EMPLOYMENT TRIBUNALS

Claimant: **Ms J Williams**

Respondent: **Sinclairslaw Limited**

Heard at: **Cardiff** **On: 21 and 22 December 2022**

Before: **Employment Judge S Jenkins**

Representation:
Claimant: Mr P O'Callaghan (Counsel)
Respondent: Mr J Allsop (Counsel)

RESERVED JUDGMENT

1. The Claimant was not an employee of the Respondent within the meaning of Section 230 of the Employment Rights Act 1996.

2. The Claimant was an employee of the Respondent within the meaning of Section 83 of the Equality Act 2010.

3. All of the Claimant's allegations of sex and/or age discrimination (apart from one as noted in the Reasons below) were brought outside the stipulated time limit, and it is not just and equitable to extend time for them to be considered. Those allegations are therefore struck out.

4. The Claimant's application to amend her claim is refused.

REASONS

Background

1. This hearing was a Preliminary Hearing to consider three matters:

   (i) The Claimant's employment status;

(ii) Whether the claims had been submitted within the relevant time limits, and, if not, whether to extend time;

(iii) An application by the Claimant to amend her claim.

2. The claim had been commenced by the Claimant on 28 April 2022, following early conciliation with ACAS between 13 and 14 April 2022. Upon receipt, the final hearing of the claim was listed for 21 to 23 December 2022, with a preliminary hearing being listed for 23 August 2022. At that preliminary hearing, Employment Judge Ryan clarified that the Claimant was bringing claims of unfair dismissal, wrongful dismissal, sex discrimination and age discrimination. He also directed that the final merits hearing should be postponed, and that the first two days allocated for that hearing should be used to consider the issues of the Claimant's employment status and her compliance with relevant time limits. Subsequent to that preliminary hearing, the Claimant submitted an application to amend her claim and it was directed that that would also be considered at this hearing.

3. I heard evidence from the Claimant on her own behalf, and from Mr Robert North, Director; Ms Emma Monteiro, Head of Human Resources; Ms Julia Martin, Head of Accounts; Mr Gregory Evans, Deputy Chief Executive; and Mr Michael Charles, Chief Executive; on behalf of the Respondent.

4. I considered the documents in the hearing bundle spanning 520 pages to which my attention was drawn, together with a limited number of additional documents which were exhibited to some of the written statements.

5. I also considered the written and oral submissions of the parties' representatives.

Issues

6. The issues to be considered were as set out in an Amended Notice of Preliminary Hearing issued following a further preliminary hearing for case management purposes before Employment Judge Sharp on 7 December 2022. The specific wording was as follows:

"***Status***

Whether a claim should be dismissed because the claimant is not entitled to bring it if they were not an employee of the respondent as defined in Section 230(1) and (2) of the Employment Rights Act 1996.

Whether a claim should be dismissed because the claimant is not entitled to bring it if they were not a worker of the respondent as defined in Section 230(3) of the Employment Rights Act 1996.

Whether a claim should be dismissed because the claimant is not entitled to bring it if they were not within the "employment" of the Respondent as defined in Section 83 of the Equality Act 2010.

Time

The Claimant's further and better particulars and the amended ET3 may amount to a material change in circumstances such that this issue ought better be deferred to the Final Hearing in the interests of justice (such as where an Employment Judge considers that there are issues regarding an alleged course of conduct or series of acts that necessitate evidence which would be better considered at the Final Hearing).

Was any complaint presented outside the time limits in Sections 123(1)(a) and (b) of the Equality Act 2010 and if so should it be dismissed on the basis that the Tribunal has no jurisdiction to hear it? Further or alternatively, because of those time limits (and not for any other reason), should any complaint be struck out under Rule 37 on the basis that it has no reasonable prospects of success and/or should one or more Deposit Orders be made under Rule 39 on the basis of little reasonable prospects of success? Dealing with these issues may involve consideration of subsidiary issues including: Whether there was "conduct extending over a period"; whether it would be "just and equitable" for the Tribunal to permit proceedings on an otherwise out of time complaint to be brought; when the treatment complained about had occurred.

Amendment

Whether the claimant's applications to amend her claim made on 29 August 2022 should be successful."

7. I refer to the Employment Rights Act 1996 as the "ERA", and the Equality Act 2010 as the "EqA" throughout this Judgment.

8. With regard to the question of the Claimant's status, I noted that the claims being pursued by the Claimant did not actually involve any assessment of worker status pursuant to Section 230(3) ERA. My focus would be therefore on whether the Claimant was an employee or in employment for the purposes of either or both Sections 230(1) and (2) ERA and Section 83 EqA.

Law

9. The statutory definitions relevant to the issue of employment status are found in Section 230 ERA and in Section 83 EqA, and these provide as follows

230.— Employees, workers etc.

(1) In this Act "employee" means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.

(2) In this Act "contract of employment" means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.

83 Interpretation and exceptions

(1) This section applies for the purposes of this Part.

(2) "Employment" means—

(a) employment under a contract of employment, a contract of apprenticeship or a contract personally to do work;

10. A considerable amount of case law surrounding employment status has developed over the years, up to an including recent consideration of the issue by the Supreme Court in the cases of ***Pimlico Plumbers Limited and another -v- Smith*** **[2018] UK SC29**, and ***Uber BV and others -v- Aslam and others*** **[2021] UKSC 5**. The foundation of the case law on employment status remains however, the case of ***Ready Mixed Concrete (South East) Limited -v- The Minister of Pensions and National Insurance*** **[1968] 2QB497**. MacKenna J in that case noted that a contract of service exists if three conditions are fulfilled, namely; personal service, control, and that the other provisions of the contract are consistent with it being a contract of service.

11. In ***Nethermere (St Neots) Limited -v- Gardiner*** **[1984] ICR 612**, Stephenson LJ noted that, in his judgement, there must be an "*irreducible minimum of obligation on each side to create a contract of service*". He further noted that he doubted that that irreducible minimum could be reduced lower than MacKenna J's essential conditions in ***Ready Mixed Concrete***.

12. Therefore, in order for there to be considered to be a contract of employment between two particular parties, there needs to be an "irreducible minimum" in relation to three core matters: personal service, control, and mutuality of obligation. In addition, the other factors present within the relationship should be consistent with there being a contract of employment.

13. As can be seen from the specific statutory definition, the concept of personal service is also significant for the purposes of the definition of "employment" under Section 83 EqA, which refers to "a contract personally to do work".

14. The assessment of personal service usually revolves around the question of whether the individual has the right to substitute another person to do the specified work.

15. Control can take many forms, for example; practical and legal, direct and indirect. It is not necessary for the work to be carried out under the employer's actual supervision or control. Control is a matter of degree, it is rarely a question of whether there is any control at all, but more often a question of whether there is sufficient control, as noted by MacKenna J in ***Ready Mixed Concrete***, to make the relationship one of employer and employee.

16. With regard to mutuality of obligation, there must be a basis of mutuality between contracting parties as part of general contract law. However, as noted by the Court of Appeal in ***Nethermere***, there must be an "irreducible minimum" of obligation on each side. That is usually expressed as an obligation on the employer to provide work and pay a wage or salary, and a corresponding obligation on the employee to accept and perform the work offered.

17. As I have noted, the definition of employment under the EqA includes employment under a contract of employment, i.e. employment under the ERA, but also confirms that it arises under a contract of apprenticeship (which has no bearing on this case), and also a contract personally to do work.

18. That reference to personally doing work bears some similarity to the extended definition of worker in Section 230(3) ERA which refers to "*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*".

19. On the face of it, the worker definition of performing personally any work goes beyond the EqA definition of personally doing work. However, as noted by Lady Hale, in ***Bates van Winkelhof -v- Clyde and Co LLP*** **[2014] UKSC 32** at paragraph 31, whilst the EqA definition does not include an express exception for those in business on their own account who work for their clients or customers, a similar qualification has been introduced by way of the European Court of Justice decision in ***Allonby -v- Accrington and Rossendale College*** **[2004] ICR 1328**.

20. Some of the case law on worker status and the interpretation of Section 230(3)(b) ERA therefore has a bearing on the question of employment status under Section 83 EqA. In ***Cotswold Developments Construction Limited -v- Williams*** **[2006] IRLR 188**, the EAT noted as follows:

"*It is clear that the statute [in that case the ERA] recognises that there will be workers who are not employees, but who do undertake to do work personally for another in circumstances in which that "other" is neither a client nor customer of theirs – and thus that the definition of who is a "client" or "customer" cannot depend upon the fact that the contract is being made with someone who provides personal services but not as an employee. The distinction is not that between employee and independent contractor. The paradigm case falling within the proviso to (2)(b) is that of a person working within one of the established professions: solicitor and client, barrister and client, accountant, architect etc. The paradigm case of a customer and someone working in a business undertaking of his own will perhaps be that of the customer of a shop and the shop owner, or of the customer of a tradesman such as a domestic plumber, cabinet maker or portrait painter who commercially markets services as such. Thus viewed, it seems plain that a focus upon whether the purported worker actively markets his services as an independent person to the world in general (a person who will thus have a client or customer) on the one hand, or whether he is recruited by the principal to work for that principal as an integral part of the principal's operations, would in most cases demonstrate on which side of the line a given person falls*."

21. The Court of Appeal also made clear, in the recent case of ***Nursing and Midwifery Council -v- Somerville*** **[2022] IRLR 447**, that there was no need, and no purpose served, in seeking to introduce the concept of an irreducible minimum of obligation in the assessment of worker status. In that case, worker status for the purposes of Regulation 2(1) of the Working Time Regulations 1998 was being assessed, but that definition is identical to that set out in Section 230(3) ERA, and, in view of the guidance provided by Lady Hale in ***Bates van Winkelhof***, also applies for the assessment of employment status under Section 83 EqA.

Time Limits

22. With regard to the time limits, Section 123 of the Equality Act 2010 provides as follows

123 Time limits

(1) Subject to section 140B proceedings on a complaint within section 120 may not be brought after the end of—

(a) the period of 3 months starting with the date of the act to which the complaint relates, or

(b) such other period as the employment tribunal thinks just and equitable.

…

(3) For the purposes of this section—

(a) conduct extending over a period is to be treated as done at the end of the period;

(b) failure to do something is to be treated as occurring when the person in question decided on it.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—

(a) when P does an act inconsistent with doing it, or

(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

23. The question therefore is when all acts complained of occurred? A course of conduct where individual acts are linked, either by reference to the application of a policy or practice or in another way, and where the last such connected act falls within time, will mean that all such acts will fall within time. The EAT recently confirmed however, in ***South Western Ambulance Service NHS Trust -v- King*** **[2020] IRLR 168**, that reliance is not to be placed on "*some floating or overarching discriminatory state of affairs without that state of affairs being anchored by specific acts of discrimination occurring over time*".

24. With regard to the potential just and equitable extension of time, the Court of Appeal, in ***Robertson -v- Bexley Community Centre*** **[2003] IRLR 434**, noted that there is no presumption in favour of extending time in discrimination claims, and it is for the Claimant to convince the Tribunal that it is indeed just and equitable to extend time.

25. The EAT in ***British Coal Corporation -v- Keeble*** **[1997] IRLR 336**, noted that the provisions of Section 33 of the Limitation Act 1980, which applies to civil claims, should also be applied in relation to Tribunal claims. That involves an assessment of the prejudice to each party and an assessment of all the circumstances of the case, which includes; the length of and reasons for the delay, the extent to which the cogency of evidence is likely to be affected, the extent to which the party sued has cooperated with the requests for information, the promptness with which the Claimant acted once they knew of the facts, and the steps taken by the Claimant to obtain advice. It is clear however that an assessment of all the circumstances is to be undertaken.

26. Recent further guidance on this issue was provided by the Court of Appeal in ***Adedeji -v- University Hospitals Birmingham NHS Foundation Trust*** **[2021] EWCA Civ 23**, that the guidance provided in the ***Keeble*** case should not be treated as a checklist, as that would lead to a mechanistic approach to what is meant to be a very broad general discretion. The Court of Appeal guidance was that the best approach for a Tribunal, in considering the exercise of its discretion, is to assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time, including, in particular, the length of, and the reasons for, the delay.

Amendments

27. The test to be applied in relation to applications to amend involves the assessment of the balance of injustice and hardship of allowing or refusing the amendments. The EAT in ***Selkent Bus Company Limited -v- Moore*** **[1996] ICR 836**, reiterated that point, which had previously been made in ***Cocking -v- Sandhurst (Stationers) Limited*** **[1974] ICR 650**, and noted a non-exhaustive list of relevant circumstances which would need to be taken into account in the balancing exercise, namely; the nature of the amendment, the applicability of time limits, and the timing and manner of the application to amend. Those points have subsequently been encapsulated within the Employment Tribunals (England and Wales) Presidential Guidance on General Case Management (2018), Guidance Note 1.

28. The EAT, more recently, in ***Vaughan -v- Modality Partnership*** **[2021] ICR 535**, give detailed guidance on applications to amend Tribunal proceedings. That confirmed that the core test in considering applications to amend is the balance of injustice and hardship in allowing or refusing the application, but noted that the focus should be on the real practical consequences of allowing or refusing the amendment, considering whether the Claimant has a need for the amendment to be granted as opposed to a desire that it be granted.

29. The circumstances set out in **Selkent** were however specifically referred to as being non-exhaustive, and other factors can be taken account in the balancing exercise. That may include the merits of the claim being sought to be added. However, a Tribunal should proceed with caution in considering the prospects of success in the context of an application to amend. The EAT, in ***Woodhouse v Hampshire Hospitals NHS Trust*** **(UKEAT/0132/12)**, noted that whilst an examination of the merits may be a relevant consideration, as there is no point in allowing an amendment to add an utterly hopeless case, it should otherwise be assumed that a case is arguable.

30. With regard to the timing and manner of the application to amend, the EAT, in ***Martin -v- Microgeneration Wealth Management Systems Limited*** **(UKEAT/05/006)** noted that whilst late amendments can be permitted in appropriate cases, the later an application is made, the greater the risk of the

balance of hardship being in favour of rejecting the amendment. Indeed, the overriding objective, which the Tribunal Rules require to be applied, involves dealing with cases expeditiously and in ways which save expense, and undue delay may be inconsistent with that.

31. However, the Courts have made clear that applications to amend can be made at any stage, with the key principle being the need for the applicant to show why the application was not made earlier. The EAT, in ***Ladbroke Racing Limited -v- Traynor*** **(UKEATS/0067/06)**, noted that, in addition, the impact of delay on additional costs may be relevant, as may be circumstances where the delay has put the other party in a position where evidence relevant to the new issue is no longer available or is rendered of lesser quality than would have been the case.

Findings

32. My findings relevant to the issues I had to decide, reached on the balance of probability wherever there was any dispute, were as follows.

33. The Respondent is a firm of solicitors operating with offices in Cardiff, Penarth and London. It is a limited company and no evidence was put before me as to the ownership of the shares in that company. It appeared however that Mr Charles was, and is, the controlling shareholder.

34. The Claimant was, and is, although not currently practising, a solicitor specialising in family law. She qualified in 1985, and, in the period leading up to 2010, was in partnership in a solicitors' firm as an equity partner. The Claimant left that partnership in what were described as acrimonious circumstances, with litigation, including employment tribunal litigation, ensuing.

35. Towards the end of 2010, discussions took place between the Claimant and Mr Evans about the prospect of the Claimant joining the Respondent. The discussions revolved around the Claimant joining the Respondent's Cardiff office, at the time a small office based in Canton, to undertake family work. At that time there was no family work being undertaken at the Canton office and therefore no existing client base. Family work was however undertaken in the Respondent's Penarth office by a solicitor based there. There appeared to have been very little cross-over between the two offices.

36. The evidence of both the Claimant and Mr Evans about their discussions was not exactly comprehensive, which is understandable bearing in mind they had taken place some twelve years earlier. Both however commented that the discussions were about the Claimant, as an experienced family law practitioner, joining the Respondent to build up the family work in the Canton office. Both also confirmed that the discussions about the role the Claimant

would perform covered a variety of options, the Claimant commenting in her evidence that she, "*had a very open mind about what she would do*".

37. The only documentary evidence from the time about the Claimant's status was an exchange of emails between Mr Evans and the Claimant. On 22 November 2010 Mr Evans wrote to the Claimant referring to their recent discussions and confirming that Mr Charles and he would like her to join them at the Respondent. That invitation was on the following basis:

"*1) You would be self-employed*

2) You would be remunerated by receiving a share of fees generated by you i.e. 37% of your fee income to be paid to you, payable on receipt of the fees by the firm.

3) The above fee sharing arrangement to commence after the first 3 months save as referred to below

4) The sum of £1500 per month to be paid to you for the first 3 months but the firm has a discretion to recoup the total sum of £4500 from you after the first 12 months.

5) You would be responsible for the cost of your Practising Certificate

6) You would agree to apply for panel membership of the Advanced Family Law Panel or the Child Panel."

38. The Claimant replied on 24 November 2010 noting, "*Proposed terms are fine and I have a practising application form to submit once I start*".

39. The only other document produced to me from the time was a copy of an induction form completed by Ms Martin in relation to the Claimant in December 2010. That form was a checklist of matters to be discussed with the new arrival, and Ms Martin had recorded in handwriting, "*N/A. Self employed*" alongside the item which said "*Obtain P45*". The Respondent's witnesses contended that this indicated an acceptance by the Claimant at that time that she would be engaged on a self-employed basis. To my mind however, the comment only reflected the Claimant's previous status as someone who had paid tax on a self-employed basis rather than under PAYE, and had no bearing on the Claimant's employment status with the Respondent.

40. On balance however, I considered that the intended relationship between the parties at its inception was one of self-employment. The wording used by Mr Evans, both in relation to status and the proposed methods of remuneration (beyond the first three months, a sharing of fee income) clearly pointed to the

Claimant being a self-employed consultant, and the Claimant unequivocally accepted that.

41. The Claimant did pay for her own practising certificate and family law panel memberships at that time, but in following years they were paid for by the Respondent, in later years in relation to practising certificates, via the bulk renewal process.

42. Whilst there was little evidence before me, I also found that the Respondent largely paid for the Claimant's training costs, although there was in the bundle evidence that the Claimant had paid herself for a three-day seminar relating to children panel membership in October 2012.

43. The terms relating to payments set out in Mr Evans November 2010 email remained in place throughout the relationship between the Claimant and the Respondent. Apart from the first three months, when £1500 per month was paid as there would have been no, or very little, work in progress capable of leading to bills and fee income, the Claimant was paid on the basis of a share of the fee income generated by her, once those fees had been paid.

44. That share was set at 37%, and remained at that level throughout the parties' relationship. Other consultants engaged by the firm had different percentage shares of the fees they generated, in one case 50%, where the consultant worked from home and employed his own assistant, and therefore was less of a burden on the Respondent's overheads.

45. In terms of the actual payments made by the Respondent to the Claimant, a schedule of payments covering the period from March 2015 onwards was produced. That demonstrated considerable fluctuation in payments, ranging from £412.92 at the lowest to £12,487.50 at the highest. There were also several months in the years 2015 to 2019 when the Claimant did not receive any payments at all, although in 2020 and 2021 the Claimant received payments more frequently than monthly, receiving 14 payments in 2020 and 17 in 2021.

46. The Claimant confirmed in her evidence that the payments she received in the early period of time with the Respondent had been low due to the need to build up work and the fact that legal aid was largely confined to care work, and was not available for mainstream divorce work, from 2011 onwards.

47. At all times the Claimant dealt with her own Income Tax and National Insurance.

48. Discussions occurred from time to time around the level of the Claimant's billing. In November 2011, there was an email exchange around the recruitment of a receptionist at the Canton office, which referenced an

understanding on the Respondent's part that the Claimant would increase her fee income by £1000 per month, noting that she had been billing approximately £4000 per month when she had indicated that she had been billing approximately £16000 per month at her previous firm. Targets were also raised in discussion in November 2015 when the Claimant had noted, "*When you are a Consultant am not sure targets are much of an inducement as you quickly grasp when your fee earning is down you do not get paid*".

49. The Claimant did, in a limited way, gain from the efforts of others in relation to the fees paid to her. As I have noted, payments were made to her as a percentage of bills rendered and paid. Those bills did, on occasions, cover some work done by others on the particular files. For example, if the Claimant was on holiday and attendance at court was required, Mr Evans would undertake that work. Also, on occasions the Claimant's PA/Trainee Legal Executive would attend court to sit behind counsel. Charges for the time spent by Mr Evans and the PA/Trainee Legal Executive would be included in the bills, but the Respondent did not discount that time before working out the Claimant's percentage payments.

50. In terms of supervision, the Claimant was largely left to her own devices. As I have already noted, there were occasional discussions about the Claimant's level of billing, but no action appeared ever to have been taken by the Respondent beyond those discussions to impose a billing target or to criticise the Claimant for not billing more.

51. There was occasional scrutiny of the Claimant's work by others, but that appeared to be confined to instances of file audits, which were required to be undertaken for legal aid purposes, occasional client complaints, and occasional concern about the Claimant's compliance with SAR requirements. One appraisal appears to have been undertaken of the Claimant by Mr Evans in June 2014.

52. There did not appear to be any specific management of the way the Claimant carried out her work. She was based in the Canton office up to 2017 and kept broadly regular office hours whilst working there but there was no evidence of any particular scrutiny of what the Claimant did or where or when she did it, other than in relation to the matters outlined in the preceding paragraph.

53. In 2017 the Respondent's Canton office was closed and operations moved to a central Cardiff office in Churchill Way. It appeared that some of the work previously carried out in the Penarth office also moved to that office. The Claimant appeared to attend at the central Cardiff office less frequently than she had attended the Canton office up to 2020. From 2020 onwards, along with many people in many workplaces, the Claimant largely worked from home due to the Covid-19 pandemic.

54. The Claimant contended that she was issued with a final written warning in 2015, following a disciplinary investigation. However, I was not satisfied that it could properly be said that a disciplinary investigation took place, and there was no evidence to indicate that any form of warning had been imposed. There was an exchange of emails between the Claimant and Mr North in November 2015 relating to concerns about the Claimant's management of files, but that arose in the context of an audit of the Claimant's files which raised concerns regarding the Claimant's work which, in my view, could not have been ignored, regardless of the Claimant's status.

55. The Claimant took holidays at her own discretion and did not obtain approval from line management or HR to do so. She put the dates of her holidays in Mr Evans' diary, he also being based in the Canton office, so that he would know to keep an eye on the Claimant's work and to attend court in relation to her files during her absence if required.

56. As I have noted, the Claimant did derive some limited benefit from Mr Evans's work in that way in that his time was included in the bills produced in relation to the Claimant's files without any adjustment being made before the Claimant received her percentage fee. The Claimant's representative attempted to assert in cross-examination that this amounted to the Claimant receiving payment in relation to holidays, but I did not consider that the simple fact that the Claimant ultimately, probably some weeks or months later, received some benefit from work done by others on her files whilst she was on holiday could properly be categorised as holiday pay.

57. In terms of the description of the Claimant's role within the Respondent's organisation, she was held out to clients as a consultant. She was also referred to as a consultant with various internal material produced by the Respondent, but not in all. For example, the Respondent's office manual produced in November 2013 refers to the Claimant as being "*employed as a full time solicitor practising in family law and mediation*".

58. Also, on two occasions, April 2015 and January 2017, Mr Evans signed declarations to the Legal Aid Agency relating to the Claimant's status as a supervisor in which he was required to confirm that the Claimant "*was and continues to be employed by the organisation*". That was in the context of the Legal Aid Agency's guidance on supervision requirements noting that it must be confirmed, "*that the individual is a continuing employee of the organisation as at the date entered on the form*". Mr Evans confirmed however in his evidence, that he was not aware of any particular requirement that the supervisor be an employee of the firm when he signed the forms, and only became aware of it in June 2021, when the Claimant raised concerns about being nominated as a supervisor to the Legal Aid Agency. Whilst full evidence was not before me about that that incident, it appears to have led to tension between the two parties, with the Claimant being adamant that she could not

be put forward as a Legal Aid Supervisor, as only people formally employed by the organisation could do so.

59. As I have noted, the only documentation surrounding the relationship between the parties was the brief exchange of emails in November 2021. Both parties in their evidence and submissions then sought to "fill in the gaps" from that for their own ends. For example the Respondent contended that the Claimant was free to work elsewhere, whether for herself or others, whilst the Claimant contended that the fact that she did not work elsewhere meant that she was not permitted to do so. In my view the relationship between the parties was entirely neutral on the point.

60. The Claimant did set up a website on her own and at her own expense, focusing on mediation services under the brand name "Absolute Mediation". However there was no evidence that the Claimant obtained any personal benefit from this during her time with the Respondent, with the limited work arising from the website being carried out by the Claimant as part of her work for the Respondent. The Claimant did however alter the contact details on the website to her own after her relationship with the Respondent ended.

61. There was no evidence the Claimant undertook any work on her own account or for anyone else during the eleven-year relationship with the Respondent. Nor was there any evidence that the Claimant had provided, or had attempted to provide, a substitute to the Respondent in relation to her work at any time.

62. With regard to the findings relevant to the time limit issue, the Claimant confirmed that the factual allegations giving rise to her claims were as set out in Further and Better Particulars of her claim that she provided in September 2022, together with the two matters she sought to add by way of amendment.

63. Within the Further and Better Particulars, the Claimant summarised nine factual matters giving rise to her claims. She confirmed under cross-examination that the dates she included in this document were as accurate as she could make them.

64. Briefly, the matters raised in the Further and Better Particulars, the relevant dates and the particular claims they related to, were as follows. I simply recite them and note that the Respondent disputes that they occurred in fact.

    1) Being paid a lower commission than a male Consultant who joined the practice in 2013 – sex.

    2) Being moved to a poorly ventilated room to make way for Mr Evans to take over the Claimant's more comfortable room in 2013 or 2014 – sex and age.

3) Being ridiculed by Mr Charles in front of young male colleagues in late 2013 or early 2014 – sex.

4) Being issued with a final written warning in November 2015 – sex.

5) The distribution of a photograph of Mr Evans with ice cream smeared over his face in around summer 2019 – age.

6) The Claimant's representation of her secretary in relation to her issues with the Respondent and being subsequently subjected to detriments from 2018 onwards – victimisation.

7) Being subjected to inappropriate taunts and comments about her appearance in around 2018 or 2019 – age.

8) Mr Charles making derogatory comments about the Claimant's age at a Christmas party in November 2018 – age.

9) Not receiving a response to an email the Claimant sent to Mr Evans on 23 March 2022 seeking confirmation of her employment status and asking for copies of all relevant documentation from her personnel file – age.

The Claimant accepted that all these, except for the last, were out of time for the purposes of her claims when viewed in isolation.

65. The two additional matters sought to be added to the Claimant's claims by way of amendment were as follows. Again I simply record them and note the Respondent disputes that they occurred in fact.

1) Being subjected to an adverse comment by Mr Charles about her appearance following minor surgery on her face in late November 2019.

2) Being required to hold herself out to the Legal Aid Agency as being employed when she was not and/or that she should enter into a "sham" employment contract for the Legal Aid Agency's purposes in June 2021.

The Claimant again accepted that these two matters, viewed in isolation, were brought out of time for the purposes of her claims.

66. Whilst limited evidence was adduced in relation to the relevant period, it appeared that, in late 2021, the Respondent's Family Legal Aid Contract expired and was not renewed. For reasons which were not clear, the family lawyer based in the Penarth office decided that she would not remain as a Legal Aid Supervisor, and, as I have noted, the Claimant did not consider that she was in a position to fulfil that role as she was not an employee. Mr North

arranged for advertisements for a solicitor capable of filling the role but without success. The Trainee Legal Executive also handed in her notice in November 2021, although she would not have been in a position to act as a Legal Aid Supervisor.

67. The loss of legally aided work had an impact on the Claimant's work. In her witness statement she referred to 90% of her work being related to the Family Legal Aid Contract. However there did not appear to have been any formal, or even informal, discussions about her ongoing position. Mr North in his evidence noted that the Trainee Legal Executive had told him that the Claimant intended to retire, which the Claimant disputed in her evidence. The Trainee Legal Executive was not called to give evidence by either side, and therefore I was not able to reach any firm conclusion on whether the Claimant had indicated an intention to retire. Even by reference to Mr North's own evidence, any such indication was not made to him directly.

68. Regardless of any indicated intention however the Claimant did not appear to do any work for the Respondent beyond approximately the end of 2021. She did not submit any bills from that point onwards and her last payment from the Respondent was on 20 December 2021. She also did not appear to have been chased by the Respondent about her lack of attendance or lack of billing.

69. Communications passed between the Claimant and the Respondent regarding bills and disbursements in 2022, although the documents in the bundle relate to the month of April only. They appear to have been derived from queries from third parties, such as expert witnesses, regarding payment for their services in circumstances where the Respondent's bills, or applications for payments on account, had not been submitted.

70. Responsibility for the preparation of bills and payments on account appear to have been the responsibility of the Trainee Legal Executive who had left the Respondent's employment in December 2021. In response to an email from Ms Martin about the payment of a disbursement on one particular file, which had been outstanding since September 2021, the Claimant replied on 28 April 2022 that, "*despite numerous requests/emails*" she had received no administrative or secretarial support since the previous December. She went on to say that she could not arrange a payment on account application or carry out any meaningful task on the Legal Aid website as she had not been trained, and that she could not process any fee earning work either without support. Ms Martin confirmed in response that one of the Respondent's litigation paralegals would be able to assist the Claimant with Legal Aid submissions, although there was no indication that that actually happened.

71. Prior to that exchange, on 21 March 2022, the Claimant had emailed Mr North, it appears in response to a query on a specific file. In that email, she

again referred to not having been allocated any secretarial support and to not being able to do anything meaningful on the Legal Aid portal. She went on to say that it appeared obvious that the Trainee Legal Executive had left on the assumption that, without a contract (I presumed that she was referring to the Family Legal Aid contract) she and the Claimant would no longer have a role. The Claimant concluded the email by saying that no one had clarified the Legal Aid position to her since the previous December and that it would be great if she could pass on administrative tasks such as payments on account applications to a named Legal Aid paralegal as she had never been able to process them without support.

72. Mr North's response was not in the bundle, but it seemed that he did reply, because the Claimant referred to it in an email she sent to Mr Evans on 23 March 2022. The lack of a response to that email gives rise to the Claimant's last claim of discrimination as set out in her Further and Better Particulars.

73. In the email the Claimant noted that Mr North had responded to her email clarifying that he could offer no administrative support in terms of her attempting to process requests from accounts and that no one in accounts could process a payment on account application, and that neither could she.

74. The Claimant pointed out that Mr North had not clarified the position regarding Legal Aid and that no one had ever chosen to discuss it with her. She noted that from the middle of December she had been offered no secretarial or administrative support and "*had/have*" no work, which she assumed had arisen due to the ending of the Legal Aid contract.

75. The Claimant asked for a copy of her signed contract or terms of engagement which she assumed would be on her personnel file. I observed that no such document had ever been produced.

76. The Claimant went on to say that it would be particularly helpful if it could be clarified if the Respondent's position was that the Claimant was employed by it, or alternatively what the practice officially deemed the terms of engagement with her formally to be.

77. The Claimant commented further that, as matters stood, and despite receiving no remuneration for several months and having no work or secretarial support, Mr North seemed to assume that she would continue to offer professional support to the Respondent indefinitely, which would include carrying out secretarial duties, which she could not perform, and indeed had never performed. The Claimant questioned on what basis Mr North had determined that to be the position, what level of further training she would require to fulfil those unpaid new duties, and why that would be deemed appropriate, as she could regain employment as a Legal Aid Supervisor

elsewhere at the standard rate of £70,000 per annum in a practice which retained a Family Legal Aid Contract.

78. The Claimant commented that she was not suggesting anything other than that it be clarified to her what the Respondent deemed her position to be moving forward. She repeated her request to be provided with formal documentation, although, as I have noted above, no such document existed and the Claimant should have been aware of that. She concluded the email by saying that once she had the documentation she could properly consider it.

79. Mr Evans in his witness statement, on which he was not challenged, noted that he did not reply to the Claimant because the matters raised were essentially matters for HR rather than him ,and should more properly be dealt with by HR. Mr Evans did not however forward the Claimant's email to Ms Monteiro, the Respondent's HR Manager.

80. Ms Monteiro confirmed that she had not seen the Claimant's email prior to these proceedings. She wrote to the Claimant on 9 June 2022, which she confirmed she had done following an assumption on her part that the Claimant, having issued her Tribunal claim on 28 April 2022, which was served on the Respondent on 9 May 2022, had regarded herself as having left the firm.

81. In the letter, Ms Monteiro stated that she understood that the Claimant had not been in the office for some time, notwithstanding the relaxation of Covid restrictions. She noted that a routine examination of files had shown that the Claimant had not been working on them, and that that appeared to accord with a comment the Trainee Legal Executive had made to her, which was that the Claimant was winding down with a view to retirement.

82. Ms Monteiro further noted that arrangements had been put in place to provide the Claimant with assistance regarding the submission of Legal Aid bills, but that the Claimant had not taken advantage of that. She asked the question, "*Have you decided to leave the firm or are you intending to return*", asking the Claimant to contact her if so. No response to that question was ever provided by the Claimant.

83. The only other finding I record of relevance to the issues I needed to address was that the Respondent appeared to have a fairly diverse workforce in terms of age. Mr Charles's evidence, which was not challenged, was that out of a workforce of approximately forty, four were in their sixties, two were in their seventies and one was in their eighties. The Claimant was 65 the day after she submitted her Tribunal claim.

Conclusions

84. Applying my findings to the issues I had to consider, my conclusions were as follows.

ERA Employment

85. The starting point of any analysis of employment status under the ERA is the contract between the parties. Section 230(1) notes that an employee is someone who has entered into, or worked under, a contract of employment. If the contract between the parties is not one of employment the Claimant cannot be an employee under the ERA.

86. As I have noted, and as was not materially disputed by the Claimant, the relationship agreed between the parties at the outset was that the Claimant would be a self-employed consultant, being remunerated by reference to a percentage of paid bills submitted by the Respondent in respect of the Claimant's work. That payment mechanism operated throughout the parties relationship, but the Claimant contended that the underlying nature of the relationship changed to one of employment soon after its inception.

87. I therefore needed to assess whether in fact the nature of the parties relationship had changed. As noted by the Supreme Court in ***Autoclenz v Belcher*** **[2022] IRLR 820**, applying the earlier Court of Appeal decision of ***Protectacoat Firthglow Ltd v Szilagyi*** **[2009] IRLR 365**, the ostensible expressed relationship may not reflect the true intention of the parties, whether at its inception or subsequently. Indeed, the Supreme Court went further in ***Uber***, noting that not only is the written agreement not decisive of the parties' relationship, it is not even the starting point for determining employment status.

88. I looked closely at the relationship between the parties over the eleven-year period to consider whether it could be said that a contract of employment existed between the parties in this case. I focused on what the earlier appellate decisions indicated were the irreducible minimum, of: personal service, control, and mutuality of obligation, further taking into account whether other factors present within the relationship were consistent with there being a contract of employment.

Personal Service

89. Whilst personal service, and the ability to provide a substitute, often looms large in employment status cases, I did not consider that it was a significant factor in this case. The very brief expressed terms agreed between the parties, as evidenced by the exchange of emails between the Claimant and Mr Evans in November 2010, made no reference to substitution. I did not

consider therefore that the Claimant, in any sense, had a "right" to substitute another person to do her work. There was no agreement that she could, but equally there was no agreement that she was prohibited from doing so, or that she could only do so subject to restrictions, such as with the Respondent's consent.

90. It was clear that the Claimant did not, in fact, provide a substitute to undertake her work, and therefore this factor was, in my assessment, neutral.

Control

91. MacKenna J, in ***Ready Mixed Concrete***, noted that "*control includes the power of deciding the thing to be done, the way in which it shall be done, the means to be employed in doing it, the time when, and the place where, it shall be done*". In this case I did not consider that the Respondent had those powers.

92. In terms of the allocation of work, the Claimant did not inherit any cases when she joined the Respondent, and had to generate her own work. That largely remained the case throughout the parties' relationship, although instructions will have been bound to have arisen through potential clients contacting the Respondent's office in relation to family law queries and then being referred to the Claimant as the family practitioner in the Canton, and then Cardiff offices. I did not consider that that limited source of work for the Claimant involved the Respondent having power to "decide the thing to be done".

93. The Claimant was engaged as a very experienced family law practitioner who had been an equity partner in a solicitors' firm for many years. She was more than capable therefore of understanding how her work should be carried out. Other than queries arising from audits undertaken for the purposes of the Respondent's Legal Aid Contract, no step appears ever to have been taken by the Respondent to indicate to the Claimant how she should carry out her work. Even there, the comments about the Claimant's work related to compliance with Legal Aid or SRA requirements. The Claimant was free to advise her clients in the ways she thought fit, and the Respondent did not have power to, or certainly did not in practice, control the way in which she undertook her work.

94. In terms of the means to be employed in carrying out her work, the Respondent did provide the Claimant with an office, IT equipment, and support in terms of receptionists, secretaries and paralegals. However, I considered that that was in line with what the Respondent provided to all those undertaking work from which it derived benefit in terms of fees, regardless of status. There was evidence that one of its consultants engaged his own assistant, but that consultant enjoyed a higher percentage of generated fees, reflective of his lower burden on the Respondent's

overheads. Whilst therefore the provision of office facilities and support was a factor, as noted in MacKenna J's summation, which pointed to there being control, I did not consider that it was material.

95. In terms of the time and place at which the work was done, as I have noted, the Claimant was provided with an office, and did generally work there, certainly up to the closure of the Canton office in 2017. She also attended regularly at the central Cardiff office from 2017 onwards up to the onset of the Covid-19 pandemic. As I have also noted, the Claimant largely kept office hours, certainly up to 2017, and therefore worked largely full time. Certainly the amount of billing in 2020 and 2021 suggested that she continued to work full time during those years, albeit at home.

96. However, there was no indication that the Respondent at any time sought to direct the Claimant as to where or when she undertook her work. There were occasional references to a desire on the Respondent's part that the Claimant's fee income should increase, but the Respondent at no point directly criticised the Claimant in relation to the hours she worked or the amount she billed.

97. I also noted that the Claimant was free to take holidays whenever she wanted, and did not have to seek any authorisation to do so. Indeed, she did, to a limited degree, gain from the efforts of others whilst she was on holiday.

98. In terms of other, more peripheral aspects of the relationship which could also impact on the assessment of control, I noted that, after the first year, the Respondent renewed the Claimant's practising certificate and paid for it, and that, for the most part, the Claimant's training was paid for by the Respondent. However it appeared that that was done out of convenience or out of goodwill. I did not consider that either matter was indicative of control.

99. Overall, I did not consider that the Respondent materially controlled the Claimant.

Mutuality of obligation

100. Mutuality is usually expressed as an obligation on the employer to provide work and to pay for it, and on the employee to accept and perform the work offered. That is often described as an irreducible minimum of obligation.

101. In this case, I did not consider that there was ever any obligation on the Respondent to provide work or for the Claimant to do any that was provided, in the context of any referrals made by the Respondent. The only obligation on the Respondent was to pay the agreed percentage of the fees billed by the Claimant in respect of her files, which, I have noted, covered the work of others to a limited extent, upon receipt of payment.

102. The lack of any material level of mutuality of obligation is evident from the fluctuation of billings, and the consequent payments to the Claimant, over the period of the relationship. Whilst billings were fairly regular in the last couple of years of the relationship, reflecting, as indicated by the Claimant, increased demand during lockdown, the Claimant confirmed that in the early period of her time with the Respondent she often earned very little. In the period for which information about billings and payment was available, there were regular gaps in which no bills were rendered and no payments made to the Claimant. Whilst that does not automatically indicate that the Claimant had no work to do, as she may have undertaken work which had not at that stage reached the point of being able to be billed, it was, in my view, indicative of there being no obligation on the part of the Respondent to provide any particular level of work, and then of there being no obligation on the part of the Claimant to undertake any particular level of work.

103. In my view, that was supported by the Claimant's comments when the possibility of increasing her fee earning was raised in 2011 and 2015, when she noted that she was not able to give guarantees about her own fee earning and that, as a consultant, she quickly grasped that when her fee earning was down she would not get paid. There was no indication that the Respondent ever took issue with those comments.

104. I also noted that the Respondent did not appear to react in any way in the first quarter of 2022 when the Claimant did not attend at the office and did not undertake any work at all. It was only when queries were raised by third parties about payments due to them which would be expected to be included as disbursements in bills submitted on the Claimant's files that any contact was made with the Claimant. It certainly did not critically raise any concerns with the Claimant about the lack of work and income. In my view that was indicative of a lack of mutuality of obligation as well as a lack of control.

105. I did not therefore consider that there was mutuality of obligation between the parties such as to point to a relationship of employment, and overall therefore I considered that the Claimant's status remained one of self-employment throughout. Having recorded that conclusion it was not strictly necessary for me to examine other factors to assess whether they were consistent with there being a contract of employment. However, had I needed to do so, I would not have considered that there were.

106. The Claimant appeared perfectly content to take advantage of her self-employed status throughout the relationship, in terms of paying Income Tax and National Insurance on that basis. There was no indication that the Claimant received sick pay in relation to any absences, and there was no indication that she was a member of any pension scheme.

107. I also noted that the Claimant consistently maintained that she was not employed, notably as recently as 2021, when she was adamant that she could not act as a Legal Aid Supervisor for the purposes of the Family Legal Aid Contract because she was not employed.

108. As the Claimant was not an employee for the purposes of the ERA, her claim of unfair dismissal therefore fell to be dismissed.

EqA Employment

109. As I have noted, employment for the purposes of Section 83 EqA means, "*employment under a contract of employment, a contract of apprenticeship or a contract personally to do work*". I have concluded that the Claimant was not employed under a contract of employment, and there is no question of the Claimant having been employed under a contract of apprenticeship. My focus was therefore on whether the Claimant was employed under a contract personally to do work.

110. Clearly, a contract existed between the Claimant and the Respondent, as formed by the exchange of emails between the Claimant and Mr Evans in November 2010. As I have noted above, the definition in Section 83 EqA does not contain the additional clarification to the concept of "personally to do work" set out in Section 230(3) ERA, i.e. that that obligation personally to do work must not be in circumstances where the other party to the contract is a client or customer of any profession or business undertaking carried on by the individual. However, as noted by Lady Hale in ***Bates*** at paragraphs 31 and 32, that qualification does fall to be considered in assessing Section 83 status, following the ECJ decision in ***Allonby***, which noted that "*a person who for a certain period of time performs services for and under the direction of another person in return for which he receives remuneration*" is to be distinguished from "*independent providers of services who are not in a relationship of subordination with the person who receives their services*".

111. Indeed, I noted that both parties' representatives focused their submissions in this area on the Section 230(3) ERA worker definition, contending that those submissions applied equally to the Section 83 EqA employment definition. My focus then was on whether the Claimant was, in essence, in business on her own account, with the Respondent only being a client of that business, or whether there was an element of subordination in their relationship. Personal service was also a relevant factor in this assessment, as noted by the Supreme Court in ***Pimlico Plumbers***, but as I have noted, that was a neutral factor in my considerations in this case.

112. The EAT, in ***Cotswold Developments***, noted, at paragraph 53, that "*it seems plain that a focus upon whether the purported worker actively markets his services as an independent person to the world in general (a person who*

will thus have a client or customer) on the one hand, or whether he is recruited by the principle to work for that principle as an integral part of the principle's operations, will in most cases demonstrate on which side of the line a given person falls".

113. I saw nothing to indicate that the Claimant actively marketed her services to the world in general. She did set up the Absolute Mediation website, but it was not disputed that all referrals from that source were dealt with via the Respondent.

114. Also, whilst there was no prohibition on the Claimant carrying out work for others, as a matter of fact she did not do so over a period of some eleven years. In my view, she was very much recruited to work for the Respondent as an integral part of its operation. She therefore fell on the worker or EqA employee side of the line.

115. The Claimant was therefore in employment for the purposes of the EqA and her discrimination claims could, subject to my conclusions on time limits, continue.

116. The List of Issues also noted that I would assess whether the Claimant was a "worker" for the purposes of Section 230(3) ERA. As I have noted, I did not see that the Claimant was in fact pursuing any claims by reference to worker status, and, following the dismissal of her unfair dismissal claim only claims under the EqA remained. However, had assessment of worker status remained relevant, I would, for the same reasons as informed my conclusions in relation to EqA employment, have concluded that the Claimant was indeed a worker for the purposes of Section 230(3) ERA.

Time Limits

117. By reference to the date on which the Claimant submitted her claim form, 28 April 2022, and the dates of early conciliation, 13 to 14 April 2022, any act or omission prior to 14 January 2022 had been brought out of time if categorised as an individual act. As I have noted, the Claimant accepted that only the last of her assertions of discrimination, i.e. number 9 in her Further and Better Particulars, the failure to respond to her email of 23 March 2022, fell within time. She contended however, that the earlier allegations formed part of a course of common conduct culminating in the last allegation, such that all allegations should be considered to have been brought in time.

118. I noted, as made clear by Choudhury P in ***King***, at paragraph 22, that the assessment of time issues at a preliminary stage involves the Claimant only needing to establish a prima facie case that there is a course of conduct or continuing act.

119. The Court of Appeal, in ***Hendricks v Commissioner of Police for the Metropolis*** **[2003] IRLR 96**, noted that there are several ways in which conduct might be said to be conduct extending over a period. One example is where there is a policy, rule or practice in place in accordance with which there are separate acts of discriminatory treatment, which was not contended in this case. Another example is where separate acts of discrimination are linked to one another and are evidence of a continuing discriminatory state of affairs, as opposed to being merely a series of unconnected isolated acts. The Claimant in this case contended that all her allegations were linked to one another and formed a continuing discriminatory state of affairs.

120. Choudhury P in ***King*** noted, at paragraph 36, that reliance in this regard cannot be placed on some floating or overarching discriminatory state of affairs, without that state of affairs being anchored by specific acts of discrimination occurring over time.

121. In ***Hendricks***, the Tribunal approached consideration of the question of a continuing act in claims of racial and sexual discrimination covering an eleven-year period by reference to there being a policy or practice of discrimination i.e. that there was a culture of discrimination within the respondent's organisation. The Court of Appeal confirmed however that concepts of policy or practice should not be treated as constricting statements of the matters to be considered in relation to the question of an "act extending over a period". The focus should be on the substance of the complaint, in that case that the respondent was responsible for an ongoing situation or state of affairs in which female ethnic minority officers were treated less favourably.

122. In ***Hendricks*** however, the focus of the Claimant's case was that the acts complained of formed part of a regime, or prevailing way of life, that existed within the respondent's organisation. The Court of Appeal confirmed that in assessing that contention the focus should not be on whether a "policy" could be discerned, but on the substance of whether the Respondent was responsible for an ongoing situation or a continued state of affairs in which female ethnic minority officers were treated less favourably. Mummery LJ noted that the "*question is whether that is "an act extending over a period" as distinct from a succession of unconnected or isolated specific acts, for which time would begin to run from the date when each specific act was committed*".

123. In this case, I was not satisfied that the assertions raised by the Claimant amounted to an act extending over a period, or. Put another way, to a continuing act. I noted that of the nine allegations set out in the Claimant's Further and Better Particulars, three related to sex (albeit one (1) seems to be a claim which could only be considered as an equal pay claim under Chapter Part 3 of Part 5 EqA which would be prevented from being pursued as a sex discrimination claim by Section 70 of that Act), four related to age,

one related to sex and age, and one related to victimisation. I observe that Judge Ryan did not, at the earlier preliminary hearing, record that the Claimant's claim included one of victimisation.

124. In relation to allegation 9, the one allegation brought in time, I asked the Claimant during the hearing to explain how she felt that any failure to reply to her email had been motivated by her sex or age. Her reply indicated that she had been unhappy about the discussions around acting as a Legal Aid Supervisor in the summer of 2021, the fact that a role as Family Legal Aid Supervisor had been advertised, and the termination of the Family Legal Aid Contract towards the end of 2021. She referred to assuming that those events had happened because of her age and commented that the failure to offer her the job of Legal Aid Supervisor amounted to "*complete age discrimination*". I observed, with regard to that last point, that the Claimant had not at any stage complained about any failure to offer her a role or that she had applied for it. In any event, the advertisement of the role appeared to have followed on from the failed discussions in summer 2021 regarding the Claimant acting as the Legal Aid Supervisor.

125. The Claimant then confirmed, when I further queried with her how she asserted that the failure to respond to her email had been motivated by her sex, that "*realistically*" the allegation was based more on age than sex.

126. There were therefore a number of different claims arising from the Claimant's allegations. It seemed to me that only the reference to alleged inappropriate or derogatory comments could potentially be considered as part of a connected ongoing state of affairs, as there were three such assertions. However, the latest of these assertions appeared to relate to events at the end of 2018, or possibly early 2019.

127. I was conscious of the guidance provided by the Court of Appeal, in ***Madarassy -v- Nomura International PLC*** **[2007] ICR 867**, that the bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination, and that they are not, without more, sufficient material from which a Tribunal can conclude that, on the balance of probabilities, a Respondent had committed an unlawful act of discrimination.

128. In my view, other than the possible connection of the three assertions of inappropriate or derogatory comments, the Claimant's allegations amounted to a succession of unconnected or isolated specific facts. They bore no connection to each other and, in my view, none bore any connection to the act that was brought in time. My conclusion therefore was that the Claimant's claims, apart from allegation nine, had been brought outside the specified time limit.

129. I then considered whether it would be just and equitable to extend time for those allegations to be considered. I noted the guidance provided by the Court of Appeal in ***Robertson*** that it was for the Claimant to convince me that it was just and equitable to extend time. I also noted the guidance in ***Adedeji*** that the best approach is to assess all the factors and in particular the length of, and reason for, the delay.

130. The Claimant did not provide any particular explanation for not having raised matters, all of which were at least three years old, with some being much older than that, at an earlier stage. Whilst she was not an employment law specialist, she was an experienced litigation solicitor and also had been involved in Tribunal litigation in relation to her role prior to joining the Respondent. She had also been involved in obtaining employment advice for her former secretary in 2018. There was therefore no indication that the Claimant was unaware of the short time limits applicable in relation to employment litigation.

131. Furthermore, the allegations raised in the Claimant's claims were not raised at the time, and most, certainly all those relating to comments, did not involve any documentation. Consideration of those claims would therefore involve the Respondent seeking to obtain evidence from those who may potentially have observed matters, and the recollection of those people, in relation to matters which were relatively fleeting, may well be limited. The delay in raising these matters is therefore likely to prejudice the Respondent.

132. In the circumstances, I did not consider appropriate to exercise my discretion to extend time to consider allegations 1 to 8 in the Claimant's Further and Better Particulars. Only allegation 9 can therefore proceed.

<u>Amendment</u>

133. As I have noted, the Claimant sought to amend her claim to introduce two allegations not originally included within her claim form. She made that application on 29 August 2022. One allegation related to a comment alleged to have been made by Mr Charles in November 2019 following the Claimant's surgical treatment on her nose. The other related to the discussions in June 2021 referred to at paragraph 58 above, regarding the Claimant's ability to act as a Legal Aid Supervisor despite not being an employee, which the Claimant contended involved the suggestion that she enter into a "sham" contract for the purposes of the Legal Aid Contract.

134. One allegation had therefore arisen some 14 months prior to the amendment and the other some 33 months prior to it.

135. I took into account the Presidential Guidance, which endorsed the ***Selkent*** guidance, that the nature of the amendment, the applicability of time limits,

and the timing and manner of the application to amend, were important. I also bore in mind the more recent guidance in ***Vaughan*** that the core test is the balance of injustice and hardship, the focus being on the real practical consequences of allowing or refusing the amendment.

136. Both parties accepted that the amendments were substantial ones, involving allegations not previously raised. It was also clear that both had been submitted quite some way out of time.

137. In terms of the balance of injustice and hardship, I noted that neither allegation appeared to have a clear relation to the Claimant's age or sex and that the Claimant may therefore struggle to substantiate them in law. I did however note the guidance of the EAT in ***Woodhouse*** that a Tribunal should proceed with caution in considering the prospects of success in the context of an application to amend.

138. The events complained of had taken place quite some time before the amendment application had been made, particularly in relation to the first allegation, and there would be issues for the Respondent in terms of obtaining evidence of what was said at the relevant time.

139. Acutely, I could again see no connection of these allegations with the allegation brought within time, such as to form a continuing act or an act extending over a period. It seemed to me therefore that even if I felt that it could be appropriate to allow the amendments to be made, they would fall foul of my conclusions in relation to time limits, and would be dismissed as having been brought outside the relevant time period in circumstances where it was not just and equitable to extend time.

140. Overall therefore, I considered that the balance of injustice and hardship lay in refusing the application to amend.

Conclusion

141. The only claims that therefore remain are the Claimant's claims of direct discrimination on the ground of age and direct discrimination on the ground of sex, those claims being limited to one factual issue, i.e. that raised in allegation 9 in the Claimant's Further and Better Particulars. A separate Notice of Hearing and Separate Case Management Directions will now be issued in relation to consideration of those claims.

_____

Employment Judge S Jenkins
Dated: 24 January 2023

JUDGMENT SENT TO THE PARTIES ON 25 January 2023

FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS Mr N Roche