial grounds, to call him to the Bar (surely an

[1] Because of prior EAT authority on the point.

act falling within **section 12**) than he would have been by its refusal, on like grounds, to accept him as a member or to permit him to dine or sit exams. We thus resist the argument that the ability of a member of the Labour Party to be nominated, or to nominate himself, to the pool from which Labour Local Government candidates would be selected falls short of the sort of full qualification which **section 12** contemplates. It is an essential preliminary to that full qualification and we fail to see why discrimination as to an essential preliminary part is any less covered by **section 12** than is discrimination as to the whole or final qualification, recognition or approval.

39. Secondly, we do not shrink from holding that the mere conferral of membership of the Labour Party (and thus of its concomitant rights) is of itself, certainly to a person who intends to be a Labour Councillor, a conferral that falls within **section 12 (1)** in much the same way as membership of an Inn of Court is such a conferral relative to a person intending to become a barrister. Mr Cavanagh had real difficulty with the question of whether a refusal, upon racial grounds, of membership of an Inn of Court would be caught by **section 12**.

40. Thirdly, we are not disposed to distinguish between acts or omissions of the National Executive Committee (or those of the Labour Party) which are allegedly merely "administrative" and its other ones; an argument in the Appellant's skeleton to such effect was not pressed orally and the Employment Tribunal had in any event well answered it by referring to its amounting to a license to discriminate which would fly in the face of the dictum in **Savjani supra**.

35 Thus the clear import of the decision is that, in order to secure the requisite protection against discrimination in relation to the conferment of a substantive qualification, that protection must extend to discrimination in respect of the conferral or holding of any prior status, or completion of any prior requirement, which is a *necessary condition* of eligibility to be considered for that qualification.

36 What the decision does not indicate is that protection should extend to *any* form of detrimental treatment by a qualifying body, of one of its members. While paragraph 40 (cited above), eschews the exclusion of acts which might be described as merely administrative, the import of this is that, if, as in that case, unrestricted membership is a necessary condition of eligibility for candidacy, the reach of the statute cannot be avoided by seeking to label the act of suspension as a merely administrative act.

37 The Claimant, however, relies on the dictum in **Savjani** there referred to. That is a dictum of Templeman LJ, in that earlier case, to the effect that the 1976 Act was drawn in wide terms, addresses a great evil, and he would be slow to find that something fell outside its ambit. The Claimant relies on this approach, arguing that it would be anomalous if protection did not extend generally to the relationship between a qualifications body and its members.

38 It seems to me that the decision in **McLoughlin** does not establish, or settle, that wider point of law, on which the Claimant relies. However, it remains open to the Claimant, potentially, simply to argue that the proper construction of the words of the relevant sub-sections is that they do prohibit detrimental treatment in any respect

by a qualifying body, discriminating against or victimising a member, whether or not the treatment *relates* to their membership *status* or other relevant qualification.

39 There is, it seems to me, a good arguable case against that interpretation. It is that Parliament has made particular provision in relation to discrimination by qualifying bodies precisely because their power to confer – or withhold – relevant qualifications dictates that there needs to be appropriate protection against discrimination by them in that connection, but has not sought to provide any wider protection than in relation to that capacity. As the explanatory notes (cited by the Claimant) put it:

> This section makes it unlawful for a qualifications body (as defined in section 54) to discriminate against, harass or victimise a person when conferring relevant qualifications (which includes renewing or extending a relevant qualification).[2]

40 However, I remind myself that what I am reconsidering here is a decision to strike out these complaints as having no reasonable prospect of success. A point can be reasonably arguable, though it faces significant obstacles or counter-arguments. Given that **McLoughlin** does not, I think, settle the point of law either way, and the potential to argue for an analogy with section 39, and the argument drawing on **Savjani**, I am persuaded, on reconsideration, that the Claimant's argument of law on this point is not so weak as to have *no reasonable prospect of success*.

41 If, however, that argument of law fails at trial, and the Tribunal at trial concludes that it *is* necessary in law for the detriment alleged to be related to membership status, as such, then the Claimant would not, in my view, have reasonable prospects of securing a finding of *fact* that the necessary connection is forged in this case. The (alleged) conduct of which the Claimant seeks to complain here (and which is the subject of this reconsideration application) is identified in my original decision at paragraph 43: in summary, not having a single point of contact, not dealing appropriately with his (internal) 14 October 2013 complaint, and Ms Harriman's statement to the Education Committee concerning the case of **Burke**.

42 The Claimant asserts in his written representations that these alleged detriments relate to the "benefits of being admitted to membership", the benefits being "putting himself forward to take an exam, or otherwise be considered for, a relevant qualification." However, I do not see how it can be reasonably argued that these particular alleged detriments relate to his membership status. None of them involves the revocation, non-renewal, non-extension, suspension, or any other alteration of his membership status as such, nor anything that could be said to affect such status, as such.

[2] At paragraph 183. As to the status of Explanatory Notes to statutes see **Westminster City Council v National Asylum Support Service** [2002] 1 WLR 2956.

43 However, because I think that the Claimant's case on the point of law has better than no reasonable prospect of success, I am no longer, on reconsideration, of the view that his prospects of establishing jurisdiction by route 2 in relation to these complaints, are so poor that they, for that reason, have no reasonable prospect of success.

Outcome

44 To the extent that the reasoning is, in the respects that I have outlined, different, my original decision is, upon reconsideration, varied as to its reasons.

45 However, for the reasons I give here, it remains my view, upon reconsideration, that there is no reasonable prospect of the Claimant succeeding in establishing jurisdiction to consider the complaints in question by route 1.

46 However, I no longer consider that he has no reasonable prospect of succeeding in establishing jurisdiction by route 2. That is because, for the foregoing reasons, though the argument faces serious obstacles, I am no longer of the view that there is no reasonable prospect of the trial Tribunal deciding that, in law, the protection against detrimental treatment applies to treatment of a member of the IFA, regardless of whether it relates to his membership status.

47 Accordingly, upon reconsideration, my original decision is varied, by way of partial revocation. In respect of the route of argument that the complaints in question relate to treatment concerning arrangements for deciding upon whom to confer a relevant qualification, contrary to sections 53(1)(a) and/or 53(4)(a), the strike out stands. In respect of the route of argument that the Claimant is a person upon whom a relevant qualification "has been" conferred, *and* that the treatment concerned amounted to subjecting to him to any other detriment, contrary to sections 53(2)(c) and/or 53(5)(c), the original strike out decision is revoked.

Employment Judge Auerbach
4 April 2017