



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4101835/2023

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Held in Glasgow on 12, 13 and 30 June; 11 August 2023

Employment Judge B Campbell

10 **Ms Mariana Consoni**

**Claimant
Represented by:
Mr S Smith -
Solicitor**

15 **ISKCON (Scotland) Ltd**

**Respondent
Represented by:
Mr S Connolly -
Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

- 20 1. The claimant was employed under a contract personally to do work in terms of section 83(2) of the Equality Act 2010; and
2. Accordingly the tribunal has jurisdiction to decide her claim.

REASONS

General

- 25 1. The respondent is a Scottish branch of the worldwide organisation titled 'International Society for Krishna Consciousness', which promotes the Hare Krishna faith. This claim arises out of events between 2020 and 2022. The claimant is experienced in a number of areas such as marketing and e-commerce. She undertook various activities whilst residing at the
- 30 respondent's property in Lesmahagow. She alleges that events occurred which give rise to complaints of direct sex discrimination, harassment and victimisation under sections 13, 26 and 27 respectively of the Equality Act 2010 ('EQA').

2. Her claim relies on it being established that she was engaged under one of the types of contract described in section 83(2) of EQA. The respondent denies that she was. It was this issue which had to be determined at this preliminary hearing.
- 5 3. Evidence was heard over three days, with a further half day for the parties to deliver their submissions. The claimant gave evidence on her own behalf. For the respondent, evidence was heard from Mr George McMullan, Chief Executive and Mr Ramunas Bucinskas, who at the time of the relevant events was Head Monk.
- 10 4. Generally, each individual who gave evidence was considered to be credible and reliable. More specific comments on aspects of the evidence are made below where relevant within the section of the judgment headed 'Findings in fact'.
- 15 5. The parties had helpfully prepared a joint bundle of documents and a cast list. Where numbers appear in square brackets below, those are references to the corresponding page numbers in the bundle.
6. Written submissions were provided and supplemented orally in the hearing. They are not reproduced here but are summarised and were considered in full during the process of reaching a decision on the preliminary issue.

20 **Legal issues**

This was a preliminary hearing confined to a single issue, namely:

1. Was the claimant engaged by the respondent under a contract falling within the scope of section 83(2) of the Equality Act 2010, namely a contract of employment, a contract of apprenticeship or a contract personally to do work,
25 and if so when.

Applicable law

1. Section 83 of EQA is an interpretation section which applies to Part 5 of that Act, dealing with the subject of work. Within that part of EQA are sections 39 and 40 which protect employees (and applicants for employment) from

discrimination and harassment. The duties not to discriminate, harass or victimise are explained in sections 13 to 19, 26 and 27 of EQA.

2. The effect of reading these sections together is to give protection against discrimination, harassment and victimisation to a person engaged in a way described in section 83(2), which states as follows:

83 Interpretation and exceptions

...

(2) “Employment” means—

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

(b) *Crown employment;*

(c) *employment as a relevant member of the House of Commons staff;*

(d) *employment as a relevant member of the House of Lords staff.*

3. In this claim the claimant alleges that she was employed by the respondent ‘under a contract of employment’, failing which she was engaged under ‘a contract ... personally to do work’.

Findings of fact

Background

1. The claimant is of dual Brazilian and Spanish nationality. She worked and studied in Scotland between 2016 and 2020. She is currently a lecturer in digital marketing.

2. The respondent operates the ‘Karuna Bhavan’ community in Lesmahagow (‘KB’). The community mainly comprises an ashram, or temple of worship, and an eco-farm. Individuals may stay there in a spiritual or secular capacity. Spiritual residents, who also tend to be called ‘devotees’, will take additional vows and devote significant times to prayer, chanting and other religious

activities. Secular residents will not, but are still expected to observe certain values and rules of personal conduct. Both types of resident will be expected to contribute in some way to the running of the community, which is largely self-sufficient although occasionally relies on grants. Examples of tasks which people undertake include gardening, animal husbandry, cleaning, manual repairs and cooking. The majority of members of the community are accommodated on the site, with a smaller number living off-site and visiting it daily to participate in community activities and complete their tasks. At regular times throughout the year the site will be open to the public and festivals and other events will take place.

3. KB is run via a temple council. Certain decisions can only be taken at council level. At the time of the relevant events both Mr McMullen and Mr Bucinkas were members of the council, along with two other individuals. The claimant was not.
4. Residents at KB are not paid in money as a rule. Some devotional residents, or long-term volunteers claimed state benefits. They would have to pay rent to the respondent, albeit at a discounted rate, and so their benefits may go towards that. Around six members, including Mr McMullen, were paid a modest weekly allowance. Mr Bucinkas was not. The other two members of the temple council were. The claimant was not.
5. As the respondent is a company it has directors. The members of the temple council are also statutory directors. They are not necessarily paid money for holding that office.

Claimant's first stay at Karuna Bhavan

6. On 28 October 2020 the claimant applied to volunteer at KB. At the time she was based in Aberdeen. She completed the respondent's standard application form for short-term volunteers, which also contained policy guidance intended to explain to applicants what would be expected of them. The form which the claimant completed was produced [37-45], although it was a version different from the one the claimant completed at the time, having

undergone updates to the general template in the intervening period. Therefore some parts were identical to the original form and others were not.

7. The application form made clear that short-term volunteers are those who are asked to remain for a month. An interest in the Krishna tradition is welcome but not essential – volunteers by default are secular residents. In return for the services they are able to provide they are given basic accommodation on-site, three meals per day and the opportunity to participate in activities such as meditation, yoga and dance, as well as being able to listen to talks and generally interact with others in the community. They are not paid any money. They are expected to work 30 hours per week over 6 days per week, although that was not stipulated to the claimant when she applied and the general expectation at that time was less. It is recognised that in some cases there is the possibility for a longer term of volunteering to be offered. Longer term volunteers would be asked to commit to working 36 hours per week.
8. The claimant spoke to Mr Ramunas Buciskas about coming as a volunteer. He was a spiritual monk at KB who also had responsibility for volunteer coordination and recruitment. She was asked to commit for two months if possible. In her application she indicated an intended arrival date of 21 November 2020 and departure date of 5 February 2021. She listed her skills as *'business management, digital marketing, hospitality, event, teaching, gardening, cooking'*. She expected that she would be using her marketing skills and doing some cooking.
9. The claimant arrived at KB on 11 November 2020 and after a two-week period of self-isolation as a Covid-19 safety measure, began integrating with the community. She undertook mainly computer-based duties such as initially preparing a schedule of individuals' duties and responsibilities. She also prepared promotional materials for programmes such as meditation courses, which involved elements of design and preparing written content. As time went on she also worked with Mr Buciskas on preparing social media and marketing content, she reinstated the production of a regular newsletter, updated the volunteer application form, and began completing some grant applications. She began taking a more active role in organising events at the

farm, some of which were open to the public. She designed more promotional flyers for events and courses. She kept records of project budgets. She also occasionally did some gardening and helped look after some alpacas kept at the farm.

- 5 10. The claimant applied for a community recovery grant on behalf of the respondent in early 2021. This allowed the respondent to pay four individuals to work for three months each as employees. She also helped secure funding for refurbishment of a barn to be used for yoga sessions, to assist with food growing and sale of produce from the farm, and to stage an annual 'Festival of Colours' event. She applied for a government Kickstart grant, which was later awarded to the respondent. The purpose of the grant was to allow the respondent to take on up to four individuals on six-month contracts as employees. She prepared a set of policies to cover their engagement.
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11. In terms of volume of work, by the beginning of 2021 the claimant was working for between 25 and 30 hours per week, mainly in relation to grant applications. She would begin between 9.30 and 10am, and work until between 5 and 8pm, with breaks during the day. She would do this on most days of the week, but not all.
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12. As the claimant's intended finish date of 5 February 2021 approached, she discussed with Mr Bucinkas that a number of grant applications had still to be submitted. It was agreed that she would stay on and be funded by one of the grants successfully applied for. This meant that for three months, from 1 March to 1 June 2021 she was engaged on a fixed-term contract of employment. She was to work for 25 hours per week and receive wages of £950 per month. A copy contract was produced [46-48] which was a materially accurate record of the agreed terms, but it was only given to the claimant in October 2021, some months after the arrangement had ended.
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Claimant's move to ISKCON community in Spain

13. The claimant left KB at the end of June 2021 and returned to Aberdeen. She came back to KB for the last two weeks of July 2021 and then travelled to live in Spain. She provided training to the employees engaged via the Kickstart
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grant in early December 2021 remotely. She stayed in touch with a number of people at KB via social media and email, but exchanges reduced after around November 2021.

14. Also around November 2021 the claimant visited an ISKCON community called New Vrajamandal ('NVM') in Spain for a festival and was offered a volunteer role there, carrying out similar duties to those she had undertaken at KB. She accepted and took up residence there in December 2021. By contrast with her time at KB, she was a devotee, and participated in the spiritual activities of the community. She was still however a volunteer and received accommodation and food, but no payments of money. On 25 December 2021 Mr Bucinkas emailed the claimant with a proposal for how she could perform services both for NVM and KB. The claimant thanked him but declined to discuss this further in any detail.

15. On 3 May 2022 Mr Johnny Milne from KB contacted the claimant via WhatsApp. He held the position of 'guest master' and helped arrange transport and accommodation for people staying at the site. He had been asked to forward a message from Mr Bucinkas, asking if the claimant wished to return to KB, and if so when. As a result of the conflict in Ukraine the respondent had arranged to offer accommodation to Ukrainian nationals and Mr Bucinkas wished to make the point that unless provision was made for the claimant, there would be no accommodation to offer her. The claimant said she would send him an email, although did not later do so.

16. Mr Milne contacted the claimant again on the same subject on 11 May 2022. The claimant asked for Mr Bucinkas to send her a WhatsApp message so she could re-establish contact with him, having blocked him as a contact in January of that year.

WhatsApp conversation between claimant and Ramunas Bucinkas

17. There began a lengthy exchange of WhatsApp messages between the claimant and Mr Bucinkas, continuing until her eventual return to KB on 26 August 2022, and beyond. The whole conversation was produced [55-96], [160-247]. This was the only communication the claimant had with anyone

within the respondent about the terms of her return to KB. A number of aspects of the conversation are relevant to the legal question to be decided by this hearing, and the whole conversation was considered. Some particularly material entries are quoted or described below.

- 5 18. The conversation opened with Mr Buciskas reiterating that if the claimant wished to return, arrangements had to be made as the respondent was offering spare accommodation at KB to refugees from Ukraine. He said that if the claimant wished to stay *'long term'* he would *'need to present this to the temple council and we could draft a service agreement like for volunteer programme but in devotional terms'*. By this he meant that the claimant would be given a written agreement containing her duties, both secular and spiritual, as well as other details such as working hours commitment and duties. The claimant said she had made lifetime connections at KB and missed them. She said KB would fulfil some of her life goals and had the spirit of community she was looking for.
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19. They discussed a 'transition period' to allow the claimant to begin carrying out work for KB gradually whilst still at NVM. Her service hours at NVM were 10am to 2pm Monday to Friday and she offered to do up to two hours of service for KB in addition to that, working remotely from NVM. As the work she would be doing was computer and internet based as she had done during her first stay, this was possible. This was anticipated to allow her to return to KB in July or August 2022 if things went well. The claimant was also trying to complete her PhD thesis which she hoped to have done by then.
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20. The claimant also raised the question of accommodation. She requested to be given the portacabin on-site, which had two rooms. She wished to have the whole space so that she had peace and privacy, could do her exercises and could accommodate the occasional guest.
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21. When the claimant asked for clarification about the proposed service agreement, Mr Buciskas replied that it was *'something that the temple council decided to do with any new people who are here long-term. Things like working hours, values, etc term of service commitment. Basically it's to*
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clarify expectations on both sides and put it on paper.' He later added that it would contain the 4 key principles of conduct, would specify seven hours of service, six days per week, and a minimum commitment to saying a certain number of prayers, plus confirmation of other policies such as on child protection. He offered to draft the document whilst the question of accommodation was being finalised.

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22. The claimant's request for the whole portacabin was not an easy one to grant given the pressure to accommodate others at the time and the fact that other residents tended not to have such a large space. Mr Bucinkas was supportive, but the decision was not his to take. On 25 May 2022 he said that Prana Prabhu (Mr McMullan) was open to the idea and very much appreciated what the claimant had to offer the community. He said that the matter was going to be discussed at the temple council meeting in the following week.

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23. In the meantime, alternative accommodation solutions were discussed. One was for the claimant to buy or rent a property outside of KB and attend daily. If she did so her hours of service would be lower and she could effectively propose how much time she worked there.

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24. On 2 June 2022 the claimant said that she was uncomfortable having any kind of written agreement covering her service at KB. She saw this as an obstacle to her returning. She wanted the arrangement to be essentially the same as had applied to her first stay as a volunteer, with some more involvement in devotional service. She also raised that everyone who lived at KB and who was not a monk received monetary pay, but she was not asking for that. The basis for that understanding was not made clear and, on the evidence, it was not correct. She compared what she wanted with her arrangement at NVM at the time, where she had a smaller number of working hours and her own accommodation. Mr Bucinkas recommended she write a letter to the temple council effectively making her business case for being allowed to have the whole portacabin in return for what benefit she would provide to the community in monetary terms through her work. The claimant was reluctant to do so and suggested that she now felt it was not possible to agree her return. They agreed to review the position in the future. In

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maintaining his position, Mr Bucinskas said *'Every job has a contract...with a lot more points.'*

25. However, just a week later Mr Bucinskas got back in touch with the claimant to remind her that the question of whether to allow the claimant to stay in the portacabin was still on the agenda for the temple council meeting, and did she
5 want it to be discussed. She said she was content as long as it was understood that she wished to come back as a long-term volunteer but not a devotee, and would only work 30 hours per week. The discussion began again about possible terms on which she could come back. Mr Bucinskas pointed
10 out that short term volunteers were asked to complete 30 hours of service per week, but for long term volunteers the requirement was for 36 hours, and that this was the level of work she carried out during her first period at KB. He again referred to the wider practice of employment, saying that if the claimant worked for a company she would generally have to commit to 40 hours per
15 week and have an agreement with many pages and points in it. By contrast, the agreement for her position at KB would be one page long. He said that he personally had no issue with the commitment the claimant was offering, but others might perceive it as her providing less than everyone else.

WhatsApp messages of 16 and 17 June 2022

- 20 26. On 16 June 2022 Mr Bucinskas messaged the claimant to say that the temple council had taken place the day before [68-70]. It had been agreed to allow the claimant to use the entire portacabin to stay in, subject to her allowing a fellow resident to use the second room to sleep in during busy festivals. She could also spend occasions off-site and continue to work remotely, provided
25 she again allowed the second room to be used by another. Her working commitment would be six hours per day, six hours per week. He also mentioned the level of prayer commitment she would have to fulfil in terms of numbers of 'rounds', which was reduced from the normal amount. The arrangement, if agreed in principle, would be subject to review after six
30 months. He believed those terms were reasonable and tried to persuade the claimant why she should accept them. In doing so he described what she would be doing at KB, namely creative design work, tourism activities, events

arrangement, organising and managing projects, HR work, animal care, working with Food For Scotland in relation to produce grown on-site, applying for grants, 'business/eco intelligence' and in due course some 'international work'. Essentially therefore she would be doing substantially the same as before, with development in some areas.

27. The following day the claimant responded [70-71]. She accepted all of the terms offered by Mr Bucinkas the previous day. She went on to say that 'we need to see are [sic] what will actually be my service:

*I would like *not to**

1. *deal with food waste/washing pots – I have some issues when I see food waste in containers, especially tomato sauce.*
2. *Work with Vrinda*
3. *Serve breakfast because I use this time (and a little bit further) for my daily workouts*

*I would like *to**

1. *Be involved in the green energy projects*
2. *Wellbeing projects*
3. *Devotee care and community development*
4. *Alpaca walk still be part of my service – which includes also feeding them, helping with sheds, etc – it is not just alpaca walking – Let's say alpaca care*
5. *Be involved in decisions related to projects, devotee care and community development'*

The claimant also insisted that only certain individuals spoke to her about her prayer recitals. She said that it would never be a written requirement for her to conduct them. She proposed to rejoin the community in September 2022,

after completing her service at NVM and handing in her PhD thesis *'if we manage to agree on everything'*.

28. Mr Bucinkas replied to say he thought her additional stipulations were reasonable in principle and that he would 'bounce back some things' with Mr McMullan. He would respond with any further details later. He did not come back with any follow up points.

29. By way of these exchanges agreement was reached on the key features of the claimant's return to KB. Her key duties were agreed, which were in essence what she had been doing in her first period as a volunteer. Her requests both to have the portacabin to herself, and to be able to perform her duties occasionally from other locations, were agreed. Her spiritual obligations were also agreed. Her working pattern in terms of hours and days per week was confirmed, albeit that a short-term reduction in her weekly hours total was later suggested by Mr Bucinkas, as documented below. The only points which had not been explicitly agreed were her desire not to deal with food waste, dish washing, preparing breakfast or working with an individual named Vrinda, and her requests to only interact with certain individuals in the conduct of her prayers and to be involved in certain activities, some of which already fell within the duties Mr Bucinkas had described for her. Those were not fundamental aspects of the arrangement for her to return to KB. Mr Bucinkas did not later come back to the claimant to indicate that there was an issue with any of them. He and the claimant continued their interactions on the basis that the requirements of her return were agreed.

Continuation of WhatsApp conversation – July to 3 August 2022

30. The claimant and Mr Bucinkas continued to exchange WhatsApp messages through June and into the middle of July 2022. The only matter of note in that time was that the claimant assisted with a grant application to Food for Scotland. She received confirmation on 28 June 2022 that her doctorate would be granted and shared comments about that with Mr Bucinkas. There was no discussion at this time about the terms of her forthcoming stay. It was implicit that those were now agreed.

31. On 18 July 2022 the claimant said that she wished to arrive at KB for the Festival of Colours if she could conclude matters at NVM. She also asked Mr Bucinkas whether he had anything to update her on following discussion with Mr McMullan. He did not.
- 5 32. On 21 July 2022 the claimant confirmed that she had been offered an effective promotion by NVM which would give her work an international dimension. She was surprised to receive the offer which was an attractive one, and wished some time to consider it.
- 10 33. By 26 July 2022 the claimant had decided she still wished to return to KB and told Mr Bucinkas that she had arranged a flight and would arrive in Edinburgh on the morning of 26 August 2022. She asked if Mr Milne could pick her up, and Mr Bucinkas agreed.
- 15 34. On 27 July 2022 the claimant said to Mr Bucinkas *'we need to get into an agreement on my times and activities, so I can keep helping him with some tasks here.'* This was a reference to her work at NVM. She was proposing to go on assisting NVM in some capacity after moving back to KB. She was managing their facebook and Instagram accounts. She mentioned some further tasks. She anticipated that it would involve one or two hours for three days per week. She emphasised that if the arrangement at KB was probationary for six months, she wanted to keep her other options open. This would limit her capacity to work on KB tasks to 24 hours per week rather than 20 36 hours per week. Mr Bucinkas did not agree with the proposal on a personal basis and did not raise it with the temple council.
- 25 35. The claimant expected the proposed reduction in hours to be less of an issue than it was. Her response to it not being accepted was to say that she had changed her mind about coming and had cancelled her flight. In fact she had not done so. Two days later she confirmed that she did want to be at KB and said, *'let's fix this'*. Mr Bucinkas replied to ask her what had changed. He said that he had negotiated an agreement between her and the temple council, 30 and that it was not an agreement between the claimant and himself. He said that when she proposed to change it, he needed to assess how to deal with

that. He said, *'We agreed certain conditions and under those conditions provided certain facilities'*. He said he appreciated her need to maintain relations with NVM, but that the temple council would not be able to reduce her hours, and she had already been offered special treatment with the terms that had been agreed, namely two rooms to herself, six hours of work per day and the ability to travel and continue providing her services remotely. He said he would be happy with a short-term compromise which would allow her to work 30 hours per week for KB and six hours per week for NVM, for two months until the beginning of November 2022. He did not say he would need approval from the temple council for that concession. He suggested she take a few days to think about the proposal.

36. On 31 July 2022 Mr Bucinkas messaged the claimant again to recap some of the things she had already been agreed. Those included exclusive use of the portacabin, reduced weekly working hours, access to yoga and the alpacas, Kirtan and other wellbeing facilities, more spare time to finalise her thesis, the ability to leave the site and work remotely, and no firm commitment to sadhana (religious study, chanting and prayer). Later that day the claimant confirmed that she was still flying to Scotland, although said she might go to back to Aberdeen rather than KB. At this point, based on the exchanges immediately before, the source of her doubt was whether she could work effectively alongside Mr Bucinkas rather than the conditions of her stay. The claimant had taken umbrage in particular at a comment Mr Bucinkas had made about it being important not to treat KB akin to a *'holiday camp'*. She felt that it was an insensitive comment which questioned her commitment to the way of life the respondent encouraged.

37. On that day there were numerous exchanges between the two individuals. Mr Bucinkas stated firmly that the claimant had to perform 36 hours of work per week. He also stated that *'You need to decide if you want to be back...And if you do I've stated the conditions.'* he said that the temple council would never agree to a four-hour working day, as might have been the case at NVM.

38. No resolution was reached on 31 July 2022, but on 3 August 2022 Mr Bucinkas asked the claimant if she had decided, as he had told Mr McMullan

that she was not coming. She confirmed a few minutes later that she would come to KB [96].

39. Later that day the two individuals discussed a two-day programme of yoga and related activities the claimant was planning to have KB host in November of that year. The claimant had planned the content and the two discussed changes to the programme and the promotional materials.
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40. Also on that day Mr Buciskas asked the claimant, *'Sorry, I just wanted to double check if you are accepting the conditions that we've raised?'*. The claimant replied, *'You really want to get into this discussion again? We talked about it for 2 hours on Sunday. Let's make a try until November and see if it will work or not.'* This was a reference to the duration of the proposed period in which she would be able to work fewer hours for KB so that she could complete some residual duties with NVM. In making this comment the claimant was confirming she had accepted the conditions put forward by Mr Buciskas. Those conditions had not substantially changed since he put them to the claimant on 16 June 2022, with the exception of him agreeing a temporary reduction in weekly working hours.
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Events following claimant's return on 26 August 2022

41. There was a break in in the WhatsApp messages until 26 August 2022, the day the claimant arrived in Scotland. She was driven from Edinburgh airport to KB by Mr Milne and moved into the portacabin as had been agreed. The respondent operated a booking system for all of its accommodation, and the portacabin had been booked for the claimant for six months, the duration of the probationary period.
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42. On that day Mr Buciskas asked the claimant for help in creating a booking sheet which could be used for attendees of the Festival of Colours the following day. This was open to the public and traditionally was a well-attended event. He also asked if the claimant could offer reiki appointments.
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43. On 27 August 2022 Mr Buciskas asked the claimant if she would be the event photographer for the festival, with assistance from others. She agreed.
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Mr Bucinkas also emailed the claimant a copy of an email she had sent him on 28 July 2021, containing a list of login identities and passwords for various applications and online accounts such as 'Clickup', 'Canva', Google email and Instagram. This allowed her to regain access to those accounts for the purposes of the work she would be doing. Throughout the day she took pictures of people at the festival for publicity purposes.

44. The same morning the claimant prepared a flyer for the Harvest Festival which was taking place on 10 September 2022. The flyers were printed and distributed to those attending the Festival of Colours.

10 45. The claimant carried out further work in promotion of the Harvest Festival on 29 August 2022. She prepared the programme for the day [286-289]. She organised a social medial countdown, involving posting of new content in the ten days leading up to the festival.

15 46. On 30 August 2022 the claimant messaged Mr Bucinkas to say that she would not charge friends or family to stay with her on-site, and that she wanted to ask her mother to visit for a month during the following summer to coincide with her graduation. She offered that she would ask any guests to perform some services within the community during their stay rather than ask them for money. Mr Bucinkas did not take issue with the suggestion, but suggested that Mr McMullen would need more persuading as he was used to living especially frugally and expected everyone on-site to make a contribution.

20 47. On 1 September 2022 the claimant sent to Mr Bucinkas details of a role she suggested she could have taken up instead of returning to KB. The details were not visible in the screenshot of the conversation. She proposed that the respondent hire her as an employee under a specific contract and pay her a salary of £52,000 per year, working 40 hours per week, with details of holidays and her job description. In return she would move out of the portacabin and rent a property off-site. This suggestion was not taken up.

25 48. On 6 September 2022 the claimant and Mr Bucinkas discussed that the presale of tickets for the Harvest Festival had gone slowly, and whether it would be better to make admission to the event free. Both agreed that it would.

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They discussed the content of the festival, some changes and additions which could be made, and additional promotional steps to try out. The claimant updated the promotional flyer and online content. She sent a selection of possible flyer designs to Mr Bucinkas for approval. Some examples were produced to the tribunal.

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49. On 7 September 2022 the claimant mentioned another volunteer named Aliya who had raised issues about her emotional and mental health. She had also given some feedback about being a volunteer and the claimant suggested Mr Bucinkas and she discuss it with a view to considering if the volunteer programme should be adapted. One of the points raised was a lack of knowledge of health and safety procedures. Mr Bucinkas said he was 'empowering' the claimant to take responsibility for inspiring and supporting Aliya. On this day the claimant emailed further promotional material she had been preparing. She and Mr Bucinkas discussed the scheduling of particular classes and activities. This continued in the following days.

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50. The Harvest Festival took place as planned on 10 September 2022. The claimant gave a presentation as part of the programme. She was paid £100 by the respondent for doing so. She and Mr Bucinkas discussed the next day how it had gone and possible learning points to be taken into account for the following year. The claimant added further photographs and text to the social media accounts. Feedback requests were sent to those who attended.

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51. On 21 September 2022 the claimant messaged Mr Bucinkas to ask if he agreed to her having a discussion with the volunteer Aliya about using her HR experience to update and expand some policies. She asked for assistance in locating the current versions. The claimant asked about some policies she had been working on during her first stay in 2021. Mr Bucinkas said that they had not yet been fully implemented. He said it had been a 'marathon' for him to oversee all of the administration of the community alone and he had not been able to take the policies further. He asked Aliya to meet with the claimant at 2.30pm that afternoon to have a discussion about taking the necessary actions forward. After they met the claimant sent her a list of links to policies

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to review [257]. On 26 September 2022 Aliya emailed the claimant a copy of the respondent's code of conduct for checking.

Grievance/complaint by claimant

52. On 28 September the claimant emailed a letter of complaint to the respondent and to 'the UK devotee care department' [310-323]. It is not for this hearing to explore what caused the complaint to be made, whether it had merit and any consequences which follow. Those will likely be for a future hearing to consider. However, some things said and done following the complaint potentially have a bearing on the question of the claimant's legal status which is to be determined by this hearing. Accordingly, the findings made below are of that nature.

53. In response to the complaint a meeting was arranged for 21 October 2022, which was attended by the claimant, Mr Bucinkas, Mr McMullen, A Ms Wanda Watson, and a Mr John Watson. An audio recording of the meeting was made and transcribed by a third-party service [324-332]. The parties agreed that the transcript was a suitably accurate record of the discussion.

54. During the meeting Mr McMullen said that he was not aware of any particular services the claimant had been undertaking. The tribunal noted however from his evidence that he had been away from KB between 1 and 17 September 2022 on leave and had cut communications completely with people on site during that time. He would therefore not have observed or been told about anything the claimant was doing.

55. He said, *'we can't stay and not do anything.'* He went on to say, *'Currently there's...actually no agreement. There was some...negotiations took place and, before you arrived there was no conclusion on that. Nothing was actually agreed. But still, it was considered that whatever was going to be agreed and will be reviewed again, and that would end in November. So that has to be reviewed in November, which is only a few days away. And that was a trial.'*

56. The claimant replied to say *'That's not right...November was the transition period to do the service to [NVM], right?'* She went on to say, *'No, that was*

six months. And there is a formal proposal. And there is a formal acceptance. Right? Six months, trial, proposal, and acceptance.'

57. Mr Bucinkas appeared to disagree, saying, *'Formal means signature.'* The claimant had not physically signed any document to agree the terms of her stay. He said he was going to agree a written contract with the claimant, but the negotiation never finished. He said that he had never raised with Mr McMullan the matters that the claimant stipulated in her WhatsApp message of 17 June 2022 and matters were overtaken by the claimant announcing that she had arranged a flight and was arriving.
58. The claimant did not accept this and said that there had been agreement on *'my arrangements, my hours and my flexibility of work and there was no agreement regarding the activities but regarding all this there is an agreement and it's been talked about agreeing the...in a council meeting on the 15th of June.'*
59. Both individuals essentially repeated their positions. Mr Bucinkas maintained that there were matters which had not been approved by the temple council and no written contract had been signed by the parties. The claimant said that the key essentials had been verbally agreed and only some detail around her precise set of duties remained to be finalised. She described them in evidence as just four things she would like or not like to do, but not conditions. Enough to constitute an agreement had been confirmed.
60. Mr McMullan re-entered the discussion to say that, going forward, there were four options. Those were:
- a. The claimant could enter into a devotee agreement, documented in writing;
 - b. Instead, she could enter a volunteer agreement (with no spiritual commitments);
 - c. She could return to NVM Spain; or

d. She could become essentially a third-party provider of services to the respondent.

61. The claimant was given until 1 November 2022 to consider the options. She was sent a note summarising the terms of the volunteering agreement option [132] and the devotee agreement [133]. Neither of them was in terms substantially the same as she had discussed with Mr Bucinkas in the lead up to her arrival at KB in August of that year. She did not agree any of the options with the respondent and left KB some time in the month of November 2022. She left some personal items behind, and the respondent instructed solicitors to write to her on 12 December 2022 to retrieve them.

The parties' submissions

Claimant's submissions

62. Mr Smith on behalf of the claimant submitted that the claimant was engaged under a contract of employment between 26 August and 12 December 2022. If she was not, then she was engaged under a contract personally to do work. In either case, she was entitled to the protections of EQA as set out in sections 39 and 40, and by extension sections 13, 26 and 27.

63. Mr Smith made reference to the reinforcement of principles set out in ***Ready Mixed Concrete (South East) Limited v Minister of Pensions and National Insurance [1968] 2 QB 497*** given in the Supreme Court judgment in ***Autoclenz Limited v Belcher and others [2011] UKSC 41***, namely that a contract of employment (or 'service' as more traditionally know) exists if three conditions are fulfilled:

- a. The individual agrees that in consideration for pay they will provide their own work and skill in performance of some service;
- b. They accept that the recipient of their service will have enough control that they can be described as their 'master'; and
- c. The other provisions of the contract are consistent with it being a contract of service.

64. Three other propositions were set out in the earlier case:

- a. There must be an irreducible minimum of obligation on each side;
- b. If a genuine right of substitution exists, this negates an obligation to perform work personally and is inconsistent with employment status;
5 and
- c. If a contractual right such as the right to provide a substitute exists, it does not matter that it is not used. It will still be part of the agreement.

65. Mr Smith also referred to ***Secretary of State for Business, Innovation and Skills v Mrs P Knight UKEAT/0073/13/RN*** in support of the principle that a
10 contract of employment may exist even in the absence of an obligation to pay the individual concerned in money, if there is some other relevant form of consideration or reward.

66. Lord Leggatt's speech in ***Uber and others v Aslam [2021] UKSC 5*** was referred to at length, with the key submission being that a purposive approach
15 should be taken to the EQA so as to give effect as far as possible to the purpose of that Act, namely to protect workers (and others) against discrimination.

67. Mr Smith made reference to other case authorities which were also considered, but not extensively discussed here. The majority were in support
20 of his secondary argument, that the claimant was party to a contract with the respondent to provide services personally.

68. In terms of the evidence, Mr Smith emphasised a number of aspects which he argued suggested that the claimant was an employee, failing which under
a contract personally to provide services. Very briefly, those were:

- a. The claimant was qualified, experienced and skilled in the type of work
25 she carried out for the respondent;
- b. The respondent received substantial value from her services, including in the form of monetary grants she had successfully applied for;

- c. She extended her initial volunteering period as a result of this value, and the amount of work available for her to do;
- d. She worked a substantial number of regular hours;
- e. The role she took up in August 2022 was substantially the same as the one she had performed as a volunteer, proposed by the respondent as they recognised the value she could provide;
- f. The key terms of the putative contract were agreed with the respondent via Mr Bucinskas, who had been given the necessary authority by the temple council;
- g. There was consideration other than money, in the form of accommodation, food, activities, learning, spiritual support and membership of a community;
- h. She was immediately integrated into groups and decision-making processes, given responsibilities, and access to electronic systems and accounts was restored;
- i. She was asked to supervise and mentor the volunteer Aliya;
- j. She undertook a variety of work, including preparing promotional materials, helping to run festivals, creating social media content, engaging with festival attendees, reviewing policies and mentoring another volunteer;
- k. She herself believed that she had a status akin to an employee, evidenced by the fact that she sought to raise a grievance with the respondent and submitted a fit note when she was unwell;
- l. The respondent had some employees, as evidenced by their Companies House records, and so the concept was not anomalous for them;

- m. The absence of any written contract should not go against the claimant as the respondent did not establish that it had any firm or even general policy of issuing contracts; and
- n. The respondent accepted that some of its codes, such as that relating to ethical behaviour, would apply to all visitors to the site regardless of the title or status they held.
- 5
69. Mr Smith also suggested that the evidence of Mr Buciskas differed from that of Mr McMullan on some points, potentially undermining their credibility or reliability. The contemporaneous WhatsApp messages should be preferred where the evidence of either witness departed from what was said in them.
- 10
70. To round off, Mr Smith argued that, applying the principles of **Ready Mixed Concrete**, the claimant was an employee of the respondent because:
- a. She received consideration under the arrangement, albeit in ways other than payment of money such as accommodation, food, tuition, experience and the opportunity for spiritual and professional development;
- 15
- b. There was a sufficient degree of control within the relationship, as evidence by her needing approval of her work, being asked to do various pieces of work which she was obliged to do, and following the direction of Mr Buciskas in relation to supervision and mentoring of another volunteer;
- 20
- c. Any other parts of the arrangement were consistent with a contract of service. There was no final written document, but the key terms were agreed in writing in the form of electronic messages. Those terms were consistent with a contract of service;
- 25
- d. There was an irreducible mutuality of obligation present in the relationship, in the sense that the claimant had to use her specialist skills for the benefit of the respondent, in return for which she was provided with food, accommodation and the meeting of any social and spiritual needs;
- 30

e. There was no right of substitution. The matter was never discussed, and it was clear that it was her personal skills and attributes which the respondent required. She would not have been able to engage someone else to do her work for the respondent.

5 71. If it was the case that the claimant did not meet the threshold for employee status, she was nevertheless a 'worker' – taken to mean a person under a contract to provide services personally.

72. Mr Smith argued that, in line with Uber, a purposive approach should be taken to the interpretation and application of section 83, and that the key features of
10 direction, subordination and integration were all present.

Respondent's submissions

73. Mr Connolly for the respondent argued that the claimant did not acquire the status of any of the types of person protected by virtue of section 83. He submitted that the claimant did not enter into a contract of any type with the
15 respondent, and so in effect her claim fell at the first hurdle.

74. Developing this argument, Mr Connolly said that the claimant's status from August 2022 onwards was that of volunteer and nothing more. Pursuant to the principles of *X v Mid Sussex Citizens Advice Bureau & another [2012] UKSC 59*, the EQA is not designed to extend protection from discrimination
20 to those in voluntary activity.

75. He submitted that when the extended WhatsApp conversation was analysed, it could be appreciated that there was never an offer of a set of terms by one party which was accepted by the other. Mr Buciskas' message of 16 June 2022 should be viewed as an offer of a volunteer contract, which was never
25 accepted by the claimant in the form it was presented. Instead, the negotiations continued and essentially petered out before agreement could be reached, ceasing only when the claimant travelled to KB and began her stay. As Mr Buciskas had only been given authority by the temple council to offer the terms which he did on that date, no terms later discussed could
30 validly be agreed and be binding on the respondent.

76. It was also argued that the minutes of the claimant's grievance meeting were consistent with Mr McMullan's evidence about there being no contract in place. The claimant did not say in the meeting that she had a contract with the respondent. She appeared to have been against having one, with Mr Bucinkas saying that he was the party who was in favour of having one in place, which the claimant resisted. She also conceded that there was no final agreement over her 'activities' – i.e. her duties.
77. The point was also made that, according to Mr McMullan, written contracts were the norm since the end of the claimant's first period at KB, and the absence of one for the claimant pointed in favour of there being no contract at all.
78. For there to have been any kind of contract, there needed to have been offer, acceptance and an intention on both sides to create legal relations. The offer must be made by a person with authority to do so – ***Puntis v Governing Body of Isambard Brunel Junior School EAT/1001/95***. In this case, Mr Bucinkas was acting as an agent of the respondent through its temple council, and could only commit the respondent to terms which the council had authorised. The offer he made on 16 June 2022 was properly authorised, but the claimant did not accept those terms and sought to impose others.
79. He also stressed that merely because the claimant performed work or services upon her arrival at KB, that did not entail that a contract was in place. It was not disputed that she was carrying out work on behalf of the respondent, at times as requested by Mr Bucinkas, but that he did not supervise her to a degree where there could be said to be control over what she did.
80. Mr Connolly made reference to the EAT decision in ***South East Sheffield Citizens Advice Bureau v Grayson [2003] UKEAT 283***, which was decided under the Disability Discrimination Act 1995, which therefore preceded the EQA, although the wording of the equivalent provision was the same. In that appeal, the EAT stated that when considering whether an individual who was a volunteer could also fall within the scope of the Act, the question was not whether the person performed work in return for benefits, but rather whether

there was a contractual obligation on the putative employer to provide work to do and an obligation on the individual personally to carry out that work, so that should the individual immediately end that agreement they would be in breach of contract. He argued that this could not be said of the claimant, suggesting that she had not crossed the threshold between a mere volunteer and someone protected via section 83.

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81. Reference was also made to the established text of **McBryde, Law of Scotland on Contract (third edition)** at paragraph 5-34 where it is stated that *'the failure to agree everything prevents consensus.'* It was accepted that 'everything' meant all of the fundamental terms and not every single aspect of the contract, however minor. As the claimant had not agreed 'everything' in this sense, there could be no contract. He submitted that the claimant did not reach agreement with the respondent on the number of hours she would work, as the proposal was for 36 hours per week but she wanted it to be 24 hours, and there was no definitive set of duties drawn up. Further, it was said, at paragraph 6-85 the point was reiterated that agreement on the fundamental terms must be reached – *'The acceptance must meet the offer or there is no consensus.'* It was accepted that this applied to the necessary terms of the agreement and not every single term. If a party proposes additional terms which would require the consent of the other, that consent must be given. A qualified acceptance of an offer is not acceptance. The claimant's reply to Mr Bucinkas' email of 16 June 2022 was so qualified, and so did not complete a contract when she sent it.

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82. Finally, Mr Connolly referred to the principle expressed in **Muirhead & Turnbull v Dickson (1905) 13 SLT 151**, that a contract is formed, and its terms constituted, by what the parties say and do rather than what they might think if different.

Discussion and decision

83. The parties were in agreement that for the claimant to fall within the scope of section 83 she had to have entered into a contract with the respondent. They also agreed that the offer of a contract of some type was made to the claimant

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by Mr Bucinskas on 16 June 2022, and that he was properly authorised by the respondent to make that offer. The parties also agreed that the relevant case law authorities and legal textbooks allowed for a contract to be formed by way of agreement on the essential terms, even if some lesser details were not agreed, or left to be determined later.

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84. The fundamental difference between the parties was that the claimant argued she had accepted the offer of 16 June 2022 and so entered into a contract, whereas the respondent maintained she had not.

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85. The parties agreed that for a contract to be formed there must be agreement on the essential terms, albeit not every term, otherwise expressed as 'consensus in idem' – see for example ***Wight v Newton 1911 S.C. 762***. It is also necessary for there to be certainty about those terms, and the parties must clearly show that they intend to be bound by them.

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86. What are the essential terms to any contract will vary depending on the nature of the contract itself - ***R & J Dempster Ltd v Motherwell Bridge & Engineering Co Ltd 1964 SC 308***. Generally they are the parties, the subject matter of the contract and the 'price', or mechanism for establishing the price. It is also well established under Scots law that there need not be consideration for a contract to be formed.

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87. A seemingly valid offer which is made by a person without the authority of their principal will not be binding and no contract will be formed if it is accepted.

88. Acceptance of an offer can be expressed, whether in writing or verbal, or inferred from a party's conduct.

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Did the claimant enter into a contract with the respondent?

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89. On consideration of the evidence in this case in light of the relevant law it is found that the claimant did enter into a contract with the respondent. The respondent made an offer to the claimant via Mr Bucinskas acting as its agent and with its authority. This was done by way of his WhatsApp message dated 16 June 2022 at 11.18am [68-70]. Both parties agreed on that. He opened

this message by saying to the claimant that the temple meeting had taken place the evening before as planned. It was at this meeting that he had said he would seek approval of her return and in particular her request for accommodation. It is found that Mr Bucinkas was authorised to offer the terms set out in that message, whether expressly confirmed at the temple council meeting, or by implication in following logically from what was expressly confirmed, or within the scope of his existing authority more generally as the appointed person responsible for recruitment and engagement of new volunteers.

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10 90. On the question of accommodation, Mr Bucinkas confirmed that the claimant could have the portacabin to herself as she had asked, subject to two minor qualifications which she accepted.

15 91. He proposed the working pattern of six hours per day and six hours per week. The claimant said she did not have a problem working up to 40 or 50 hours per week, and that it tended to happen naturally anyway. She did, as Mr Connolly pointed out, later try to push back on that but a compromise was reached where she would only work 30 hours per week for the first two months, so she could complete some residual work with NVM. This was a minor and temporary derogation from the main term and one which Mr
20 Bucinkas was entitled to agree on the respondent's behalf. If he was not, then in any event that derogation was not a fundamental term of the contract. The fundamental term was the core requirement to work 36 hours per week on a more permanent basis. The claimant agreed that she would be doing so after the first two months and for the rest of her period at KB, which the parties
25 intended to be long term and open ended. It is not uncommon for a person starting work in a new post to be given some initial leeway in building up their workload and in finishing off projects and other pieces of work they were involved in with their previous employer.

30 92. Mr Bucinkas also proposed a six-month probationary period, to ensue that both parties could be sure that the arrangement was working. The claimant accepted this. The building in of this step was an indicator of the parties' underlying expectation that by default the arrangement would be longer term.

93. Next Mr Bucinkas described the activities the claimant was expected to undertake – *'creative work as a designed, as tourism, events, projects organiser/manager, HR work, animal care, Food for Scotland plant based activities, grants, business/eco intelligence and we can do some international work here when the time is right as we build infrastructure and connections. Also it is [an] opportunity to grow with the project as it grows.'* In doing so he set out in some detail the duties she would have. Those were substantially the same as she had carried out during her first stay, with the intention that she would build on and develop some aspects. There was no lack of understanding on either side as to what she would be expected to do during her hours of service and in return for being able to reside as part of the community.
94. Lastly, he proposed a compromise in relation to the performance of prayer 'rounds', where as an indicator of her longer term spiritual commitment, she would be required to perform between four and eight per day rather than the normal amount of 16. She agreed, provided certain people did not discuss it with her. Again, this adjustment was not a fundamental term of the contract.
95. In the claimant's reply to Mr Bucinkas' message, sent the following day [70-71] she confirmed immediate agreement of some of the terms. As noted, she confirmed that she didn't have an issue in principle with working 36 hours per week, or even more than that. She did go on to stipulate in more detail what activities she would like to do and not to do. Importantly, she used the words 'would like to' and 'would like not to'. These were not essential terms of the contract. The essential terms in relation to her duties or activities were those which Mr Bucinkas put in his message, as quoted above. In that context, the claimant's comments are an attempt to add to or refine them, but not change them. Some, particularly the list of 'likes', were things she had been doing during her first stay and would have been getting involved in again as part of what Mr Bucinkas was proposing. They were a clarification or reinforcement of what had been offered, not a deviation. The things she said she would not like to do were just that, and cannot be read as fundamental conditions of the whole agreement.

96. In any event, any residual uncertainty was removed by the parties' later words and actions. In particular, after further discussion between the claimant and Mr Bucinkas over a range of matters, the claimant said on 3 August 2022, in response to a prompt from Mr Bucinkas, 'Yes. I will go to KB.' When pressed
5 by Mr Bucinkas to confirm that she had agreed his terms, she confirmed that she would do and see how things worked during the initial review period. In doing so, and to the extent that she had not accepted on 17 June 2022 any of the conditions put forward by Mr Bucinkas, she was accepting them then.
97. This position was supported by the fact that both she and Mr Bucinkas acted
10 consistently with the discussed terms being in place. The claimant travelled from Spain to Scotland, moved into the portacabin and immediately began working on activities for the forthcoming festival and planning events later in the year. She was given access to IT systems, accounts and passwords. She reverted to the types of work she had carried out during her first stay, again
15 reporting to Mr Bucinkas for approval and instruction.
98. The respondent argued that it was an essential term of any contract with the claimant that it be in writing. Mr McMullan said that was now the norm for all individuals, although no examples of others' contracts were produced. Mr
20 Bucinkas said to the claimant in a message on 9 June 2022 that the respondent would want to capture the key terms in a document which would only be a page long. This is a reference back to his message of 11 May 2022 when he said, '*We could draft a service agreement like for volunteer programme but in devotional terms.*', and the exchanges which followed. The claimant did not know what this meant and asked for clarification. He
25 explained that it would cover the need to follow the fundamental principles, specify the working pattern and commitment to a number of rounds of prayer, and confirm adherence to other policies. However, a written agreement was not stipulated in the offer of 16 June 2022. There is only a reference to '*put[ting] hours on the paper*'. The question of a written agreement was not
30 mentioned again in the many exchanges taking place up until the point of the claimant's arrival at KB, when discussion of terms ended. The respondent may have wished to document the terms at some point but the issue was

never revisited. There was insufficient evidence to establish that it was a term of the contract for some or all of its features to be confined to writing. If there was such a term, it was not a fundamental one.

Was the claimant an employee?

5 99. Mr Smith's primary argument was that the claimant was an employee of the respondent. This is not found to be established on the evidence.

100. Returning to the three essential requirements per **Ready Mixed Concrete**, it is true that the claimant was obliged to perform her services personally in return for reward, and would not have been able to provide a substitute to perform them, even occasionally.

101. However, there was not the required degree of control over her. She was specialised in the principal skills the respondent required her to perform, and was essentially asked to provide an end product and trusted to do so. How she went about it and when were left up to her, as nobody within the respondent had the same skills or experience so as to be able to supervise or direct her in how she carried out the work.

102. Further, the terms of the contract were not consistent with her being an employee. Whilst she was given consideration for her services, and a working pattern, there was no agreement as to holidays, pension or other benefits, notice periods, sick pay or treatment of periods of illness, or the applicability of a grievance or disciplinary procedure. There was no written statement conform to section 1 of the Employment Rights Act 1996, and therefore no confirmation of her commencement date both generally and for the purposes of calculating continuous employment, or whether or not she could be asked to work outside of the UK, or had any entitlement to training.

Was the claimant engaged under a contract personally to do work?

103. On the evidence, the claimant was engaged under a contract personally to do work. That she was engaged under a contract has been explained above. There was an offer on 16 June 2022 and an acceptance the following day. If the contract was not concluded at that point, the claimant accepted it on 3

August 2022. The claimant began performing services almost immediately and certainly was performing them from the point of her arrival back at KB on 26 August 2022.

5 104. As explained above, the claimant had to perform her services personally. All individuals who wished to remain at KB, from short-term volunteers to longer term spiritual devotees had to be vetted and had to agree to relatively stringent rules of personal conduct. They became part of the community rather than merely people performing work, and it was important that they integrated effectively. The claimant was asked to return to KB because of the work she had done before, which had tangible value for the respondent. But she was also accepted because of how she fitted into the community and shared its values.

10 105. There cannot be any realistic doubt either that she was performing 'work'. This was accepted by the respondent. In substance and quantity the evidence was that she was applying her skills and experience for the benefit of meeting the respondent's needs. She did so effectively and in a way that was of appreciable value.

Conclusion

20 106. The tribunal finds that the claimant was employed 'under ... a contract personally to do work' by the respondent, and therefore fell within the scope of section 83(2)(a) of the EQA.

107. The tribunal accordingly has jurisdiction to hear her complaints under sections 13, 26 and 27 EQA and directions will be issued for case management and to arrange a full hearing of the claim.

25 108. The claimant held the required status between 26 August 2022 and the date in November 2022 when she left KB. The precise date was not confirmed in evidence at this hearing. It may be necessary to clarify this date more precisely at the full hearing, depending on the dates of the events said to support her legal complaints.

109. It should be clear that the conclusions reached in this judgment are based on the very particular facts of the claimant's case, and the evidence led before the tribunal. They should not be taken as indicative of the status of any other individual engaged by the respondent in whatever capacity.

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Employment Judge: B Campbell
Date of Judgment: 12 October 2023
Entered in register: 18 October 2023
and copied to parties

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