Neutral Citation Number: [2026] EAT 56

Case No: EA-2024-SCO-000090-LP

EMPLOYMENT APPEAL TRIBUNAL

52 Melville Street Edinburgh EH3 7HF

Date: 17 April 2026

Before :

THE HONOURABLE LORD COLBECK

- -

Between :

JOHN HALLEY **Appellant**

- and –

THE RIGHT HONOURABLE LADY SMITH & JULIE-ANNE JAMIESON

Respondents

- -
- -

John Halley, the **Appellant**
Brian Napier KC (instructed by Turcan Connell), for the **Respondent**

Hearing date: 26 February 2026

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JUDGMENT

SUMMARY

Disability Discrimination; Status of counsel to a public inquiry under the Inquiries Act 2005

An Employment Tribunal had not erred in holding that counsel to a public inquiry established under the Inquiries Act 2005 was not the holder of a public office in terms of sub-section 50(2) of the **Equality Act 2010**; nor was he a "worker", as defined by sub-section 203(3) of the **Employment Rights Act 1996**.

The Honourable Lord Colbeck:

Introduction

1. What is the status of counsel to a public inquiry established under the **Inquiries Act 2005 ("2005 Act")**?

2. The appellant was appointed as lead junior counsel to what became known as the Scottish Child Abuse Inquiry ("SCAI"). The respondents are, respectively, the chair of the inquiry and the secretary to the inquiry.

3. The SCAI was established under the **2005 Act** on 1 October 2015. Its purpose is to investigate and raise public awareness of the abuse of children while in care in Scotland. It affords an opportunity for public acknowledgement of the suffering of those children and creates a forum for the validation of their experiences. The inquiry seeks to fulfil its terms of reference by investigating the nature and extent of the abuse of children in care and how the abuse has affected them and their families. The inquiry must create a public record of the abuse it uncovers and determine which institutions and bodies failed in their duty to protect children. It considers whether any failures have been corrected, and whether any changes to the law, policies or procedures are needed (see **British Broadcasting Corporation v Chair of the Scottish Child Abuse Inquiry** 2022 SC 184 at paragraph [2]).

4. The appellant brought claims for disability discrimination and victimisation against the respondents. The appellant did not rely upon his status as an advocate and made no claim under section 48(6) of the **Equality Act 2010**. Following a preliminary hearing on 24 May 2024, the Employment Tribunal ("ET") directed that a preliminary issue should be determined, by way of written submissions. The preliminary issue is in the following terms:

> "Is the (appellant) the holder of a public office in terms of section 50(2) of the Equality Act 2010; which failing, is the claimant a 'worker'; and in either case does the claimant have the necessary status upon which to found a claim of discrimination in this case?"

5. Written submissions were made by parties. By way of a judgment dated 4 September 2024[1], (Employment Judge ("EJ") M A Macleod, sitting alone), the ET held that the appellant was not a holder of a public office; and that the appellant was not a "worker". As a consequence, the appellant's claims were dismissed for want of jurisdiction.

6. The appellant appeals against the decision of the ET. Three grounds of appeal advanced by him were allowed to proceed. The first two, in essence, are to the effect that the ET erred in reaching the decisions it did on the preliminary issue and in dismissing the appellant's claims. The third ground of appeal relates to the procedure followed by the EJ. In respect of grounds 1 and 2, in granting permission, Judge Stout observed that this is a developing area of the law and the question of whether the ET has jurisdiction to consider a claim by an advocate to a public inquiry merits consideration by the EAT.

7. Ground 3 is headed: "Error in law by concluding that the appellant had agreed to final determination without any further evidence" and is in the following terms:

> "The Employment Judge erred in law by asserting that the appellant had "agreed" to determination of the issues for determination without the necessity of further procedure, including evidence being led, if necessary. The appellant's stated agreement was simply to determination of the issues which the respondents emphatically insisted upon; and that such determination should be made by written submissions. The appellant is not prevented, as a matter of law or otherwise, from insisting that further evidence is required in any event. The Employment Judge's decision to contrary effect (at para 56, Judgment) has no basis in law and no such basis is asserted by him."

8. In respect of ground 3, Judge Stout was less convinced, but it seemed to her inevitable that the question of whether evidence was required would be traversed by the parties in the course of arguing about grounds 1 and 2. She therefor granted permission on ground 3 also.

[1] See Halley PH 4103196-22 Status and eligibility.doc

9. Permission having been granted, an appeal hearing was originally assigned for 9 December 2025. The appeal was to be heard by Lady Poole, however, certain issues arose and Lady Poole reached the conclusion that it was not appropriate for her to hear the appeal. An alternative date for the appeal in December 2025, before me, was canvassed but was unsuitable to parties. A new appeal hearing was assigned for 26 February 2026. By no later than 3 February 2026, parties were aware that the appeal would be heard by me.

10. On 25 February 2026 at 14:15 the appellant e-mailed an application seeking to discharge the appeal hearing assigned for the following day. The application is lengthy. The essence of it was that the appeal could not lawfully proceed, in the appellant's particular and unique circumstances, before a judge who is subject to the disciplinary and other management powers and favour of the Lord President of the Court of Session. In the e-mail which sent the application the appellant indicated that he would not be attending on 26 February 2026. The application was accompanied by a considerable number of documents. It was not practicable to consider the application and supporting documents and obtain comments from the respondents in the time that remained on the afternoon of 25 February 2026. I instructed the Tribunal Clerk to indicate to parties that I would hear them on the application on 26 February 2026. The appellant responded to the Tribunal Clerk by reiterating that he would not be attending.

11. On 26 February 2026, there was no appearance by, or on behalf of, the appellant. Having considered the appellant's application and the supporting documents, so far as relevant, and having heard from senior counsel for the respondent, I refused the application to discharge the appeal hearing. Thereafter, having heard from senior counsel for the respondents on further procedure, I determined that the appeal would be heard on the papers and reserved judgment.

Submissions for the appellant

12. The appellant's submissions on this issue before the ET are set out by the EJ at paragraphs 4 – 31 of his judgment. I will not repeat them. His skeleton argument for the appeal sets out the basis

of his appeal. The appellant maintains that the EJ erred in law in the following respects and for the following reasons.

13. The EJ erred in law by concluding that the ET did not have jurisdiction to consider the appellant's claims. In particular, the EJ erred in law by concluding that the appellant is not the holder of a public office, within the meaning of section 50(2)(b) of the **Equality Act 2010**, by virtue of the appellant's appointment as counsel to a public inquiry; by concluding that the appellant's appointment as counsel to a public inquiry was an appointment to act, in the circumstances detailed in the available evidence, as a self-employed advocate without the workplace protections from disability discrimination afforded by Part 5 of the **Equality Act 2010**; by concluding that the appellant's appointment as counsel to a public inquiry did not give rise to an "employment relationship" in view of the available evidence in the contractual documentation produced (see ET judgment, paras 69 - 70); and by concluding that the appellant was not a "worker" "defined by" section 83(2)(a) of the **Equality Act 2010 ("EqA")**. There is no such definition in section 83(2)(a) of the **EqA**.

14. The authorities cited vouched that the appellant is a "worker" within the meaning of section 230(3)(b) of the **Employment Rights Act 1996**. The appellant's appointment therefore falls within the definition of "Employment" in section 83(2)(a) of the **EqA** as a person in employment under a contract personally to do work, or at the very least, a person having the same protection (**Gilham v Ministry of Justice** [2019] UKSC 44, at paras 8 and 46; and **Clyde & Co v Bates Van Winklehof** [2014] UKSC 32, at paras 2-3, 25, 31-34, 40, 44 and 46). The proper assessment of the appellant's claims required the application of the following approach in law:

> "In *Percy v Board of National Mission of the Church of Scotland* [2005] UKHL 73, [2006] 2 AC 28, para 141, Lady Hale referred to the authors' comment in Harvey on Industrial Relations and Employment Law, para A[4] that the distinction as to whether a person is in an employment relationship is between those who work for themselves and those who work for others, regardless of the nature of the contract under which they are employed." (see **O'Brien v Ministry of Justice** [2013] UKSC 6, para 40).

The appellant was not working for himself as counsel to a public inquiry. The EJ erred in law by his failure to apply and to follow the proper approach a set out in the authorities cited to him.

15. The EJ erred in law by concluding that the appellant's appointment as counsel to a public inquiry was an agreement to work within the scope of the appellant's self-employed practice as an advocate. In particular, the EJ erred by failing to recognise, understand and to apply the authorities cited to him (**O'Brien** and **Gilham**) which demonstrate that the applicable law maintains a distinction between self-employed persons and persons required to work in other employment relationships, whether contractual or of another kind (see ET judgment, at paras 69 - 70); that this is a matter of longstanding (European and domestic) legal principle to be applied on an analysis of employment relationships between those who work for themselves and those who work for others, regardless of the nature of the contract under which they are employed (**O'Brien**, para 40); that the legal principle is applicable in employment relationships including, but not restricted to, cases involving judges, ministers of religion and other office holders, such as counsel to public inquiries; and that the determination of the issue in any particular case, such as the appellant's case, depends on such matters as are referred to at para 39 of **O'Brien**, as follows:

> "The self-employed person has the comparative luxury of independence. He can make his own choices as to the work he does and when and where he does it. He works for himself. He is not subject to the direction or control of others. Of course, he must adhere to the standards of his trade or profession. He must face the reality that, if he is to succeed, he must satisfy the needs and requirements of those who engage his services. They may be quite demanding, and the room for manoeuvre may be small. But the choices that must be made are for him, and him alone, to take."

16. The EJ applied simplistic and erroneous reasoning in distinguishing **O'Brien** and **Gilham** (see ET judgment at para 67). The cases of **O'Brien** and **Gilham** elucidate, explain and apply the relevant and applicable principles of law in assessing whether counsel to a public inquiry is an office

holder within the meaning of section 50(2)(b) of the **EqA** for the purposes of disability discrimination claims; whether counsel to a public inquiry falls within the definition of "worker" in section 230(3)(b) of the **Employment Rights Act 1996** for those purposes; and, therefore, whether the appellant fell within the scope of section 83(2)(a) of the **EqA**.

17. The EJ failed to accept the appellant's submissions, after consideration of the available evidence and application of the legal principles, that the nature of the commitment undertaken by the appellant as counsel to a public inquiry was fundamentally different in character from that of an advocate in practice who is a free agent who could make his own choices as to the work he did and when and where he did it; who was not subject to the direction or control of others; and who performed personal services as a self-employed person for clients. He failed to understand that the appellant's claims for disability discrimination under the **EqA** are derived from European law (**Gilham**, para 8); that sections 50(2)(b) and 83(2)(a) of the **EqA** required to be interpreted accordingly; that the appellant's employment status as counsel to a public inquiry was that of a worker under European law and an office holder under section 50(2)(b) of the **EqA**; and that his conclusion to the contrary was unlawful and discriminatory as between the appellant and other SCAI workers. He failed to understand that the authorities cited to him demonstrate that sections 50(2)(b) and 83(2)(a) of the **EqA** required to be interpreted and applied in the appellant's case in a manner which avoided unlawful discrimination (see **O'Brien** and **Gilham**).

18. The appellant further maintained that the EJ failed to understand, and to apply, the law as explained in the authorities cited to him in the respect that the appellant's appointment required the appellant, as counsel to a public inquiry, to undertake personally to perform work or services and that the recipient of that work or services was not a client or customer of the appellant (**Gilham**, para 8). He failed to understand that the cases cited to him by the appellant require that the appellant, as a "worker" in terms of section 230(3)(b) of the **Employment Rights Act 1996**, has a right to the protections afforded to him from disability discrimination following his appointment; and that section 50(2)(b) of the **EqA** should be interpreted and applied in a manner which avoids discrimination in

the workplace between employees and "limb (b)" workers such as the appellant (**Gilham**, para 30). He failed to understand that, on a proper understanding and application of the authorities of **O'Brien** and **Gilham**, the appellant also falls to be regarded, therefore, as a worker within the meaning of section 83(2)(a) of the **EqA** having entered into a contract personally to do work as counsel to a public inquiry; or, at the very least, having the same protection as such a worker (**Gilham**, paras 8 and 46). The appellant is entitled to claim the protection of section 83(2)(a) of the **EqA**.

19. The appellant also maintains that the EJ erred in law by concluding that the appellant had agreed to final determination without any further evidence (ground 3). The EJ erred by asserting that the appellant had "agreed" to determination of the issues without the necessity of further procedure, including evidence being led, if necessary. The appellant's stated agreement was simply to determination of the issues which the respondents emphatically insisted upon; and that such determination should be made by written submissions. The appellant is not prevented, as a matter of law or otherwise, from insisting that further evidence is required in any event. The EJ's decision to contrary effect (at para 56 of the judgment) has no basis in law and no such basis is asserted by him.

20. The appellant invited the EAT to allow his appeal and to make an order to the effect that he is the holder of a public office in terms of section 50(2)(b) of the **EqA**; and is also a worker within the meaning of section 230(3)(b) of the **Employment Rights Act 1996**. As a consequence, the ET has jurisdiction to consider the appellant's claims for disability discrimination.

Submissions for the respondent

21. The respondents' submissions on this issue before the ET are set out by the EJ at paragraphs 32 – 47 of his judgment. I will not repeat them. The respondents' outline submissions set out the basis upon which the respondents maintained that the EJ had not erred in the decisions reached by him. Those submissions were made by reference to the grounds of appeal.

Ground 1

22. The appellant alleges the ET erred in law by concluding that it did not have jurisdiction to

hear the complaints of discrimination and complaints of error of law (a) in the ET's finding that he did not have the status of a holder of public office in terms of s.50(2)(b) of **EqA**; (b) in its finding that he acted as a self-employed advocate when appointed as lead junior counsel to the SCAI; (c) in its finding that his appointment as junior counsel did not give rise to an "employment relationship"; (d) in its finding that he was not a "worker" within section 83(2)(a) of the **Equality Act 2010**. The respondents maintain that the ET did not err in law in reaching these conclusions.

23. At para. 64 of the ET's judgment, with reference to the letter from Angela Constance MSP of 4th September 2016, the ET correctly understood the meaning and significance of the letter. The author is noting the intention of Ms O'Brien to appoint the claimant as Junior Counsel to the Inquiry. She is not granting approval to his appointment. In writing she specifically refers to "You [i.e. Ms O'Brien] have advised that you intend to appoint John Halley, Advocate as Junior Counsel to the inquiry." There is no basis upon which it can be said that the appellant was appointed to an office or post, appointment to which was made either on the recommendation of, or subject to the approval of, a member of the executive (section 50(2)(b)).

24. At para. 65 the ET confirms "The power to appoint the claimant rested entirely with Ms O'Brien as the chair of the SCAI, and this is accepted by Ms Constance in her letter". That is consistent with the **Inquiries (Scotland) Rules 2007** which recognises that all appointments of counsel to do inquiry work are made by the chair. Rule 2(1) of those rules provides: "'counsel to the inquiry' means a qualified lawyer, if any, who is appointed by the chairman to act as counsel for the inquiry." There is no provision for the appointment of counsel for the inquiry by a Minister and that is not surprising given the fundamental principle that public inquiries are and must be seen to be independent of government.

25. The ET was entitled and correct to reject the appellant's contention that, on the facts, there was a necessary "component of approval which was considered necessary by a member of the executive" (see ET judgment paragraph 61). The content of the letter was evidence agreed by the parties (see ET judgment paragraphs 56 –57). The ET's conclusion reflects the plain meaning of the

letter and is based on a finding in fact as to what were the circumstances of the appointment. If the interpretation of the circumstances of the appellant's appointment was not a matter of fact, the EJ's construction of the letter was sound in law.

26. The requirements of s.50(2)(b) of the **EqA** not being met by the terms of the appellant's appointment, there is no error of law in the ET's conclusion (see ET judgment at paragraph 64) that there is no basis upon which it can be said that the appellant was appointed to an office or post, appointment to which was made either on the recommendation of, or subject to the approval of, a member of the executive (section 50(2)(b)). In consequence he did not have the status of being the holder of a public office for the purposes of his claim of discrimination.

27. The ET did not err in law in finding (see ET judgment paragraph 85) that the appellant acted as a self-employed advocate when appointed as lead junior counsel to the SCAI. The EJ noted, as part of his conclusions that the requirements of s.50(2)(b) **EqA** were not met, that his view was that in carrying his duties as counsel to the inquiry the appellant carried out duties which, taken together, related to the work of an advocate "and provide no persuasive basis that the claimant was appointed as the holder of a public office" (see ET judgment at paragraph 71). The ET was entitled to accept the submission by the respondents that the appellant's duties (as set out in the letter of 4th September 2015 from Angela Constance) were consistent with those of an Advocate in practice at the Bar.

28. Further confirmation of the appellant's status as a practising advocate is that his claims for payment for work done were, as required by the letter of 4th September 2015, submitted via fee notes sent to the second respondent (the secretary to the inquiry) from his clerk, and that, when payment was not forthcoming, he complained to the Faculty of Advocates, using the standard procedure available to advocates for the collection of fees and the resolving of fee disputes. Advocates' clerks are employed by Faculty Services Ltd., which is a service company owned by the Faculty of Advocates and operates to support practising advocates in their work.

29. The EJ was entitled to have regard, in reaching the above view, to the summary of the duties of a practising advocate as set out by Lord President Inglis in **Batchelor v Pattison and Mackersy**

(1876) 3R 914, at 918, which includes the following statement:

> "the nature of the advocate's office makes it clear that in the performance of his duty he must be entirely independent, and act according to his own discretion and judgment in the conduct of the cause for his client. His legal right is to conduct the cause without any regard to the wishes of his client, so long as his mandate is unrecalled, and what he does bona fide according to his own judgment will bind his client and will not expose him to any action for what he has done, even if the client's interests are thereby prejudiced."

30. From around October 2016 when the appellant was granted "exempted absence" by the Faculty of Advocates, he was not entitled to carry out any work as an advocate so long as he was absent on that basis. Until that date he was entitled to, and did, carry out such work as he was instructed to do for SCAI, as a practising advocate. He has remained on exempted absence since then. The appellant is not correct in maintaining that a finding that he was appointed in the capacity of a practising advocate would leave him "without the workplace protections from disability discrimination afforded by Part 5 of the Equality Act 2010." As noted by the ET in its judgment at paragraph 86, section 48 of the **EqA** makes provision for extending the protections of Part 5 of the Act (covering discrimination, harassment and victimisation) to barristers and advocates. The specific provision of such protection is evidence that Parliament considered that practising advocates and barristers did not fall within the definition of "worker" in section 83(2)(a) of the **EqA**.

31. The ET did not err in finding that, on the evidence before it, there was no basis for finding that an employment relationship existed between the appellant, the inquiry chair and the Minister (see ET judgment at paragraphs 69 - 70). The statement in the letter sent to the appellant by Ms Constance and repeated in the letter sent by Ms O'Brien shows that there was no intention on the part of either to enter into an employer / employee relationship with the appellant; both letters stated expressly that the appointment of the appellant did not constitute an offer or a contract of employment and did not attract any salary, pension or similar benefits. The letter is, however, wholly compatible with an

intention to enter into a relationship where the appellant would make himself available to be instructed to provide legal services to SCAI as a self-employed professional. The terms of the letter from the chair made it clear that he was to claim his "fees" by rendering fee notes to the second respondent and that the appellant was to arrange for "his clerk" to liaise with the secretary to the inquiry for this purpose.

32. The ET did not err in finding that the Appellant was not a "worker" for the purposes of section 83(2)(a) of the **EqA**. Notwithstanding the difference in wording between that provision and s.230 of the **Employment Rights Act 1996**, it is established that the same test applies. In **Pimlico Plumbers Ltd. v Smith** [2018] I.C.R. 1511, the Supreme Court held this difference in wording was a "distinction without a difference", see paras. 13-15. While the definition found in section 83(2)(a) of the **EqA** does not expressly exclude from the definition of employment work under which the party receiving services has the status of a client or customer of the party providing these, it is to be read as having that effect. The appellant was accordingly, as the ET held (see ET judgment at paragraph 89), someone who lacked the status and eligibility of a "worker" for the purposes of bringing a claim under the **EqA**.

Ground 2

33. For the reasons given above in respect of Ground 1, the ET did not err in concluding that the appointment of the appellant as counsel to the SCAI was an agreement to work within the scope of his practice as a self-employed advocate.

34. The ET did not err in its interpretation of the decision in **O'Brien**. The finding that a recorder of the Crown Court had, in holding that role, an "employment relationship" that enabled him to claim he was a "worker" for the purposes of EU law and thus entitled to rely on the **Part Time Workers Directive** in bringing a claim in respect of less favourable treatment does not assist the appellant. As the ET correctly held it is "a significant and unbridgeable stretch to argue that the position of a self-employed advocate is analogous to a judicial office-holder" (see ET judgment at paragraph 82).

35. Further, for the purposes of EU law, the concept of "worker" excludes "independent providers

of services who are not in a relationship of subordination with the person who receives the service." (per Lord Wilson in **Pimlico Plumbers Ltd** at para. 14). As a self-employed advocate the appellant was not in a relationship of subordination with the first-named respondent. In **Halawi v WDFG UK Ltd. t/a World Duty Free** [2015] IRLR 50, it was confirmed by Arden LJ (at paragraph 44) that under EU law the notion of 'subordination' was required for the EU definition of "worker". Practising advocates appointed as counsel to public inquiries are independent providers of legal services and are not in any relationship of subordination.

36. As for the decision in **Gilham**, that again is a case which concerns, in the context of a whistleblowing claim, the status of a judicial officeholder. As such it has no application to the circumstances of the appellant. Also, the Supreme Court reached its decision not on the basis that DJ Gilham was a "worker" under a contractual arrangement, but on the basis that she should enjoy her right to freedom of expression as an officeholder. Depriving her of this right on grounds of her occupational status would breach Article 14 of **ECHR**, and to avoid this outcome, the Supreme Court held that the **Employment Rights Act 1996** should be read and given effect to in such a way as to extend whistleblowing protection to the holders of judicial office. There is nothing in that decision that supports the argument that the appellant is either a "worker" or the holder of public office for the purposes of the **EqA**. The ET did not err in rejecting the Appellant's submissions based on the cases of **O'Brien** and **Gilham**.

37. The ET did not err in rejecting the submission that the nature of the appellant's obligations arising from his appointment as junior counsel to the SCAI were fundamentally different in character from the obligations owed by an advocate in practice who has been instructed to carry out legal work. The EJ considered the scope of the activities which were attached to his appointment as Lead Junior Counsel to the SCAI and he was entitled to find, on the evidence that was before him, that in carrying out these duties the appellant was carrying out the activities of a practising advocate (see ET judgment paragraphs 83-86). The EJ did not misunderstand the relevance of EU law to the appellant's claims. The appellant, as a self-employed practising advocate, was not a "worker" under EU law.

38. The duty to interpret the **EqA** in a way which avoided unlawful discrimination does not assist the appellant in establishing he had the status of "worker" or holder of public office under that Act. The respondents did not accept that the EJ failed to understand the nature of the appellant's appointment as counsel to the SCAI. The appellant, in his capacity as counsel to the SCAI, was not a "worker" in terms of section 230(3)(b) of the **Employment Rights Act 1996**. He was not a "limb (b)" worker because he provided professional services to a client. Neither was he the holder of public office for the purposes of section 50(2)(b) of the **EqA**. Further, in his capacity as a practising advocate he enjoyed protection against discrimination under section 48(6) of the **EqA**. The respondent did not accept that the decisions in **O'Brien** and **Gilham** assisted the appellant in establishing his status as a "worker" in terms of section 83(2)(a).

Ground 3

39. The respondent submitted that the EJ did not err in finding (see ET judgment paragraph 1) that the parties had agreed that the issue of the appellant's status as the holder of a public office and "worker" should be determined by way of written submissions only. Neither did he err in taking as agreed evidence, available to inform his conclusions, the letters sent by Ms Constance dated 28 August 2014 and Ms O'Brien dated 4 September 2015. The appellant himself says in his appeal that his "agreement was simply to determination of the issues which the respondents emphatically insisted upon; and that such determination should be made by written submissions." The EJ did not err, standing the agreement that had been reached, in rejecting the appellant's suggestion that further evidence, beyond the documents he treated as agreed, might be required before a final determination could be made. (see ET judgment paragraph 56).

40. The respondent submitted that the appeal should be refused.

Decision

Introduction

41. In addition to the two central questions to this appeal, first, is the appellant the holder of a public office and, second, is the appellant a worker, the appeal must also address the third ground of appeal, which is set out in paragraph [7] above. If further evidence is, in fact, necessary to determine the two central questions it would, perhaps, be unnecessary to consider the decision of the ET in relation to them at this stage. Accordingly, it is appropriate to address Ground 3 first.

Ground 3

42. In granting permission on this ground, Judge Stout anticipated that it was inevitable that the question of whether evidence was required would be traversed by the parties in the course of arguing about grounds 1 and 2. Few things are inevitable. In the event, the appellant's submissions did no more than make the assertions set out in paragraph [19] above. Most pertinently, beyond the broad assertions made, the appellant has identified no evidence which he contends is germane to grounds 1 and 2. That, alone, is sufficient to deal with ground 3, however, it is appropriate to address another matter relative to it.

43. At a preliminary hearing (by CVP) on 24 May 2024, presided over by EJ Macleod, the appellant accepted that there was a point of law to be addressed; and it was the appellant who proposed that the preliminary issue could be dealt with on the basis of written submissions only by the EJ in chambers. The solicitor for the respondents assented to this proposal. The direction relative to the making of written submissions was discussed. A case management order was then made to facilitate the determination of the preliminary issue by written submissions. No issue was taken with the case management order at the time. It was open to the appellant to seek to have it varied, suspended or set aside. No such application was made.

44. In the written submissions made by the appellant in compliance with the case management order, at paragraph [2], the appellant asserted that whether he was an officeholder (sic) within the meaning of section 50(2)(b) of the **EqA** was a matter for evidence. He went on to submit, "There is *some* evidence available on the papers. However, it may be that no final factual determination can be made without evidence being led". The EJ concluded that he was able to resolve the preliminary issue

on the evidence before him without evidence being led. From the terms of the appellant's written submissions, it is clear that he contemplated that scenario

45. At paragraph [9] of his written submissions, the appellant set out what he describes as "Evidence of factual background". Paragraph [10] of those written submissions commences, "It follows from the evidence of the factual background to the claimant's appointment that the characterisation of the claimant's appointment as counsel to the inquiry in a Public Inquiry under the 2005 Act falls to be distinguished from "normal" basis of instruction of self-employed Advocates …". The written submissions conclude (at paragraph [14]) that, in effect, if the ET did not find in the appellant's favour on the preliminary issue, "… evidence will require to be led before the mixed questions of fact and law involved can be determined."

46. The position adopted by the appellant on the issue of evidence is inherently contradictory. If there was sufficient evidence before the EJ to enable him to hold the appellant was the holder of a public office and / or a worker, how could it be that there was insufficient evidence to hold that he was not? Moreover, in his written submissions the appellant did not assert that evidence was required to resolve the preliminary issue and did not identify what that evidence was.

47. The approach to documents set out by the EJ at paragraph 56 of his judgment was entirely appropriate. Ground 3 is without merit and is dismissed.

Is the appellant the holder of a public office?

48. The starting point in a consideration of this issue is section 50 of the **EqA**. In particular, subsection (2) thereof which *inter alia* provides:

> "A public office is—
>
> (a) an office or post, appointment to which is made by a member of the executive;
>
> (b) an office or post, appointment to which is made on the recommendation of, or subject to the approval of, a member of the executive"

Sub-subsections (c) and (d) are of no application to the present case.

49. By virtue of section 212(7) of the **EqA**, "any part of the Scottish Administration" is a "member of the executive". The term "Scottish Administration", as used within the **EqA**, is defined by section 126(7)(a) of the **Scotland Act 1998** as meaning, "(i) members of the Scottish Government and junior Scottish Ministers, and (ii) the holders of offices in the Scottish Administration which are not ministerial offices. The Cabinet Secretary for Education and Lifelong Learning is a member of the Scottish Government.

50. The central question is whether or not the appellant's appointment was either made by a member of the executive, or was made on the recommendation of, or subject to the approval of, a member of the executive. Two letters – the terms of which are not disputed – are central to this question. First, that from the then Cabinet Secretary for Education and Lifelong Learning to the then chair of the SCAI dated 28 August 2015. Second, that from the then chair of the SCAI to the appellant dated 4 September 2015. The full terms of the letters are set out in paragraphs 59 and 60 of the judgment of the ET. I do not propose to set these out again in full, referring only to the pertinent parts of them, below.

51. The letter from the Cabinet Secretary "provides a determination in respect of the remuneration and expenses of Inquiry Counsel under section 39(1) of the Inquiries Act 2005". It goes on to state that "You (i.e. the then chair of the SCAI) have advised that you intend to appoint (the appellant) as Junior Counsel to the Inquiry." It goes on to make a determination in relation to remuneration and expenses, in relation to "this appointment" (i.e. the appointment of the appellant by the chair of the SCAI to act as Junior Counsel to the Inquiry).

52. Section 39(1) of the **2005 Act** is in the following terms;

> "The Minister may agree to pay to –
>
> (a) the members of the inquiry panel,
>
> (b) any assessor, counsel or solicitor to the inquiry, and
>
> (c) any person engaged to provide assistance to the inquiry,
>
> such remuneration and expenses as the Minister may determine"

53. The letter from the then chair of the SCAI states, "I (i.e. the then chair of the SCAI) wish to appoint you (i.e. the appellant) to act as Lead Junior Counsel to the (SCAI). You have accepted this appointment, and this letter makes your appointment formal." The letter goes on to set out the commencement and duration of the appointment; the work of counsel to the inquiry; the place of work; information technology and remuneration, expenses and fee notes (in the last part referring to the determination made by the Cabinet Secretary in terms of section 39). The letter also attached a copy of that determination.

54. The factual issue that requires to be resolved for the purposes of section 50(2) is whether the appointment is to a public office, in that it was made either by a member of the executive; or on the recommendation of, or subject to the approval of, a member of the executive. From the terms of paragraph [2] of his written submissions to the ET, the appellant appears to rely on the latter, however, I address both.

55. The ET1 in respect of the first respondent is silent on the issue of the appellant's appointment. In his ET1 in respect of the second respondent the appellant states that, "(he) was appointed to the office of Lead Junior Counsel to the (SCAI) by letter dated 4 September 2015." The letter of that date is that from the then the chair of the SCAI to the appellant. The relevant part of that letter is quoted above at paragraph [53]. The appointment was not made by a member of the executive. It was made by the then chair of the SCAI. That is entirely consistent with the definition of "counsel to the inquiry" that is to be found in rule 2(1) of **The Inquiries (Scotland) Rules 2007** in terms of which *"counsel to the inquiry"* means a qualified lawyer, if any, who is appointed by the chairman to act as counsel for the inquiry.

56. I then turn to consider whether the appointment was made on the recommendation of, or subject to the approval of, a member of the executive. Neither ET1 addresses this. The appellant's submissions to the ET touch upon the issue, by reference only to the letter from the then Cabinet Secretary for Education and Lifelong Learning to the then chair of the SCAI dated 28 August 2015, referred to above at paragraph [51].

57. There are two avenues to public office in sub-section 50(2)(b) – recommendation or approval. There is nothing within the letter of 28 August 2015 which suggests either. The language, "You have advised that you intend to appoint (the appellant) …" is not redolent of recommendation. Equally, there is nothing, whatsoever, within the terms of the letter to suggest approval. If it had been the intention of the Cabinet Secretary to approve the appointment that could easily have been done in the letter (logically between the noting of the intention to appoint and the determination in respect of remuneration and expenses).The appointment was not made on the recommendation of, or with the approval of, a member of the executive.

58. It follows from the foregoing that the appellant is not the holder of a public office.

Is the appellant a worker?

59. In their submissions to the ET, the respondents acknowledged that anyone who could be categorised as a worker may be entitled to bring a complaint under part 5 of the **EqA**, however, as a practising advocate the appellant was not a worker, as defined by sub-section 83(2)(a) of that Act, there being express, separate provision in respect of advocates in section 48(6) which infers that an advocate is not a worker.

60. The term "worker" is defined in sub-section 203(3) of the **Employment Rights Act 1996**. It is not a defined term in section 83 of the **EqA**. The term defined in section 83 is "Employment", with reliance in this case placed on sub-sub-section (2)(a), that meaning employment under a contract of employment, a contract of apprenticeship or a contract personally to do work. In **Pimlico Plumbers Ltd**, the Supreme Court held this difference in wording was a "distinction without a difference. I say no more in relation to it.

61. In determining the appellant's status, it is necessary to consider the nature of the work anticipated. Four particular areas were identified in the letter by the then chair of the SCAI to the appellant dated 4 September 2015, however, it is clear from the wording of the letter that the matters identified were not an exhaustive list ("the work of Counsel to the Inquiry will include"). First, the provision of legal advice to the inquiry panel and inquiry team in relation to any matter connected

with the inquiry e.g. the inquiry's terms of reference, scope of the panel's powers, requests for evidence, protocols / procedures of the Inquiry, designation of core participants, identification of witnesses and warning letters. Second, the consideration of documentary and other evidence before the inquiry and advising on evidence to be presented to, and the witnesses whose evidence is to be taken by, the inquiry; appearance at the oral (and any other) hearings of the inquiry to present evidence, examine witnesses and make submissions as required. Third, assisting in the drafting the report of the inquiry. Fourth, possibly acting as counsel for the Chair and other members of the panel in any court proceedings arising out of the inquiry.

62. The nature of the work identified in all but the third heading is such as might ordinarily be undertaken by counsel instructed in a matter. It is unnecessary to say anything further in relation to those. The third matter, assisting in the drafting of the report of the inquiry is, perhaps, in a different category, however, when one considers it carefully, it is no more than the ordinary work of counsel in drafting documents – in this case for the limited purpose of assisting in the preparation of the inquiry report. Those were the particular needs and requirements of the inquiry, as identified by the then chair at the pot of the appellant's appointment.

63. Taken together, there is nothing in the matters identified to suggest that the appellant is a worker, as opposed to an instructed advocate. That is not, however, the end of the matter. There are, in my view, five further matters of relevance.

64. Four of those matters are contained within the letter by the then chair of the SCAI. First, the letter stipulates that the appellant would normally undertake his work for the inquiry from its office premises, however, there was "a facility" for the appellant to work from home or elsewhere. Second, the letter states in terms that, "(the appellant's) appointment does not constitute an offer or contract of employment and does not attract any salary, pension or similar benefits". Third, the letter states that the appellant's clerk was to liaise with the secretary to the inquiry in relation to the rendering and payment of fee notes. Fourth, there was no cap to the maximum number of hours that the appellant was permitted to work in any week. The fifth further matter of relevance is the fact that the appellant's

appointment did not preclude him from carrying out work for other parties.

65. Having regard to the scale of the inquiry, the fact that the appellant was to "normally" undertake his work for the inquiry from its office premises is unsurprising. It does not detract from the appellant's independence. The remaining further matters of relevance are all entirely consistent with the position that would pertain with any instructed advocate.

66. The appellant had the choice as to whether to accept the appointment offered to him. In the circumstances of a public inquiry, as with any work in which an advocate is instructed, he must satisfy the needs and requirements of the inquiry. Whilst they may, in certain respects, be somewhat different from the circumstances of, say, a defended civil action in the Court of Session, that does not detract from the advocate's independence. **O'Brien** (at paragraph 39) recognised that the room for manoeuvre may be small, but the fact remains that the appellant was able to act according to his own discretion and judgment in the conduct of the cause for the inquiry (cf. **Batchelor**).

67. The appellant was not a worker and did not have the protection of section 83 of the **EqA**. As an advocate, he has the protection given by sub-section 48(6) of that Act.

Other matters raised by the appellant

68. A number of other matters were raised by the appellant in his skeleton argument. In light of the decision I have reached it is unnecessary for me to comment further upon them.

Disposal

69. The appeal is dismissed.