EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Ms S Khan **v** **The Law Society of England and Wales**

Heard at: London Central by CVP **On**: 20 January 2021

Before: Employment Judge A James

Representation

For the Claimant: Did not attend and was not represented

For the Respondent: Ms K Newton QC, counsel

This has been a remote hearing. The form of remote hearing was video link (Teams). A face-to-face hearing was not held because it was not safe or practicable during the current national lockdown. Further, at the time of the hearing, London Central Employment Tribunal was closed due to air quality issues and HMCTS staff and judges are working remotely. There are very limited opportunities for in-person hearings. The claimant had applied for a postponement, on the basis that this hearing was not appropriate for a remote hearing. That application was rejected for reasons which are set out in detail below.

PRELIMINARY HEARING JUDGMENT

(1) The tribunal does not have jurisdiction to hear the claimant's claims against the respondent and they are struck out because:

   a. the claimant was not in the employment of the respondent or a contract worker (sections 39 to 41 Equality Act 2010);

   b. the claimant was not an office holder of the respondent (sections 49-52 Equality Act 2010);

   c. the respondent was not acting as a qualifications body under section 53 Equality Act 2010 in relation to any of the claimant's claims;

   d. the claimant was not a worker under the definition contained within either sections 43K or 230(3) of the Employment Rights Act 1996;

(2) The tribunal potentially has jurisdiction to consider the claimant's claims because the claim form was potentially presented in time, at least in

relation to the incidents complained of in October 2019. The question of time limits would still have been a live issue for the tribunal to make a further determination on, if the claims had not been struck out and were proceeding. In particular, whether any of the alleged detriments which are upheld amounted to conduct extending over a period; and if so, but the last of them was before October 2019, was it reasonably practicable to present them in time and/or would it be just and equitable to extend time (sections 48(3) Employment Rights Act 1996 and 123(1) Equality Act 2010).

REASONS

Structure of judgment

1. This judgement is structured as follows. First, the claims and issues are set out. Second, there is a lengthy section in relation to the proceedings. Third, are the findings of fact. Finally, in the conclusions section, the relevant law in relation to each issue is set out, followed by the tribunal's conclusions in relation to each of those issues in turn.

Claims and issues

2. The claimant brings claims of victimisation following the making of complaints of discrimination on grounds of race and/or religion or belief; and/or claims of detriment on grounds of protected disclosures. The issues between the parties which fall to be determined by the tribunal at the preliminary hearing are as follows:

   2.1. Whether the Claimant was an employee or contract worker for the purposes of sections 39 to 41 of the Equality Act 2010 ('EqA');

   2.2. Whether the Claimant was an office holder for the purposes of sections 49-52 EqA;

   2.3. Whether, in relation to the claimant's claims against the respondent, the respondent was acting as a qualifications body under section 53 EqA. (I record that this has been slightly refined from the issue identified by EJ Welch on 10 June 2020);

   2.4. Whether the Claimant was a worker for the purposes of either section 43K or 230(3) of the Employment Rights Act 1996 ('ERA'); and

   2.5. Whether the Tribunal does not have jurisdiction to consider the Claimant's complaints due to them having been presented out of time.

The Proceedings

3. The claim form (ET1) was submitted on 3 January 2020 but was initially rejected. For reasons which are set out below, it was treated as having been

received on 3 February 2020. The Notice of Appearance (ET3) was submitted on 17 March 2020.

4. On 10 June 2020 there was a preliminary hearing for case management before EJ Welch. That hearing commenced by telephone, but was then converted to a Microsoft Teams meeting by video. The record of the meeting does not record that, but I accept Mr Harrop's recollection in that regard, who represented the respondent at that hearing. He had difficulties with video, and therefore joined with his sound on only.

5. At that hearing, the issues set out above were identified. Those issues were set down for a two-day preliminary hearing on 20 and 21 August 2020. EJ Welch noted in the record of the hearing:

> *We explored whether the Open Preliminary Hearing could be considered for a remote hearing. The Claimant confirmed that she preferred the hearing to be in person, having found remote hearings not as successful in other jurisdictions. It was therefore agreed that the hearing would be listed in person.*

6. The 20 August preliminary hearing took place before EJ Goodman using Microsoft Teams. Again, Mr Harrop informs me and I accept that the claimant did not experience any apparent difficulties in using that application during the hearing.

7. The preliminary hearing had to be postponed because the disclosure process had not been completed. The claimant had sent her documents to the respondent's office who stated that its staff had not found them. They asked for the documents to be sent by email instead. The claimant responded by saying that she would send the documents, if the respondent sent to her the documents which were the subject of a specific disclosure application by her at the hearing on 20 August. The respondent declined to do so since they disputed the existence of some of the documents, and the relevance of another. EJ Goodman made an unless order that the claimant provide her disclosure documents by email by close of business on 21 August 2020. EJ Goodman declined to make orders for specific disclosure of the documents sought by the claimant.

8. The preliminary hearing was relisted to 29 and 30 September 2020. It is recorded at paragraph 8 of EJ Goodman's record of the hearing:

> *The respondent is comfortable with both remote and in-person hearings, although one witness has expressed a wish to give evidence remotely. If there is an in-person hearing, it is possible to do this and has been done regularly well before the arrival of coronavirus. The claimant objects strongly to a remote hearing, saying that while she has the technology, she has found it difficult to give evidence and … cross-examine others online. I said that her preference will be taken into account, and it would be necessary to consider with the regional employment judge whether there was space for the hearing. The tribunal will do its best to accommodate the claimant's preference having regard to the overriding objective and rule 46.*

9. The hearing on 29 September 2020 took place using CVP. I am informed by Ms Newton and accept that the claimant did not experience any difficulty using CVP during that hearing.

10. EJ Isaacson noted in the record of the hearing that the claimant had not complied with the timetable set out for some of her disclosure; and exchange of witness statements had not taken place until 4pm on 28 September 2020, the day before the preliminary hearing was due to take place. The claimant informed the tribunal that she wanted more time to prepare as a result of matters arising from the respondent's witness statement and she also produced further documents. The respondent raised concerns that the claimant had expanded her claim by the evidence set out in paragraphs 10 to 13 of her witness statement and that these new matters should either be struck out or the respondent given more time in which to take further instructions. After some discussion it was agreed that the best course of action was to postpone and to make further case management orders, so the case was ready for a preliminary hearing which would be listed for three days. EJ Isaacson then recorded the following:

    (6) The claimant indicated that she really preferred for the OPH to be in person. I explained to her the logistical reasons why so many hearings had to be heard remotely due to social distancing, judges and administrative staff working remotely and a mounting back log.

    (7) Fortunately, listings were able to list the OPH for 3 days in person commencing 20 to 22 January 2021. However, the claimant was warned that it may be necessary to convert the hearing from in person to by video. It was clear that the claimant has the ability and facilities to have the case heard by video remotely if necessary. Below are some directions regarding CVP and are only relevant if the hearing is converted to a video hearing.

    Additional directions were set out later in the order, directing what should happen if the hearing had to take place by CVP, rather than in-person.

11. Witness statements were due to be exchanged on 8 December 2020. The claimant applied to put back exchange until 31 December 2020. It is not clear whether that was formally approved by the tribunal but in any event that was the date on which witness statement exchange took place.

12. The parties were also ordered to exchange skeleton arguments on 14 January 2020. The respondent did so. The claimant did not.

13. The parties had been notified on 12 January 2021 that the hearing would proceed by CVP. This was because of the move to remote hearings wherever possible, for public safety reasons, due to the further national lockdown; together with specific issues at London Central Employment Tribunal due to concerns about air quality. In an email dated 14 January 2021, the claimant applied to postpone the hearing.

14. The claimant argues in her email that she would not be in a position to conduct a three-day preliminary hearing via video link. She submits that the issues before the tribunal are important, and potentially precedent setting; that there was no special need for urgency in deciding the issues; that whilst both parties were legally represented, the claimant was also a witness; that witnesses needed to be cross-examined and the submissions will be complex and lengthy; and that although the claimant was familiar with using video link,

she has faced issues in the past with connectivity and the quality of the video link. The postponement application was opposed by the respondent.

15. Regional Employment Judge Wade refused that application on 18 January 2021 because:

    15.1. *The claimant is a legal professional and runs her own office. It must be within her capability to achieve a suitable internet connection for this hearing. Indeed, she confirmed to Judge Isaacson that she did have the equipment and merely said that she would prefer an in person hearing.*

    15.2. *As the respondent says, the case of Re A to which the claimant refers was dated April 2020. Since then huge strides have been made in enabling hearings to take place remotely.*

    15.3. *This is neither a particularly long hearing nor does it involve very many witnesses. It also covers issues which are well travelled and so there are no exceptional circumstances to make this case unsuitable for a remote hearing.*

    15.4. *Central London ET has developed considerable expertise in running video hearings. The judges and the administrative staff are all able to assist parties and have knowledge of a number of "work arounds" which can enable a hearing to take place effectively. For example, it is sometimes easier to run the hearing on Teams rather than by CVP (best run with Google Chrome as the default browser), this can be tested at the start of the hearing.*

    15.5. *A judge will, of course, not force a party to participate in a hearing where justice cannot be done. This is not a reason for not starting the hearing.*

16. The claimant applied for a reconsideration of that decision in an email sent at 10am on the morning of this hearing. In an email sent at 10:25am, that application was refused and the claimant was urged to make every attempt to join the hearing.

17. The hearing commenced at 10:30am. Prior to the commencement of the hearing the claimant spoke with the clerk and told him she was having connection difficulties. The claimant made no apparent attempts to join the hearing. It was therefore adjourned to 10:55am, and a further email was sent at 10:49am urging the claimant to attempt to join the hearing. The clerk also phoned the claimant to offer assistance.

18. Again, the claimant made no apparent attempt to join the hearing at 10:55 am. It was therefore decided that a link be sent for a Microsoft Teams meeting, to start at 11:30 am. This was an alternative method which had been used successfully on two previous occasions by the claimant, during the previous case management hearings. Following the sending of the link, an email was sent at 11:23 am, confirming the arrangements. Yet again, the claimant made no apparent efforts to join the hearing using Microsoft Teams. She sent an email at 11:40 stating that she was not able to connect and again requested that the hearing be postponed until it could be heard in person. The Claimant confirmed in her email that she was at the time at her work address in Leicester. Following discussion with Ms Newton, the hearing was adjourned until 2.00 pm. A lengthy email was sent at 12:21, informing the claimant that

the hearing would proceed at 2.00 pm, and the options that were being considered. These included a postponement of the hearing, which would give rise to a costs application by the respondent; or proceeding with the hearing, in the claimant's absence. The claimant was also directed to answer a series of questions, to assist the tribunal to decide what was just. This included a request that the claimant explain why she did not send her skeleton argument to the respondent on 14 January 2021 as required by Judge Isaacson's order.

19. The hearing reconvened at 2.00 pm. Again, the claimant made no apparent effort to join the hearing. In an email sent at 14:01, the claimant states that "*the respondent has been fully aware and been on notice as to the difficulties that the claimant has faced in the past with remote video hearings*". In relation to the request to explain why she did not exchange skeleton argument on 14 January 2021 the claimant stated:

> *The Order was not complied with as the Claimant made an application to postpone the Preliminary Hearing on 14 January 2021, as the in-person hearing had been converted to a remote hearing, and could not in any event be held in-person as the Tribunal is closed at present. The decision to refuse the Claimant's application was made on 18 January 2021 and the Claimant made a re-consideration of that decision at 10:00am today.*

20. No application has been made by the claimant to postpone the date for exchange of skeleton arguments.

21. As to the issues with broadband/Internet, the claimant confirmed that the firm's broadband provider is BT "*and to the claimant's knowledge the broadband is not due for upgrade*".

22. The email exchange is copied in full at Annex A to this judgment (save that the email addresses have been removed, together with the address of the claimant's solicitors office and the standard information that appears at the bottom of the emails). For ease of reference, the emails have been rearranged into chronological order.

23. Having had the opportunity to take instructions from the respondent, Ms Newton confirmed that the respondent wanted me to determine the preliminary issues in the claimant's absence. I decided to do so for the following reasons.

    23.1. Since the first lockdown, both the tribunal and users have gained considerable experience in conducting hearings remotely. In the current emergency, remote hearings provide, in many cases, an acceptable way of maintaining access to justice, including the right to a fair hearing within a reasonable time. I am quite satisfied this is one of them.

    23.2. This is the third time that the preliminary issues have come before the tribunal for determination. The adjournment of the hearing on the two previous occasions has been largely down to the claimant's failure to comply with directions, resulting in unless orders being made. Some of the matters complained about by the claimant happened nearly three years ago. Justice requires that progress be made.

    23.3. The claimant is continuing to comply with directions in time, the most recent example being her failure to provide a copy of the claimant's skeleton argument to the respondent on 14 January 2021. The

claimant's explanation for failing to do so, namely because a postponement application was made on that date, is not acceptable. Tribunal orders should be respected. The claimant shows disrespect to the administration of justice in failing to comply with them. This is particularly inexcusable when the claimant is herself an officer of the court. It should have been readily apparent to both the claimant, as a qualified solicitor, as well as to the firm that represents her, that unless and until the postponement application was granted, the claimant should continue to comply with the direction made. No application was made, either at the time of the postponement application or since, to vary it.

23.4. The claimant has on three previous occasions been able to participate in remote hearings, by using Microsoft Teams/CVP. The question as to whether the hearing should take place in person or remotely has been canvassed at each of the previous case management hearings, and the claimant has been on notice that it may need to take place remotely. The claimant's ability to do so is a matter of record and that record has not been contested by the claimant.

23.5. As for the firm's alleged broadband/internet connection issues, I am astonished that nearly one year into the pandemic, proper efforts have not been made to resolve any connection difficulties experienced by the firm. I struggle to understand how the firm can properly represent its clients without having an adequate broadband/internet connection, which allows for the use of video link applications such as Microsoft Teams and CVP. The firm's offices are in Leicester, not some remote rural area where there are known broadband/internet issues.

23.6. The claimant could have made alternative arrangements to use her domestic facilities; to use those of friends of family (if Covid-safe arrangements were possible); and/or arranged for representation by counsel who may have been able to provide a suitable room for the hearing. It is hard to escape the conclusion that the claimant is not willing to participate unless the tribunal arranges an in-person hearing. It is not for the claimant to dictate how the hearing takes place, if it can be held remotely in a fair manner. I am quite satisfied that is the case.

23.7. I considered whether in the alternative, the claimant's claim should be struck out, on the tribunal's own motion, on the basis that it was not being actively pursued; and/or that tribunal orders had not been complied with. I decided however that justice was better served by engaging with the issues and making a determination on them, given the substantial efforts that have been made to prepare the case for the hearing. That way, a determination could be made on the merits, albeit without the input of the claimant or her representative.

24. There was an agreed bundle of 678 pages, a bundle of witness statements, a skeleton argument from the respondent and a bundle of authorities. I was fortunate enough to have had the opportunity to consider those in detail the day before the hearing, and did not therefore require any further time to read into the case.

25. The tribunal considered written statements from the claimant; and for the respondent, heard evidence from Catrin Lewis, who during the relevant time

period covered by these claims was Head of Private, Civil and Commercial Law; Ross Hutchinson, who is employed by the Law Society as Head of Governance; and Pat Hodges who is employed as Payroll Manager by the Solicitors Regulatory Authority (SRA). As it was not possible to test the claimant's evidence through cross-examination, the respondent's account has been preferred, where there is a material difference between the claimant's evidence, and that of the respondent.

26. Ms Newton then made oral submissions on behalf of her client. At the conclusion of those submissions, consideration was given as to whether or not the claimant should be provided with an opportunity overnight to provide written submissions, on the basis that Ms Newton could then reply further in writing. I decided not to do so, on the basis that the claimant had failed to provide a written skeleton argument in line with the directions. That was the opportunity to put her arguments in writing and it was not in the interests of justice to provide a further opportunity to do so. The case was therefore concluded on the first day. Judgement was reserved.

Findings of Fact

27. The first part of these facts sets out in detail the role and governance structure of the respondent. There then follows a general chronology of the facts pertinent to the claimant's role in the respondent and the preliminary issues with which the tribunal is concerned.

I. The Law Society

The Law Society and the SRA

28. The respondent, the Law Society for England and Wales (the Law Society), is the independent professional body for solicitors in England and Wales. The regulation of solicitors is the responsibility of the Solicitors Regulation Authority (SRA). That is still formally part of the Law Society, although it operates independently. The intention is for the two bodies to be formally separated soon.

The Charter and Council

29. The originating document for the Law Society is its Charter from 1845, which was last amended in 1954. The Charter vests the management of the Law Society in the Council as the governing body of the organisation. The role of Council is to represent members; set the practising certificate and compensation fund contribution; approve the annual business plan and budget; and determine the society's position on significant policy issues.

30. Council members do not receive any form of remuneration for their role, but are able to claim expenses incurred in attending meetings or fulfilling any obligations as a Council member. These expenses arrangements are discussed in detail below.

The General Regulations

31. The relationship between the Council and the Law Society organisation is governed by the General Regulations. The General Regulations also effect

the delegations of responsibility from the Council, so that there are a limited number of bodies within the respondent's governance structure that have actual delegated decision-making authority.

32. General Regulations 37 to 49 (updated 2017 version) establish six (now five) Special Committees referred to below. The regulations refer to 'terms of office' of members of those committees. On the respondent's case, none of the members of any of the Law Society committees are office holders, as a matter of law, by reason of their membership of those committees alone. On its case, only the Deputy Vice President (DVP), Vice President (VP), and President are office holders in the legal sense. That is considered further in the conclusions.

Special Committees

33. A number of Special Committees report to Council. During the period covered by the claimant's claims there were six, including the Audit Committee, the Council Members' Conduct Committee and the Equality, Diversity and Inclusion Committee. There are currently five Special Committees.

The Boards

34. Below Council there were also a number of boards, including the Legal Affairs and Policy Board (LAPB). In 2018, a single board, the Law Society Board (LSB) was established. The LSB is the body charged with overseeing the effective implementation of the Law Society's strategy and business plans as set by Council. Under the previous structure, 21 committees reported to the LAPB, including the Civil Justice Committee (CJC), with which the claimant's claims are primarily concerned. These are known by the respondent as 'community committees'. Four other committees reported to the regulatory affairs board. These 25 committees now report to the LSB.

Community committees

35. The community (or specialist) committees are not part of the Law Society's governance structure. These committees are not established formally under the Bye-Laws or General Regulations but by decision of the parent bodies (previously, the LAPB and Regulatory Affairs Board; now the Policy and Regulatory Affairs Committee).

36. There is a Protocol governing relations between the Law Society and the community committees. The current version of this document is dated September 2014 and states that it is intended to "*provide a framework and guidelines to govern the relationship between the Law Society and each of its sections and divisions (collectively referred to as a "community") in the management and operation of the community*". It is also designed to create a framework for relations between the Law Society and the community committees, define the role of community committees within the wider Law Society, and provide a way of resolving conflicts.

37. Members of the community committees were previously known as 'community volunteers'. They are now referred to as Elected and Appointed Members (EAMs). This term is considered to better reflect the contribution made to the work of the Law Society by EAMs.

Recruitment process for community committees

38. A recruitment process is followed in relation to committee membership/ chairing to ensure the widest possible range of members with relevant

experience. Vacancies are advertised, followed by a process of short-listing. Appointments are made after interviews conducted by a panel consisting of the Chair of the specialist committee and a member of the parent committee.

39. It is the respondent's position that: "*When the Law Society appoints a Committee Chair it does not have any ability to direct the Chair (personally) as to when and where or how to discharge their functions in exercising the appointment. Committee Chairs have complete autonomy in performing the role as volunteers*". That evidence was not challenged and I accept it.

Remuneration and expenses

40. Save for the following exceptions, members of Council and of Council Committees (by which I mean both Special Committees, and community committees) do not receive any remuneration. The exceptions are the Chair of the new LS Board established in early 2018; external members of the Audit Committee; and the three office holders, the Deputy Vice President, Vice President and President. Further, committee members may be recompensed for speaking engagements at committee events at a rate agreed by the Product Manager prior to the event and capped in line with the Law Society's speaker fee policy.

Finance Polices

41. On appointment to the post of chair of a community committee such as the CJC, the appointee is sent a Committee Chair's Handbook, which includes a copy of the Finance Policies. Section 7, which deals with Committee Membership and Appointments also makes reference to 'terms of office' – normally, three years. The Finance Polices confirm:

> *The policy of the Law Society Group is to reimburse Members of Council Boards and Committees for expenditure incurred (in accordance with this paper) by reason of the performance of his / her duties as a Member.*

42. The document details the claimable expenses, such as travel, accommodation, and overnight subsistence, which are to be reimbursed against receipts (with some discretion if a receipt is not available for a minor expense).

43. In addition, Board and Committee chairs, Council members and Committee members are entitled to an annual expenses allowance. I accept in full Mr Hutchinson's evidence regarding this payment, which follows. The Law Society's Management Board made a decision that in relation to other expenses that are incurred in performing the various functions (such as paying for wi-fi in a hotel or paying a congestion charge), it would not be proportionate from an administrative perspective for those small amounts to be claimed individually. As such, committee members are also able to claim an annual incidental expenses allowance to compensate them for those types of expenses. The Law Society's Finance team issue claim forms to committee members on an annual basis, and the member can claim the capped allowance for that particular financial year.

44. Appendix 1 to the Finance Policies states:

> *There is an annual expense allowance claimable by Members of qualifying boards and committees and Committee & Board Chairs. The allowance is*

intended to compensate for incidental expenses (listed below) incurred by reason of the performance of duties as a member.

45. Appendix 2 to the Finance Policies states:

Incidental expenses are covered by the annual expense allowance. Separate claims for incidental expenses will not be reimbursed.

The following expenses are incidental expenses if they have been incurred by reason of the performance of your duties as a Member:

a) Incidental expenses necessarily incurred whilst driving a motor vehicle. This includes. but is not limited to. toll charges, the congestion charge and insurance costs.

b) Coffees and refreshments purchased that do not accompany a meal.

c) Telephone calls (both mobile and landline).

d) Access to the Internet.

e) Stationery and postage.

f) Paper costs.

g) The use of a laptop, equivalent to depreciation at 20% of the cost of the laptop.

h) Ongoing or emergency maintenance of the laptop.

i) Maximum of £5 per night for incidental expenses incurred when staying in overnight accommodation.

j) Maximum of £3 per week for the expenses incurred in the use of one's home as an office ('home office costs').

k) Ad hoc sundries including newspapers.

46. The rates for the 2013/2014 annual expense allowances were:

- £3,850 for a Board or Committee chair.
- £1,283 for Council members.
- £ 642 for Committee members.

These amounts are increased annually in line with RPI.

47. I asked Mr Hutchinson whether he considered that there was an element of profit in the annual expenses allowance. He contended that there was not. As stated above, the view taken was that it was not proportionate to employ people to go through all of the incidental expenditure, arising from performance of the duties as committee members etc. Hence the decision to set a capped rate for these types of expense. The Law Society is for example reluctant to provide laptops to committee members, and prefers instead to allow an element of depreciation, in the allowance, for such items.

<u>The tax position</u>

48. Mr Hutchinson's position is supported by the current stance of HMRC in relation to the allowance. Based on previous advice from HMRC, the annual expenses allowance had been subject to PAYE and NI and a P60 was produced. Since receiving clearance from HMRC in December 2011 however, such payments are now made gross, through finance, not payroll.

49. The general position of the Law Society that members and chairs of committees do not receive remuneration, is to be contrasted with payments the clamant received for attendance at the Solicitors Regulation Authority's (SRA) Equality Diversity & Inclusion (ED&I) Committee which is referred to further below.

II. General chronology

The claimant's appointment to the CJC

50. In September 2009 the claimant became a member of the Civil Justice Committee (CJC). The role of the Civil Justice Committee is to keep under review civil litigation (including dispute resolution), to promote improvements, to provide guidance to the profession and to answer queries.

51. On 18 November 2009 the claimant's appointment as a member was approved by the Legal Affairs and Policy Board (LAPB). The claimant's appointment was renewed in 2012 and 2015 by the respective Chairs of the CJC. The claimant was paid an annual expenses allowance, which as noted above was initially subject to PAYE and NI deductions at source. The claimant was sent a payslip and a P60 in April each year. As noted above, HMRC's position changed in 2011 and since then the expenses allowance has been paid through finance without deductions.

The SRA's ED&I Committee

52. On 6 January 2015 the claimant was offered an appointment as a solicitor member of the SRA's ED&I Committee from 1 January 2015 for a one-year term of office. The appointment was subject to a Non-Executive Member Agreement. This recorded that the claimant was entitled to a payment of £500 per meeting attended. The claimant sent ad hoc Fee Requisition forms for her attendance at meetings of the committee and was paid via payroll. Her payslips refer to 'Law Society – Non-Employed'. The reference to the Law Society is because it is the bank account holder. In any event, the SRA is still formally part of the respondent, although that is due to change soon.

53. In an email to the claimant from Dominic Tambling headed 'Fee requisition for SRA EDI Committee' dated 3 June 2015, in response to a query from her as to why tax had been deducted from one of the payments, the claimant was told: "*As the post you hold is classed as an office holder, if we make payment to you we have to apply tax*." In a previous email dated 5 March 2015 from Pat Hodges to Dominic Tambling, Ms Hodges confirmed that the £200 deduction for tax, but not NI, was correct.

Ethnic Minority Lawyers' Division (EMLD)

54. On 31 October 2016 the claimant was invited to become a member of The Law Society's Ethnic Minority Lawyers' Division (EMLD). The claimant attended the next meeting of the EMLD Committee on 9 November 2016. In the draft list of issues provided by the claimant to the 10 June 2020

preliminary hearing, the claimant confirms that her claims relate to her membership of the Civil Justice Committee; together with her later appointment (and subsequent removal) as Chair of that Committee. The claimant expressly states that in relation to her membership of the EMLD, her status was no more than that of a volunteer or an interested third party. On 26 September 2018 the claimant tendered her resignation from the EMLD Committee, which was subject to a 3-month notice period.

Small Firms Division Committee

55. The claimant is or has also been a member of the Small Firms Division Committee. The claimant clarified at the hearing on 29 September 2020 that her membership of this committee was not part of her claim either, and nothing further needs to be said about it.

The role of Chair of the CJC

56. On 23 February 2017, the claimant applied for the Chair of the CJC role. The claimant was interviewed on 13 March 2017. She was recommended for appointment on 4 April 2017 by the panel. In a letter dated 12 April 2017, the LAPB formally confirmed the claimant's appointment. Attached to the letter were the Finance Policies referred to above. The letter also referred to the "*Unconscious Bias and Disability Confident Training, which will need to be completed before you take up office as chair*". The claimant completed this online training module before she took up her role.

57. The claimant sat on an interview panel for new committee members of the CJC on 5 May 2017. She received no payment for doing so.

58. The appointment formally commenced on 1 September 2017 for a three-year term which was due to expire on 31 August 2020.

59. In addition to attending and chairing CJC meetings, it was agreed that from time to time the claimant would attend external meetings as a representative of the Law Society. The claimant also contributed towards ad hoc working parties and subgroups. It is not unusual for a Committee Chair to do such things. There was however no obligation on the claimant to do so and such attendance and participation was voluntary.

60. The expectation is that members of committees attend at least 50% of the meetings during the year. There is no obligation in that respect however, and no penalty for failing to do so. Due to work commitments, the claimant was not able to achieve that attendance rate between 2012 and 2015. This was a factor which the interview panel considered, before deciding to formally offer the claimant the position of Chair of the CJC.

Acas Early Conciliation

61. On 12 June 2019, the claimant commenced Acas Early Conciliation. The Early Conciliation Certificate was issued on the same day.

Removal from Law Society roles

62. On 3 October 2019, the claimant was removed with immediate effect from all of her Law Society roles. These included her role as Chair and member of the CJC, her role as member of the Small Firms Committee and her appointment as Solicitor Member Representative on The Law Society's Joint Tribunal Panel.

The ET1 and subsequent hearings

63. On 3 January 2020 the claimant filed an ET1 claim form, and included reference to the Acas Early Conciliation Certificate number R166593/19/89 in box 2.3 of the form.

64. On 20 January 2020, the claimant was sent a letter by the Employment Tribunal rejecting her claim, on the basis that the Tribunal had been unable to locate the ACAS Early Conciliation Certificate with Number Rl66593/19/89. The claimant was directed that if she was to apply for a reconsideration, she was to enclose that ACAS Early Conciliation Certificate. The clamant duly did so by letter, emailed to the Tribunal on 3 February 2020.

65. On 18 February 2020, Employment Judge Glennie reconsidered the decision to reject the claim and the claimant's claim against the respondent was accepted by the Tribunal.

66. On 10 June 2020 at the preliminary hearing, the claimant accepted that she was only relying on her membership of the CJC and after September 2017, her role as Chair of the CJC in relation to her claims, not her other roles. That position was reiterated at the hearing on 29 September 2020, at which the claimant also drew a distinction between being a community/division member and a board member (although the claimant has never in fact been a member of any Law Society Board).

Conclusions

67. As noted above, each of the issues will be dealt with in turn, by first setting out the relevant law, and then the conclusions on each issue.

Issue 1 - Was the Claimant an employee or contract worker under sections 39 to 41 of the Equality Act 2010 ('EqA')

68. In order to benefit from the rights set out in sections 39 and 40 of the Equality Act 2010, a claimant must be 'in employment'. That is defined in section 83(2)(a) of the Equality Act 2010 as follows:

> *83 Interpretation and exception*
>
> *(2) 'Employment' means –*
>
> *(a) employment under a contract of employment, a contract of apprenticeship or a contract personally to do work.*

69. Further, section 41 of the Equality Act 2010 provides:

> *41 Contract workers*
>
> *(3) A principal must not victimise a contract worker- …*
>
> *(5) A 'principal' is a person who makes work available for the individual who is-*
>
> *(a) employed by another person, and*
>
> *(b) supplied by that other person in furtherance of a contract to which the principal is a party (whether or not that other person is a party to it)*

(6) 'Contract work' is work such as is mentioned in subsection (5)

(7) A contract worker is an individual supplied to a principal in furtherance of a contract such as is mentioned in subsection 5(b).

70. Central to these provisions, is the requirement for the existence of a contract. For a contract to exist, three main conditions need to be satisfied:

    70.1. There must be an agreement made between two or more people;

    70.2. The agreement must be made with the intention of creating legal relations; and

    70.3. The agreement must be supported by consideration.

71. As for the requirement for consideration, the 'wage/work bargain' is at the heart of any employment contract. Per MacKenna J in *Ready Mixed (South East) Ltd v Minister of Pensions and National Insurance 1968* 1 All ER 433:

> *[T]here must be a wage or other remuneration. Otherwise there will be no consideration, and without consideration no contract of any kind.*

72. In *South East Sheffield Citizens Advice Bureau v Grayson* [2004] ICR 1138 the EAT examined the question of whether unpaid volunteers could be said to be in 'employment' within the meaning of the relevant legislation. At the time of that decision, an employer needed to employ 15 or more people for the provisions of the Disability Discrimination Act 1995 to apply. In determining the question, it was necessary to consider whether volunteer workers at the bureau were employees. In her oral submissions, Ms Newton relied heavily on the Grayson decision, and I will quote from the relevant sections of the decision below, when coming to my conclusions on this issue.

73. The argument that volunteers should fall within the scope of the provisions prohibiting discrimination at work, despite the absence of a contractual relationship, was rejected by the Supreme Court in *X v Mid Sussex Citizens Advice Bureau and anor* [2013] ICR 249. In doing so it held (by reference to the cases of *Allonby v Accrington and Rossendale College* [2004] ICR 1328 at paragraph 67 and *Lawrie-Blum v Land Baden-Wurttemberg* [1987] ICR 483 at paragraph 17) that the concept of worker has been restricted to persons who are remunerated for what they do.

Conclusions on employment/contract worker status

74. For the reasons which follow, I conclude that the claimant was not in 'employment' for the purposes of section 39 Equality Act 2010. Central to that decision is the conclusion that the claimant was not under any contract at all with the respondent, in relation to her role as either a member or a Chair of the CJC.

75. At paragraph 12 of *Grayson*, Rimer J stated:

> ***12.*** *… We start from the point that the question for the tribunal was whether the Bureau's volunteer workers were subject to a contract under which they were obliged to work for the Bureau. So expressed, it would appear to us surprising if the answer to that question were yes, since it is of the essence of volunteer workers that they are ordinarily under no such contract. As volunteers, they provide their services voluntarily, without reward, with the consequence that they are entitled to withhold those services with impunity. However that starting*

> *position is not necessarily also the finishing point. In every case, including this one, if a question arises as to the legal relationship between an alleged employer and a so-called voluntary worker, it is always necessary to analyse that relationship to see exactly what it amounts to. But if the proposition is that the volunteer worker is in fact an employee under a contract of service, or under a contract personally to do work, for the purposes of s.68 of the 1995 Act, then in our view it is necessary to be able to identify an arrangement under which, in exchange of valuable consideration, the volunteer is contractually obliged to render services to or else to work personally for the employer.*

76. Like the volunteers in *Grayson*, the claimant undertook her role and the duties which it involved, on a voluntary basis. The claimant was not under any obligation to render her services to the Law Society. The claimant did not receive any remuneration for it. She did receive expenses, which are considered below.

77. At paragraph 13 of *Grayson*, Rimer J stated:

> ***13*** *At least one test which may help in this identification exercise is to consider whether, if the volunteer should decline without prior notice to perform any work for the employer, the latter would have any legal remedy against him; and similarly to consider whether, if the volunteer attends to do work and there is none, he has any legal remedy against the employer. We should perhaps add that in summarising the position in the way we have, we have not overlooked the decision of this Appeal Tribunal in Burton v Higham t/a Ace Appointments [2003 IRLR 257 in which it was held that it is not necessary for the purposes of the s.68 definition to show that the contractual obligation to work is to do work for the other party to the contract, as opposed to some third party. We do not regard that particular consideration as material in this case. The critical question here is whether the volunteers were contractually obliged to provide their services to the Bureau, albeit that the provision of those services, at any rate in relation to the work done by the advisers, was in part outwardly manifested by the giving of advice to the Bureau's clients. (Tribunal's emphasis)*

78. In the claimant's case, there was no remedy for the respondent, against the claimant, if she did not carry out any of the role that she was reasonably expected to carry out. As noted above in the facts section, committee members are expected to attend at least 50% of the meetings. When the claimant failed to do so, for understandable reasons, there was no sanction available to the respondent against the claimant, and no sanction was applied. To the contrary, despite the attendance issue, the respondent still decided to appoint the claimant to the role of Chair of the CJC.

79. At paragraph 14 of *Grayson*, Rimer J stated:

> ***14*** *We agree with the tribunal that, in considering the key questions in the present case, it is necessary to focus on the 'volunteer agreement' and to consider, in particular, whether it imposes any contractual obligations on the volunteers actually to do any work for the Bureau in exchange for consideration. We consider, first, that it is of least some relevance that the agreement is not required to be signed by either the Bureau or the volunteer, a factor which tends to us to suggest that it was not regarded (at least by the Bureau, which was the author of the document) as constituting a binding legal relationship in the nature*

of a contract of service or for services between it and the volunteer. We do not, however, regard that feature as by itself conclusive.

80. In the claimant's case, there wasn't even a volunteer agreement or anything corresponding to one. There was in contrast a written agreement in relation to the claimant's membership of the SRA's ED&I Committee. Whilst that is not a role which directly concerns us in this case, the existence of such an agreement stands in stark contrast to her role as Chair and member of the CJC. As does clause 3 of the Agreement, confirming that a fee is payable for attendance at meetings.

81. At paragraphs 15 and 16 of *Grayson*, Rimer J stated:

> ***15*** *However, rather more solid, and early support, for the view that the agreement was not intended to constitute such a legal relationship is to be found in its opening explanation of itself, namely that it '... has been prepared to clarify the reasonable expectations of both the volunteer and the Bureau.' The agreement is, therefore, one directed at clarifying each sides 'reasonable expectations'. Translated, that means that it is directed at identifying what the Bureau reasonably expects of the volunteer and what the latter can reasonably expect of the Bureau. That is not the language of contractual obligation. In particular, someone who is indisputably engaged under a contract of service, or for services, will not usually find his and his employer's respective contractual obligations expressed in terms of 'reasonable expectations'. They will ordinarily be expressed in terms of unqualified obligation, or at any rate the primary obligations will be so expressed, in particular those relating to the employee's hours of work and his reward for it.*
>
> ***16*** *Moving forward in the agreement, it goes on to provide that the volunteer's 'usual minimum commitment is for six hours including interviewing and writing up case records'. We interpret the phrase 'usual minimum commitment' as indicating, in the context, what the Bureau expects of its volunteers. It is not saying that the volunteers must work those hours, let alone that there is a legal obligation for them to do so, and the tribunal accepted Mrs Whiteley's evidence that no sanction was available against any volunteer who did not honour his commitment. If there is no sanction for not honouring that commitment, that suggests that it is not a commitment in the nature of a legal obligation. …. But it is to be noted that the agreement says nothing about the amount of holiday the volunteer can take. On the face of it, he or she can take as much holiday as and when he or she likes, subject only to the qualification that it is at least expected of him or her that he or she will give the Bureau plenty of warning of it. It appears to us that an agreement under which an alleged employee has this sort of freedom with regard to the taking of holiday is unlikely to be a contract of service or for services. The most striking pointer against it being such a contract is of course that the volunteer is not paid for his services. Whilst he is reasonably expected to put in at least six hours a week, he is not in fact obliged to put in any such hours; he is not paid for such hours as he does put in and the agreement identifies no minimum number of weeks per year during which he is expected to put in those minimum hours.*

82. In the case of the claimant's membership and chairing of the CJC, the respondent had no more than a reasonable expectation that the claimant

would carry out that role diligently. There is no doubt a moral obligation in that respect; but there is no corresponding contractual obligation.

83. Paragraph 16 applies equally to this case. As noted above, there is an expectation that EAMs attend at least 50% of the meetings; but there is no contractual obligation to do so.

84. At paragraph 17 of *Grayson*, Rimer J stated:

> ***17*** *The tribunal was impressed by the fact that the agreement makes it clear that the Bureau will reimburse volunteers for their expenses incurred in connection with the performance of work for the Bureau. It also found as a fact that this part of the agreement extends only to true expenses. We regard this feature of the agreement between the Bureau and its volunteers as entirely unsurprising. It would, in our view, be very surprising if unpaid volunteers were expected to bear their expenses incurred in the course of their work for the Bureau, and we do not regard this feature of the agreement as providing support for the contention that in truth the agreement was one of service or for the personal provision of services.*

85. The claimant did receive expenses, as well as the annual expenses allowance, whilst both a member and the Chair of the CJC, although at different rates. Since 2011, that allowance has been paid through finance, not payroll, in line with the agreement with HMRC that the allowance is not taxable. It is apparent that HMRC does not view there as being any real element of profit in relation to it. It is instead an administratively convenient way of ensuring that EAMs are reimbursed for the reasonable incidental expenses they can be expected to incur in carrying out their roles. The annual expenses allowance is a very different type of payment to the fee paid to the claimant for her attendance at SRA ED&I Committee meetings.

86. At paragraph 20 of *Grayson*, Rimer J stated:

> ***20*** *…. We do not ourselves regard provision to the volunteer of training as amounting to consideration for a commitment by the volunteer to provide services in exchange. The training is certainly so as to enable the volunteer to do the job, and the Bureau reasonably expect its trained volunteers to do work for it which will show the provision of training to have been worthwhile. But the training cannot, in our view, be regarded as consideration of what the tribunal appears to have found to be some form of reciprocal undertaking by the volunteer to honour some minimum commitment. The agreement itself makes no such suggestion, nor can we see how the acquisition by the volunteer of experience in the course of the provision of his services can amount to consideration for what the tribunal appears to have found to be such a reciprocal undertaking. The notion that the acquisition of the experience which the doing of a particular job will give can be regarded as consideration for the performance of the job itself is one which we cannot understand.*

87. In the claimant's case, she did have to undertake a compulsory training module, which took about an hour and a half to complete. EAMs are required to undergo such training in order to ensure that they comply with equality law when carrying out their roles for the respondent. Whilst my conclusion does not depend on it, I take judicial notice of the fact that CAB volunteers have to carry out much more extensive training than that, before being entrusted to carry out volunteer duties.

88. Finally, at paragraph 21 of *Grayson*, Rimer J stated:

> ***21*** *We consider that the crucial question which was before the tribunal was not whether any benefits flowed from the Bureau's to the volunteer in consideration of any work actually done by the volunteer for the Bureau, but whether the volunteer agreement imposed a contractual obligation upon the Bureau to provide work for the volunteer to do and upon the volunteer personally to do for the Bureau any work so provided, being an obligation such that, were the volunteer to give notice immediately terminating his relationship with the Bureau, the latter would have a remedy for breach of contract against him. We cannot accept that the volunteer agreement imposed any such obligation. Like many similar charitable organisations, similarly dependent on the services of volunteers, the Bureau provides training for its volunteers and expects of them in return a commitment to work for it, but the work expected of them is expressed to be voluntary, it is in fact unpaid and all that the volunteer agreement purports to do is to set out the Bureau's expectations of its volunteers. In our view, it is open to such a volunteer at any point, either with or without notice, to withdraw his or her services from the Bureau, in which event we consider that the Bureau would have no contractual remedy against him. We find that it follows that the advisers and other volunteers were not employed by the Bureau within the meaning of the definition in s.68 of the 1995 Act.*

89. Ms Newton submits it if one replaces the word 'Bureau; with 'Law Society', exactly the same conclusions can be drawn. I agree. Again, I note that the position of the claimant in relation to her EAM roles, is in marked contrast to her position in relation to her membership of the SRA's ED&I Committee.

90. Turning to section 41 Equality Act 2010, I can deal with that briefly. First, there is still a requirement for a contract. That is absent here for all of the reasons given above.

    90.1. Further, during the 29 September 2020 hearing, it is recorded at paragraph (14) that the claimant:

    > *confirmed that in the alternative she also was claiming under section 41 of the Equality Act 2010 (EqA) as a contract worker. She stated that the principal was the Law Society and the other party was the board of the Law Society.*

91. Ms Newton argues that such an argument is legally erroneous in that section 41 EqA envisages that the principal and the 'other party' are distinct and separate legal entities. On the claimant's case, the board and the Law Society are part of the same entity. I agree. The claimant's argument is in this respect misconceived. In any event, the absence of a contract under which the claimant was supplied to the respondent is fatal to such a claim.

Issue 2 - Was the Claimant an office holder for the purposes of sections 49-52 EqA?

92. Section 49 EqA provides as follows:

> ***49 Personal offices: appointments, etc***
>
> *(1) This section applies in relation to personal offices.*
>
> *(2) A personal office is an office or post –*

(a) to which a person is appointed to discharge a function personally under the direction of another person, and

(b) in respect of which an appointed person is entitled to remuneration

…

(10) For the purposes of subsection 2(a), a person is to be regarded as discharging functions personally under the direction of another person if that other person is entitled to direct the person as to when and where to discharge the functions.

(11) For the purposes of subsection 2(b), a person is not to be regarded as entitled to remuneration merely because the person is entitled to payments-

(a) in respect of expenses incurred by the person discharging the functions of the office or post, or

(b) by way of compensation for the loss of income or benefits the person would or might have received had the person not been discharging the functions of the office or post.

93. As Ms Newton observes, s.49(2) requires two conditions to be satisfied, including entitlement to remuneration. For the reasons set out above, I have concluded that the claimant was not entitled to remuneration in her role as a either a member or Chair of the CJC. The claimant is entitled to the payment of expenses; but s.49(11) EqA specifically provides that a person is not to be regarded as entitled to remuneration merely because they are entitled to payments in respect of expenses incurred by the person discharging the functions of the office or post. The expenses payments made to the claimant in respect of her CJC role were just that. The absence of remuneration is fatal to this part of the clam succeeding.

94. The fact that there are references in the Law Society Regulations and in the letter confirming the claimant's appointment as Chair of the CJC to a 'term of office', cannot mean that those occupying such roles for that 'term of office' are office holders within the meaning of Section 49 EqA, where the statutory conditions required by that section are not met. In the claimant's case, they are not.

Issue 3 - in respect of the claimant's claims, did the respondent act as a qualifications body under section 53 EqA

95. Section 53 EqA provides as follows:

53 Qualification bodies

(4) A qualifications body (A) must not victimise a person (B)-

(a) in the arrangements A makes for deciding upon whom to confer a relevant qualification;

(b) as to the terms on which it is prepared to confer a relevant qualification on B;

(c) by not conferring a relevant qualification on B.

(5) A qualifications body (A) must not victimise a person (B) upon whom A has conferred a relevant qualification-

(a) by withdrawing the qualification from B;

(b) by varying the terms on which B holds the qualification;

(c) by subjecting B to any other detriment.

96. Section 54 EqA provides as follows:

(2) A qualifications body is an authority or body which can confer a relevant qualification.

(3) A relevant qualification is an authorisation, qualification, recognition, registration, enrolment, approval or certification which is needed for, or facilitates engagement in, a particular trade or profession.

97. The alleged detriments complained of by the claimant are set out at paragraphs 45A-N of the Claimant's Claim Form. They do not relate to the conferment, variation or withdrawal of any relevant qualification which was needed by the Claimant in order for her to remain a member of the legal profession. On the contrary, the claimant remains a qualified solicitor. The alleged acts of the Respondent, relied on by the Claimant as founding her claim, relate only to her participation as a volunteer in various committee role. Therefore, in respect of the claimant's claims, the respondent did not act as a qualifications body under section 53 EqA.

Issue 4 - was the Claimant a worker under the definition contained within either section 230(3) or 43K of the Employment Rights Act 1996 ('ERA')

98. Section 230(3) of the ERA provides as follows:

230 Employees, workers etc

(3) In this Act 'worker' (except in the phrases 'shop worker' and 'betting worker'), means an individual who has entered into or works under (or where employment had ceased, worked under)-

(a) a contract of employment, or

(b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual.

99. Section 43K of the ERA extends the definition of a worker for those claiming 'whistleblowing' detriments. The relevant parts of section 43K read:

43K extension of meaning of 'worker' etc for Part IVA

(1) For the purposes of this Part "worker" includes an individual who is not a worker as defined by section 230(3) but who—

(a) works or worked for a person in circumstances in which—

(i) he is or was introduced or supplied to do that work by a third person, and

(ii) the terms on which he is or was engaged to do the work are or were in practice substantially determined not by him but by the person for whom he works or worked, by the third person or by both of them,

(b) contracts or contracted with a person, for the purposes of that person's business, for the execution of work to be done in a place not under the control or management of that person and would fall within section 230(3)(b) if for "personally" in that provision there were substituted "(whether personally or otherwise)",

[(ba) works or worked as a person performing services under a contract entered into by him with [the National Health Service Commissioning Board] [under [section 83(2), 84, 92, 100, 107, 115(4), 117 or 134 of, or Schedule 12 to,] the National Health Service Act 2006 or with a Local Health Board under [section 41(2)(b), 42, 50, 57, 64 or 92 of, or Schedule 7 to,] the National Health Service (Wales) Act 2006]. . .,]

[(bb) works or worked as a person performing services under a contract entered into by him with a Health Board under section 17J [or 17Q] of the National Health Service (Scotland) Act 1978,]

(c) [works or worked as a person providing services] in accordance with arrangements made—

(i) by [the National Health Service Commissioning Board] [[under section 126 of the National Health Service Act 2006,] or] [Local Health Board] under [section 71 or 80 of the National Health Service (Wales) Act 2006], or

(ii) by a Health Board under section [2C, 17AA, 17C,] . . . 25, 26 or 27 *[or 26] of the National Health Service (Scotland) Act 1978, . . .*

[(ca) . . .]

[(cb) is or was provided with work experience provided pursuant to a course of education or training approved by, or under arrangements with, the Nursing and Midwifery Council in accordance with article 15(6)(a) of the Nursing and Midwifery Order 2001 (SI 2002/253), or]

(d) is or was provided with work experience provided pursuant to a training course or programme or with training for employment (or with both) otherwise than—

(i) under a contract of employment, or

(ii) by an educational establishment on a course run by that establishment;

and any reference to a worker's contract, to employment or to a worker being "employed" shall be construed accordingly.

100. Section 43K extends the definition of a worker to additional categories of individual so as to provide specific protection for certain agency workers, homeworkers, NHS practitioners and trainees. Fatal to the claimant's case, is that each definition still requires there to be a contract (*Sharp v Bishop of Worcester* [2015] ICR 1241), which as concluded above, is absent in this case.

101. I accept in full the arguments of Ms Newton that the Claimant's circumstances do not fit within any of the provisions of section 43K, as follows:

101.1. Section 43K(1)(a) covers agency workers. The Claimant was not at any point an agency worker and therefore this section has no application.

101.2. Section 43K(1)(b) is intended to cover homeworkers, namely independent contractors who provide services whether personally or otherwise from their homes. However this provision still requires there to be a contractual relationship, which is absent in this case (see *Sharp)*.

101.3. Sections 43K(1)(ba) (bb) (c) and (cb) only cover certain NHS practitioners and nurses and midwives in training, and so are not applicable here. Section 43K(1)(d) covers those individuals who are provided with work experience as part of a training course or are provided with training for work. Neither are applicable in the claimant's case.

101.4. Section 191 ERA 1996 extends the definition to Crown employees but none of these provisions are of any application to the present case. The clamant is not in Crown employment in relation to any of the roles she carried out for the respondent.

Issue 5 - does the Tribunal have jurisdiction to consider the Claimant's complaints although they were presented out of time

102. Rule 13 of Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 provides:

> *(1) A claimant whose claim has been rejected (in whole or in part) under rule 10 or 12 may apply for a reconsideration on the basis that either—*
>
> *(a) the decision to reject was wrong; or*
>
> *(b) the notified defect can be rectified.*
>
> *(2) The application shall be in writing and presented to the Tribunal within 14 days of the date that the notice of rejection was sent. It shall explain why the decision is said to have been wrong or rectify the defect and if the claimant wishes to request a hearing this shall be requested in the application.*
>
> *(3) If the claimant does not request a hearing, or an Employment Judge decides, on considering the application, that the claim shall be accepted in full, the Judge shall determine the application without a hearing. Otherwise the application shall be considered at a hearing attended only by the claimant.*
>
> *(4) If the Judge decides that the original rejection was correct but that the defect has been rectified, the claim shall be treated as presented on the date that the defect was rectified.*

103. Bearing in mind the facts above, it appears that the claimant's claim was in fact validly presented within three months of the last of the acts complained of in her claim form. It was only rejected because it was assumed, because the ACAS early conciliation form was for some reason not obtainable by HMCTS staff, that it had not been validly presented. Once that was brought to the claimant's attention, she provided the tribunal with a copy of the ACAS

early conciliation certificate, as directed by Employment Judge Glennie. That was provided on 3 February 2020, within a reasonable period of the request having been made.

104. Rule 13(4) affords no discretion where it is decided that the original rejection was correct. See *Adams v British Telecommunications Plc* [2017] ICR, 382 EAT, (see paragraph 10). The tribunal therefore has to treat the claimant's claim as not having been presented until 3 February 2020, even though it had in fact been validly submitted in time. This is a somewhat unreal situation.

105. In such circumstances, I have no hesitation in concluding that it was not reasonably practicable for the claimant to submit her claim in time because until she was notified by the tribunal that there was a potential issue, there is no reason why she should not have assumed that the claim had been validly presented in time. Further, within a reasonable period thereafter, the claimant provided the tribunal with a copy of the ACAS early conciliation certificate, and it was then accepted. (I note that were not any separate ACAS early conciliation certificates for the other respondents named in the claim form, but that is nothing to the point here, since the claim is only proceeding against the Law Society.)

106. Similarly, I have no hesitation in concluding that it is just and equitable to extend the time limit to 3 February 2020, in respect of the discrimination claims.

107. In deciding the above, I am concerned simply with whether or not the claim form was submitted within three months of the last of the acts complained of within it. If the claim was proceeding, it would have been for a tribunal in due course to consider what claims succeed and, if so, whether any of them formed part of a course of conduct extending over a period. To that extent, time limits would still be in issue.

108. Ms Newton submitted that I should also find that the earlier matters complained of in the claimant's claim form can be severed from the matters she complains of which date from October 2019, since they are not part of conduct extending over a period.

109. It is often the case that where a series of acts are complained about in a claim form, which has been submitted within time in relation to the last act complained of, tribunals leave the question of time limits to the final hearing. Nevertheless, that is not a hard and fast rule, and I approach this issue fully aware that it is open to me to take a different approach.

110. Having considered the issue in that light, I do not consider it appropriate to make a decision on the question of whether or not any of the acts complained of extend over a period. I have not heard any substantial evidence in relation to the detriments about which the claimant complains. Determining this issue now would potentially mean making findings of fact which would then bind the employment tribunal subsequently hearing the substantive claim (if it were proceeding), without having had the benefit of hearing the evidence as a whole. I note that at least one of the October 2019 allegations names an individual, namely Mr de Waal, who is also mentioned in relation to some of the earlier allegations. This is not in my view a case where it can reasonably be determined, on the basis of the evidence that is

before me, that the claimant will not be able to establish that conduct extends over a period. I am firmly of the view that if justice is to be done to the parties in this case, that is something that should be determined after hearing all of the evidence.

Disposal

111. It follows from the above conclusions that whilst the claims are potentially in time, all of the claimant's claims should be struck out because the tribunal does not have jurisdiction to hear them.

_____
Employment Judge A James
London Central Region

Dated: 25 January 2021

Sent to the parties on:

26th Jan 2021

.....
For the Tribunals Office

ANNEX A – RECORD OF EMAILS BETWEEN EMPLOYMENT TRIBUNAL AND CLAIMANT ON 20/01/21

From:
Sent: 20 January 2021 10:00
To: HM Courts' Skype Account 0243 <
Subject: Re: URGENT APPLICATION TO RE-CONSIDER DECISION OF 18 JANUARY 2021 - 2200025/2020 - S Khan v The Law Society of England - 3 day OPH, 20 to 22 January 2021 by CVP
Importance: High

Dear Employment Judge James,

The Claimant makes an application for re-consideration of the decision made by Employment Judge Wade on 18 January 2021 to refuse to propose the Preliminary Trial. The application for re-consideration is made pursuant to s.70 and s.71 of The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

As mentioned in the Claimant's application of 14 January 2021 the Claimant has faced issues with connectivity in past, and has this morning been unable to connect to the CVP. The Claimant has made enquiries with the firm's broadband provider, as to the issue with connectivity but the broadband provider has been unable to assist with the issue. The Claimant does not have the capability to achieve a suitable internet connection for the hearing of the Preliminary Trial via CVP and seeks the hearing to be adjourned and re-listed to a date when the hearing can be held in-person.

Yours sincerely,

Sophie Khan

Sophie Khan & Co.

Solicitors and Higher Court Advocates

From: HM Courts' Skype Account 0243
Sent: 20 January 2021 10:25
To:
Cc:
Subject: RE: URGENT APPLICATION TO RE-CONSIDER DECISION OF 18 JANUARY 2021 - 2200025/2020 - S Khan v The Law Society of England - 3 day OPH, 20 to 22 January 2021 by CVP

Dear Parties/Representatives

The application for reconsideration is refused. EJ A James directs that the claimant make further attempts to join the hearing. It is due to start at 10.30 am, according to the NOH sent to the parties. The clerk has the claimant's mobile number and can assist her to resolve any technical difficulties.

The claimant has been able to join CVP hearings in the past. She runs a law firm. It is imperative that law firms are able to access and use remote hearing technology in order to carry out their duties towards their clients and to the courts

during the pandemic. At this stage in the pandemic, any technical difficulties should have long been resolved.

If the claimant continues to experience difficulties, Microsoft Teams will be used as an alternative. Separate joining instructions will be sent out, if that becomes necessary. If so, and the parties/representatives do not already have Microsoft Teams installed on their device, there is no need to download it – instead, the option to join via their web browser should be chosen.

Yours faithfully

London Central Employment Tribunal

From: HM Courts' Skype Account 0243
Sent: 20 January 2021 10:49
To:
Subject: RE: URGENT APPLICATION TO RE-CONSIDER DECISION OF 18 JANUARY 2021 - 2200025/2020 - S Khan v The Law Society of England - 3 day OPH, 20 to 22 January 2021 by CVP

Dear Parties/Representatives

Further to the email below, EJ A James understands that the claimant has told the clerk, Mr Mireku, that she cannot join the meeting.

EJ A James is not convinced that the claimant has made all reasonable attempts to join the hearing. It will commence at 10.55 am and the clamant should join that hearing. The claimant has joined hearings previously by CVP without issues having arisen. If problems arise, Microsoft Teams will be used as an alternative.

The claim was submitted in January 2020, over a year ago, and progress needs to be made in relation to it. It is not for the clamant to decide, as she suggested to the clerk, that it is not necessary for the hearing to go ahead today since it is not urgent. That is a judicial decision and both the REJ and EJ A James consider that justice requires that the case proceed today, unless it is clear, during the hearing, that the claimant cannot effectively participate in it.

Yours faithfully

London Central Employment Tribunal

From: HM Courts' Skype Account 0243 <
Sent: 20/01/2021 11:23
To: "**Subject**: RE: URGENT APPLICATION TO RE-CONSIDER DECISION OF 18 JANUARY 2021 - 2200025/2020 - S Khan v The Law Society of England - 3 day OPH, 20 to 22 January 2021 by CVP

Dear Parties/Representatives

Further to the email [above], EJ A James understands that the claimant has again told the clerk, Mr Mireku, that she cannot join the hearing.

In light of the previous history of this matter and what she has reportedly told the clerk, EJ A James is not convinced that the claimant has made all reasonable attempts to join the hearing.

The claimant has previously been able to join three remote hearings by video link, both Microsoft Teams and CVP. An invitation has now been sent to the representatives and to the claimant, to a Microsoft Teams 'meeting'. That hearing will start at 11:30 AM. If the claimant does not join, the tribunal will consider any applications that the respondent has to make, in the light of the claimant's non-participation in the hearing.

The claimant is asked to confirm whether she is currently trying to participate from the address given in the ET1, namely Portland Towers in Leicester, or if not, where she is currently located.

If it is not possible for the other participants to join the Microsoft Teams meeting through the link provided to their representatives, the respondent's solicitors should send their email addresses to this email address, so that the invite to the teams meeting can be sent to them as well.

Yours faithfully

London Central Employment Tribunal

From: **Sent:** 20 January 2021 11:40
To: HM Courts' Skype Account 0243 <

Subject: RE: URGENT APPLICATION TO RE-CONSIDER DECISION OF 18 JANUARY 2021 - 2200025/2020 - S Khan v The Law Society of England - 3 day OPH, 20 to 22 January 2021 by CVP

Dear Judge,

I write further to your email correspondence of 11:23am.

As communicated to your clerk, the Claimant has not be able to connect remotely to the hearing, and again seeks an postponement of the Preliminary Trial to be re-listed at a date when it can be held in-person.

The Claimant is currently trying to participate for the firm's offices at Portland House, 9 Power Towers in Leicester.

Yours sincerely,

Sophie Khan

Sophie Khan & Co.

Solicitors and Higher Court Advocates

From: HM Courts' Skype Account 0243
Sent: 20/01/2021 12:21
To: "
Cc: "

Subject: 2200025/2020 - S Khan v The Law Society of England & Wales - 3 day OPH, 20 to 22 January 2021 by CVP - adjourned until 2.00 pm

Dear Parties/Representatives

2200025/2020 - S Khan v The Law Society of England - 3 day OPH, 20 to 22 January 2021 by CVP - adjourned until 2.00 pm

Following the sending of the email below at 11.23 am, and the sending of an invitation via email to the parties to a Microsoft Teams 'Meeting', the tribunal attempted to start the hearing again at 11:30am, via Microsoft Teams, an application that has previously been used successfully by the claimant. Following a discussion between EJ A James and Ms Newton QC, **the hearing has been adjourned until 2.00pm**. It will proceed at that time via the Microsoft Teams link sent this morning.

The claimant is urged to make every effort to join that meeting.

Further, the claimant is directed to provide the following information/documents to the tribunal before the hearing recommences at 2.00 pm:

1. Any correspondence between the claimant and the tribunal in January/February 2020, with regard to the initial rejection of her claim, and its subsequent acceptance.
2. The claimant was due to exchange her skeleton argument with the respondent by 14 January 2020. The claimant has failed to do so. The claimant must provide a written explanation as to why that order has not been complied with, before 2.00 pm.
3. If it is necessary to postpone the hearing, Ms Newton indicated that she was instructed to make an application for costs thrown away in any event, which would be in the region of £10,000. EJ A James asked Ms Newton to take instructions from her client, as to whether or not the hearing should simply proceed in the claimant's absence, so that the employment tribunal can engage with the merits of the issues that are the subject of this preliminary hearing. What is the claimant's response to that suggestion?
4. Who is the claimant's Internet/broadband supplier and why has the claimant not made arrangements to upgrade her package, knowing of the difficulties she alleges have occurred in the past and that this hearing was likely to proceed as a remote hearing? Particularly since she is located at

her work address, Portland Towers, which is not far from the centre of Leicester, where there should not be any inherent internet/broadband difficulties.

5. Does the claimant have access to Microsoft Teams through Sophie Khan & Co? If so, why can she not join using that application? If not, what mechanism does the claimant use to conduct remote hearings and other business-related meetings during the pandemic?

Yours faithfully

London Central Employment Tribunal

Reply received at 14:01 on 20/01/2021

Dear Judge,

I write further to your email correspondence of today at 12:21pm, and provide the Claimant's response using the same numbering:

1. Please find enclosed a copy of the letter to the Tribunal dated 3 February 2020 with regard to the initial rejection of the claim. The acceptance of the claim - Acknowledgment of Claim dated 18 February 2020 can be found at page 3 of the Bundle.

2.The Order was not complied with as the Claimant made an application to postpone the Preliminary Hearing on 14 January 2021, as the in-person hearing had been converted to a remote hearing, and could not in any event be held in-person as the Tribunal is closed at present. The decision to refuse the Claimant's application was made on 18 January 2021 and the Claimant made a re-consideration of that decision at 10:00am today.

3. If the Tribunal postpones the hearing, then that decision has been taken in the interest of justice and the administration of justice. The Preliminary Trial was listed as an in-person hearing, and the Respondent, has been fully aware and been on notice as to the difficulties that the Claimant has faced in the past with remote video hearings. The Claimant's application made on 14 January 2021 was sent to the Respondent's solicitors, at the time the application was filed at the Tribunal. The Claimant seeks a postponement of the Preliminary Trial to a date when an in-person hearing can be listed. It would be unfair and unjust to proceed in the absence of the Claimant, when the Tribunal and Respondent has been on notice since June 2020, of the difficulties that the Claimant has faced with remote video hearings.

4. The firm's broadband provider at Portland House, 9 Portland Towers, Leicester is BT, and to the Claimant's knowledge the broadband is not due for upgrade. As mentioned above, the Preliminary Trial had been listed as an in-person hearing specifically because of the difficulties that the Claimant had experienced with remote video hearings. This hearing was converted from an in-person hearing to a remote hearing on 12 January 2021.

5. The Claimant has access to Microsoft Teams, however as communicated to your clerk this morning, there is no connectivity. In the past, the connectivity via Teams has been crackled. The Claimant does not conduct hearings via video. The case management hearings are conducted via BTMeetMe and trials and inquests are conducted in-person attendance. This was communicated to the Tribunal at the last hearing.

Yours sincerely,

Sophie Khan

Sophie Khan & Co.
Solicitors and Higher Court Advocates