EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondents**
Ms A Bailey		(1) Stonewall Equality Limited (2) Garden Court Chambers Limited (3) Rajiv Menon QC, Stephanie Harrison QC and Liz Davies, sued as Representatives of all members of Garden Court Chambers (except the Claimant)

Heard at: London Central **On**: 11 and 12 February 2021

Before: Employment Judge Stout

Representations
For the claimant: Ben Cooper QC and Rachel Owusu-Agyei
For Stonewall Equality Limited: Robin White
For Garden Court Chambers Limited and Garden Court Chambers: Anthony Johnston

JUDGMENT

The judgment of the Tribunal is that the Respondents' applications to strike out the Claimant's claims under Rule 37(1)(a) and/or for a deposit order under Rule 39 is dismissed. The Claimant's application to amend is granted.

REASONS

1. The Claimant is a barrister at Garden Court Chambers (the Chambers), an unincorporated association whose service company is the Second Respondent (the Service Company). The First Respondent (Stonewall) is a charity that promotes equality and human rights for lesbian, gay, bisexual and trans people. In these proceedings, she brings (or seeks to bring) claims for victimisation and/or indirect sex or sexual orientation discrimination against the Service Company and Chambers, and a claim of instructing, causing or inducing that unlawful conduct against Stonewall.

The type of hearing

2. This has been a remote electronic hearing under Rule 46 which has been consented to by the parties. The form of remote hearing was video (V). A face to face hearing was not held because of the pandemic.

3. The public was invited to observe via a notice on Courtserve.net. Many members of the public joined, with cameras off. There were some issues with connectivity. Ms White suffered a powercut at 3.4pm on Day 1, so we adjourned early and resumed at 9.30am on Day 2. There were some difficulties hearing the Judge during the giving of judgment. That deficiency is rectified by providing these written reasons which are now publicly available.

4. The participants were told that is was an offence to record the proceedings.

5. With the consent of the parties, I granted permission to observers to report the proceedings by “tweet” if they wished.

The issues

6. The issues to be determined at this hearing were:

a. Whether a Rule 50 order should be made in respect of the names of three third parties in the bundle;
b. The Claimant's amendment application;
c. The Respondents' applications for strike-out or deposit orders.

7. The First Respondent had also by letter of 11 February 2021 made an application for costs against the Claimant in respect of preparation of the bundle for this hearing. In the event, after hearing brief submissions at the end of the hearing, in the course of which Mr Cooper for the Claimant indicated that if I was going to entertain the costs application, she may wish to make a counter-application. I therefore indicated that I would not determine the costs application at this hearing. It therefore remains an application that may yet be made at a later date by the First Respondent, if so advised.

Rule 50 application

8. Ms White on behalf of the First Respondent made an application for the anonymisation / redaction from the bundle for the hearing of the names of three individual members of the Stonewall Trans Advisory Group (STAG) on the basis that their names were of limited or no relevance to the issues before the Tribunal and making their names public in these proceedings would potentially expose them to public criticism (or worse) in the light of the sensitivity of the issues at what I have referred to below as the emotional heart of the case. The application was made without supporting evidence.

9. The Claimant resisted that application on the basis that a key issue in this case is how Stonewall influenced the actions of the Chambers/Service Company, that the three individuals had sought to involve themselves in the disciplining of the Claimant in this case and were in the same position as any other direct actor in proceedings. There were no proper grounds for anonymising them and the important principle of open justice outweighed the individual's rights to privacy in this case.

10. I refused the application for reasons which I gave orally at the hearing and set out below.

11. Rule 50 provides as follows:

> **50.— Privacy and restrictions on disclosure**
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> (1) A Tribunal may at any stage of the proceedings, on its own initiative or on application, make an order with a view to preventing or restricting the public disclosure of any aspect of those proceedings so far as it considers necessary in the interests of justice or in order to protect the Convention rights of any person or in the circumstances identified in section 10A of the Employment Tribunals Act.
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> (2) In considering whether to make an order under this rule, the Tribunal shall give full weight to the principle of open justice and to the Convention right to freedom of expression.
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> …
> (4) Any party, or other person with a legitimate interest, who has not had a reasonable opportunity to make representations before an order under this rule is made may apply to the Tribunal in writing for the order to be revoked or discharged, either on the basis of written representations or, if requested, at a hearing.

12. The principles to be applied in cases where article 8 is relied on were summarized by Simler J in Fallows and appear to the Tribunal to hold good in the light of the Supreme Court's guidance in *Khuja v Times Newspaper Ltd* [2017] UKSC 49, [2019] AC 161:

> 48. The authorities to which both I and the employment judge were referred, including In re Guardian News and Media Ltd [2010] 2 AC 697 , A v British Broadcasting Corpn (Secretary of State for the Home Department intervening) [2015] AC 588 , In re S (A Child) (Identification: Restrictions on Publication) [2005] 1 AC 593 and Global Torch Ltd v Apex Global Management Ltd [2013] 1 WLR 2993 , emphasise the following points of relevance to this appeal:
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> > (i) That the burden of establishing any derogation from the fundamental principle of open justice or full reporting lies on the person seeking that derogation. It must be established by clear and cogent evidence that harm will be done by reporting to the privacy rights of the person seeking the restriction on full reporting so as to make it necessary to derogate from the principle of open justice.
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> > (ii) Where full reporting of proceedings is unlikely to indicate whether a damaging allegation is true or false, courts and tribunals should credit the public with the ability to understand that unproven allegations are no more than that. Where such a case proceeds to judgment, courts and tribunals can mitigate the risk of misunderstanding by making clear that they have not adjudicated on the truth or otherwise of the damaging allegation.
> >
> > (iii) The open justice principle is grounded in the public interest, irrespective of any particular public interest the facts of the case give rise to. It is no answer therefore for a party seeking restrictions on publication

> in an employment case to contend that the employment tribunal proceedings are essentially private and of no public interest accordingly.
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> (iv) It is an aspect of open justice and freedom of expression more generally that courts respect not only the substance of ideas and information but also the form in which they are conveyed. Thus as Lord Rodger of Earlsferry JSC recognised in *In re Guardian News and Media Ltd*, para 63:
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> "The judges are recognising that editors know best how to present material in a way that will interest the readers of their particular publication and so help them to absorb the information. A requirement to report it in some austere, abstract form, devoid of much of its human interest, could well mean that the report would not be read and the information would not be passed on."
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> 49. As for the balancing exercise itself [i.e. the balancing exercise between Articles 8 and 10], Lord Steyn described the exercise to be conducted in *In re S (A Child)*, para 17 as follows:
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> "What does, however, emerge clearly from the opinions are four propositions. First, neither article has as such precedence over the other. Secondly, where the values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary. Thirdly, the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each. For convenience, I will call this the ultimate balancing test."

13. It must be remembered that anonymisation is itself a significant infringement on the principle of open justice and Article 10 rights even if the hearing itself is public. As Lord Rodger JSC put it in *In re Guardian News and Media Ltd* [2010] 2 AC 697 at para 63 "What's in a name?" 'A lot', the press would answer".

14. There is a significant public interest in open justice in any case, even if it does not raise issues that are of wider public interest: see *F v G* (UKEAT/0042/11), para 49. However, if the issues raised do not have a wider public interest, that may be a factor in favour of granting an order: see *EF and NP v AB and ors* (UKEAT/0525/13), para 72 and *A v B* [2010] ICR 849 at para 13. What is of public interest is to be assessed objectively; it is not a question of what is of prurient interest to the public: see *EF and NP* at paras 50 and 68 and the cases cited therein.

15. The issue at the heart of these proceedings concerning trans women is a sensitive one which has caused significant public controversy. I do accept that the publication of someone's name in connection with that debate has the potential to interfere with their Article 8 rights, but I have not received any evidence in this case as to what the extent of that interference would be for these particular individuals. It may be that these people already have a public profile in relation to the matters at issue in this case. However, the material in the bundle in which they feature is not public material, it is material from a private Facebook group, disclosed to the Claimant specifically for the purposes of these proceedings. I am therefore prepared to treat it for the purposes of this preliminary hearing as being private material in respect of which they enjoyed a reasonable expectation that it would not be made public.

16. However, it does not follow an order under Rule 50 should be made. The starting point is the principle of open justice, which is as important at this preliminary stage as it is at the full merits hearing. A name is important to the principle of open justice as the authorities indicate, but I am not satisfied that the names of individuals are particularly important to the issues before me at this hearing. It is relevant and important that individual members of STAG expressed support for the taking of action against the Claimant, but it is not relevant who did. If it were, I would expect the Claimant to have identified those individuals in the proceedings. She has not done so. Their names did not featured in any of the material I have read about this case in advance of the hearing. At this preliminary stage, I cannot make any assessment as to the importance of these individuals to these proceedings generally. I can say, with considerable confidence, that they do not appear to me to be of any relevance to the issues I have to decide at this hearing. On the other hand, if I do not make the order today, there may be significant impacts on these indviduals which will be irremediable.

17. In those circumstances, while giving due weight to the principle of open justice, it seems to me that the right thing at this stage, consistent with

balancing the competing interests, is to make a Rule 50 order, to last until the first day of the final hearing (unless discharged by earlier order) requiring that the identity of these three individuals be redacted from the public hearing bundle and not otherwise identified in these proceedings. The three individuals will be identified as Individuals A, B and C in accordance with the redacted bundle.

18. I emphasised that were this application made in this way at the final hearing I would be unlikely to have granted it. If Stonewall seeks to renew its application at the final hearing, it will need to be supported by evidence from the individuals in question as to the impact on them and it will be a matter for the Tribunal at that hearing whether a Rule 50 order is continued.

The evidence and submissions

19. Each party provided a Skeleton Argument and made oral submissions. The parties provided a 583-page bundle (agreed apart from the above redactions). I did not read the whole bundle, but only the documents to which I was taken in argument.

20. There was also a witness statement from Judy Khan QC, former Head of the Chambers. Mr Johnston applied to call Ms Khan to give evidence and to tender her for cross-examination. I refused this application for reasons I gave orally at the hearing. In brief, a strike-out application is not supposed to be a mini trial of the issues and it would not be possible fairly to test Ms Khan's evidence in the context of this hearing prior to full disclosure (even if there were time, which there is not, despite the two-day listing). The parties are free to make submissions about Ms Khan's evidence and I can judge which parts are likely to be irrefutable and which may be susceptible to cross-examination. In any event, some of Ms Khan's evidence is in strict terms hearsay and therefore limited in the weight that I can give it – a point that will not be changed by tendering her for cross-examination.

Amendment / strike-out / deposit order

Introduction

21. I gave reasons orally at the hearing and what follows is the written record of that judgment, with minor amendments.

22. The emotional heart of the case, if I can put it like that for present purposes, is the heated public debate in recent years concerning gender theory insofar as it relates to trans persons. The Claimant in this case believes that Stonewall's position in that debate (which she sums up in her claim form as being that *"'Trans Women Are Women' …for all purposes and in all circumstances purely and exclusively on the basis of their chosen identity"*) has been sexist and homophobic and detrimental to women and lesbians, both of which are protected characteristics under the EA 2010 and characteristics of the Claimant. The two Respondents to the proceedings are organisations which, as Ms White put it in her submissions, are well known for being at the forefront in advancing equality generally. In this case, the views of the Claimant and that of Stonewall have clashed on a very sensitive topic.

23. The essence of the legal claim that the Claimant makes is that In December 2018 she made clear in an email to all members of Chambers that she was opposed to Chambers associating with Stonewall through its Diversity Champions' Scheme and expressed herself in terms that alleged that Stonewall was acting in relation to its campaign in breach of the Equality Act 2010 (EA 2010). Then in October 2019 the Claimant launched (with others) an organisation known as the LGB Alliance to campaign for LGB rights without the gender theory espoused by Stonewall, and made various tweets in connection with that launch. As a result of these acts, some of which the Claimant maintains in these proceedings were protected acts for the purposes of s 27 of the EA 2010, and/or as a result of antipathy by others towards her expressed views (which antipathy the Claimant contends amounts to an indirectly discriminatory practice), the Claimant alleges that she suffered various detriments, including a significant downturn in

instructions and consequent loss of income. Stonewall complained about her to Chambers, her tweets were investigated by Chambers and complaints about two of those tweets were upheld and the Claimant asked to remove the tweets, which she did not do.

Case management history

24. At a case management hearing before me on 21 September 2020 Ms McColgan QC who was then representing the Claimant indicated that the Claimant intended to bring an application to amend her claim so as to add Garden Court Chambers, the unincorporated association as a Respondent to these proceedings. An application to that effect was subsequently made on 12 October 2020. In that application Judy Khan QC, Stephanie Harrison QC and Liz Davies, the then Heads of Chambers, were identified by name, to be sued in a representative capacity on behalf of all members of Garden Court Chambers. The proposed amended claim also made a number of other minor amendments to the claim which were essentially to clarify and update in certain respects the pleading, and to identify where it was said that the proposed third respondent (the Chambers) was responsible for the claims already pleaded.

25. The claim both originally and as amended identified the statutory basis for the claims against the Service Company and the proposed claim against the Chambers as being sections 27 and 19 of the EA 2010 read together with section 47. Section 47 provides, so far as material, that a barrister (or a barrister's clerk: s 47(8)) must not discriminate against (s 47(2)(d)), or victimise (s 47(5)(e)) a person who is a tenant by subjecting them to a detriment. There is also a very broad provision in Section 47(6) that prohibits any person (without any express limitation on their status or identity), in relation to instructing a barrister, from discriminating against or victimising them.

26. Garden Court Chambers and its Service Company objected to the claim being brought on that basis on the grounds that neither Chambers or the Service Company is 'a barrister' within the meaning of section 47. They

sought to resist the amendment, and to strike-out the claim on the basis that it stood no reasonable prospect of success as a result.

27. Stonewall also contended that the claim against it was unarguable because the conditions for liability under s 111 were not fulfilled, specifically that (as required by s 111(7)) Stonewall was not a in position to commit a basic contravention against the Service Company, and (as required by s 111(9)(b)) the Service Company was not in a position to contravene the EA 2010 against the Claimant.

28. There was a further preliminary hearing before me on 30 November 2020 which was intended to be a 30 minute hearing for the purpose of checking whether this Open Preliminary Hearing was still needed. In the event, at that hearing it was apparent the parties had not been able to resolve the dispute on the pleading issues, and there were also a number of other issues that needed to be determined, including in relation to disclosure. The Respondents also indicated at that hearing that it was their position that the Claimant's claim stood no reasonable prospect of success merits, and they therefore sought to strikeout the claim and/or a deposit order on that basis in addition to on the pleading points already identified.

29. Shortly before this hearing on 4 February 2021, the Claimant set out a further proposed amended claim, in this version indicating that in addition or in the alternative to section 47 of the EA 2010 she also relies on s 57 (the provision relating to trade organisations), and on ss 109 and 110 (the effect of which, so far as relevant, is to render employers and principals liable for the acts of their employees and agents).

<u>The law</u>

30. There is no significant dispute as to the legal principles I have to apply to applications to amend, to strike out and for deposit orders.

31. In brief, the Tribunal has a discretion under Rule 29 to permit amendments to a party's statement of case. It is a discretion to be exercised in accordance with the overriding objective (the need to deal with cases in ways which are proportionate to the complexity and importance of the issues and to avoid unnecessary formality being particular important here), and with the principles in *Selkent* [1996] ICR 836, i.e. taking into account all the circumstances, including the nature of the amendment, any applicable time limits, the implications of the amendment in terms of impact on the trial timetable or costs and balancing the injustice/hardship of allowing the amendment against the injustice/hardship of refusing it.

32. If a new claim is to be added by way of amendment, then the Tribunal must consider whether the complaint is out of time, but the parties are agreed that this amendment is in the nature of a relabelling and is not a new claim, and as such there is no need to consider the question of timings (*cf Foxtons Ltd v Ruwiel* UKEAT/0056/08 (18 March 2008) per Elias P at paragraph 13, which was common ground between the parties, post *Galilee v Comr of Police of the Metropolis* [2018] ICR 634 in *Reuters Ltd v Cole* (Appeal No. UKEAT/0258/17/BA at paras 15 and 27).) Nor does the time limit apply where a new respondent is added to an existing claim: *Gillick v BP Chemicals Ltd* [1993] IRLR 437 and *Drinkwater Sabey Ltd v Burnett* [1995] ICR 328.

33. The fact that an amendment is a 'mere' relabelling, however, does not mean that an amendment should automatically be allowed. The *Selkent* principles require that all the circumstances be considered. The Tribunal must consider the timing and manner of the application, although it should not be refused merely because there has been a delay in making it: cf *Mist v Derby Community Health Services NHS Trust* [2016] ICR 543 at para 76 per HHJ Eady QC. The Tribunal must consider all the circumstances, in particular the impact on the proceedings and whether there can still be a fair trial.

34. The underlying merits of the proposed amended claim may be relevant if the Tribunal is in a position to make a fair assessment of those merits, since there

is no point in allowing an amendment to add an utterly hopeless case, but normally it should be assumed that the proposed amended claim is arguable: cf *Woodhouse v Hampshire Hospitals NHS Trust* (UKEAT/0132/12), at para 15.

35. Where the need for an amendment arises because of the 'fault' of the party or a legal adviser that is not necessarily a reason for the amendment to be refused: *"it is not the business of the tribunals to punish parties (or their advisors) for their errors"*: *Evershed v New Star Asset Management* UKEAT/0249/09 at para 33 per Underhill P.

36. So far as strike-out is concerned, Rule 37 permits the Tribunal to strike out all or part of the claim or response at any stage of the proceedings on grounds that it has no reasonable prospect of success. This is also a power to be exercised taking into account all the relevant circumstances, including the overriding objective. A strikeout may not be appropriate in cases where there are substantial disputes of fact, especially in discrimination claims which are highly fact sensitive as the House of Lords emphasised in *Anyanwu* [2001] UKHL 14, [2001] ICR 391 at para 24 *per* Lord Steyn. However, where a dispute of fact can fairly be resolved at a strikeout hearing, or the claim stands no reasonable prospect of success whatever the outcome of the dispute, then a strikeout may be appropriate even in a discrimination claim: *ibid* at para 39 per Lord Hope.

37. So far as deposit orders are concerned, Rule 39 permits the Tribunal where it considers that any specific allegation or argument in the claim or response a little reasonable prospect of success to make an order requiring a party to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument. By sub-section (5) of that rule if the tribunal at any stage following the making of a deposit order decides a specific allegation or argument against the paying party for substantially the reasons given in the deposit order the paying party shall be treated as having acted unreasonably in pursuing that specific allegation for the purpose of Rule 76

costs orders, unless the contrary is shown, and the deposit shall be paid to the other party or parties and will count as part payment in respect of any costs order made under. If a party succeeds on the allegation the deposit shall be refunded.

38. The purpose of the deposit order is to identify at an early-stage claims of little prospect of success and to discourage the pursuit of claims by requiring a sum to be paid about creating a risk of costs if the claimant fails: *Hendon v Ishmael* (2017) ICR 486 at paragraph 10 per Simler J. In deciding what prospects of success a claim or response may have, the Tribunal has a broad discretion and is not restricted to considering purely legal questions. The Tribunal can take into account the credibility of the facts asserted and (if it is in a position to make a proper assessment) the likelihood of them being established at a hearing. It is, however, essential that a deposit order is not made, not made in such amount, as to restrict disproportionately the fair trial rights of the paying party or impair access to justice. There are further detailed provisions in rule 39 dealing with assessing the amount of deposit which I need not deal with at this stage.

<u>My conclusions</u>

39. I intend no disservice to the excellent submissions of all counsel in not summarising them here, in the interests of allowing sufficient time for the other matters we have to deal with today.

40. The merits of the claim are relevant to both the strike-out / deposit orders and the amendment application. I should not permit an amendment to bring an unarguable case, nor should I strike out or make a deposit order in respect of the existing claim if the proposed amendment would remedy the alleged deficiencies (and it is otherwise appropriate to allow an amendment applying the legal principles I have identified).

41. I deal first with the merits of the proposed amended claim against the Chambers and the Service Company. There is no dispute that the statutory

home identified for this claim by the Claimant last week (s 57) is the proper basis for such a claim. There is no dispute, and I accept, that both the Chambers as an unincorporated association, and the Service Company, are trade organisations within the meaning of section 57. By s 57(7) a trade organisation includes *"any other organisation whose members carry on a particular trade or profession for the purposes of which the organisation exists"* and it is clear from *1 Pump Ct, Chambers v Horton* UKEAT/0775/03/MH and *Higham v Horton* [2005] ICR 292, CA that a barristers' chambers fulfils that definition. I cannot see that it makes any difference whether the chambers takes the form of an unincorporated association or a service company or, as here, both. Since trade organisations are prohibited under section 57 from victimising any of their members by subjecting them to any other detriment, it seems to me plain that the Claimant as a member of those organisations can in principle bring a claim against both Chambers and Service Company under the Act.

42. The route by which liability for discrimination and victimisation must be established, however, or (at least in relation to victimisation and possibly also for the indirect discrimination claim in these proceedings) is by way of identifying an individual who is acting as authorised agent or in the course of employment for that organisation and for whose acts the trade organisation is accordingly liable by virtue of ss 109 and 110. Liability can only attach to either Chambers or the Service Company if it can be attached to an individual as the *Reynolds v CLFIS (UK) Ltd* [2015] ICR 1010 case makes clear. Despite invitations from me at both previous case management hearings, the Claimant in this case has not as yet identified any individuals who she says have done unlawful acts, she has just identified detriments to which she has been subjected by the Respondents collectively. That does not mean her claim is unarguable, but for there to be a fair trial individuals will need to be identified. In order to establish liability on the part of the Respondents at trial, the Claimant will need (at least in relation to the victimisation claims) to identify particular individuals who have subjected her to detriments because of her protected acts, and who have done so either in the course of their

employment by the Service Company or as authorised agents of the Service Company or Chambers (although in relation to the claim regarding instructions this difficulty may not arise because of the broad terms of s 47(6)). Given the way that the PCPs are expressed for the indirect discrimination claims, particularly the first which is founded on the opinions of individuals, she will also need to identify what individuals within Chambers she says have an indirectly discriminatory practice of regarding views such as she holds about the trans gender theory debate as bigoted or not worthy of respect.

43. Although the claims will in my judgment need to be further particularised to identify individuals, I am satisfied, in the light of the material in the bundle to which I was taken by Mr Cooper, that there is evidence here to raise a reasonably arguable case on liability for victimisation in respect of the detriments identified at paragraph 24.

44. Taking paragraph 24(b)(ii) and (iv) first, there is evidence that some members of Chambers reacted adversely to the Claimant's email of 14 October 2018, in which she makes what is more than reasonably arguably an allegation that Stonewall has done something unlawful under the EA 2010 because it has *"been complicit in supporting a campaign of harassment… To anyone who questions its trans self – ID ideology, especially lesbians and feminists"*. Stonewall is a provider of services, prohibited under s 29 of the EA 2010 from discriminating against and/or harassing persons to whom it provides services because of their protected characteristics. There is scope for argument whether the Claimant's email fully communicates such an allegation, but it is plainly arguable that it does. There is also evidence that some members of Chambers, and some employees, were concerned about the Claimant's launch of the LGB Alliance in October 2019, and the tweets that the Claimant sent around that time, and that some members of Chambers reacted adversely to that and regarded the Claimant's views as bigoted. There is also evidence, in particular in relation to Michelle Brewer, that supports the argument that she at least was not acting in a purely personal capacity in this

respect, given that she had apparently taken a lead in Chambers on a trans rights working group. The precise status of that group will be a matter for evidence, but there is a more than arguable case here. There is also some evidence that Ms Brewer communicated her views to the Heads of Chambers and/or the management committee.

45. I recognise that the Claimant has not at this stage been able to show that those individuals who expressed views adverse to the Claimant played a material role in subjecting her to the specific alleged detriments of publishing a statement stating that she was under investigation, or upholding the complaint by Stonewall. Nor can she at this stage show that the motivations of those individuals were adopted by those who actually did take the decisions, but that is not necessarily to be expected at this point in the proceedings, before disclosure has been completed and before witness evidence has been heard. That sort of issue is quintessentially one for inference following hearing of all evidence. I am satisfied that the Claimant has established that she has a reasonably arguable case on the merits in relation to detriments 24(b)(ii) and (iv) which stands more than little prospects of success.

46. The detriment at 24(b)(iii) as pleaded at present does not make sense because Stonewall's complaint was not on its face a detriment to which the Claimant was subjected by Chambers or the Service Company, but Mr Cooper has explained today that this paragraph is to be read together with paragraph 17.a where it is alleged that unnamed individuals within Chambers colluded with Stonewall in the submission of the complaint. Thus read, much the same points can be made as with the previous detriments. There is material in the bundle which shows there was interaction between one or more members of Chambers and persons who were at least associated with Stonewall (being on their Stonewall Trans Advisory Group) that could be said to amount to 'collusion' and the claim is not unarguable simply because it is not at this stage clear that those persons were acting as agents of Chambers

or the Service Company or in their capacity as individuals or what effect or link their actions had to the decisions ultimately taken.

47. So far as concerns the detriment at paragraph 24(b)(i), being the withholding of instructions and/or work in 2019, causing the Claimant financial loss, I can also accept that the Claimant has a reasonably arguable case, based on:

    a. the evidence I have already referred to regarding the adverse reaction to her first alleged protected disclosure,
    b. the material in her solicitor's letter of 4 November 2020 which is more than sufficient to establish at this stage that there is an arguable case that the initially very persuasive explanation that Ms Khan gave in her witness statement for the Claimant's reduction in billings is not the whole picture, and
    c. the material from the 2017 task force that Mr Cooper showed me also raises an arguable case (albeit in a very different context) that where a member is poorly regarded for some reason clerking and distribution of work to that member may be affected.

48. As to the claims about compliance with subject access requests in paragraph 24(b)(v), Mr Cooper has clarified today that the Claimant accepts that is not (and could not be as currently pleaded) a claim about any particular individual barrister's response to a subject access request, and claims in relation to individual barrister's responses cannot be brought against Chambers or the Service Company because individual barristers undoubtedly act independently as regards their obligations as data controllers under the data protection legislation. Insofar, however, as this detriment concerns the responses by the Second and Third Respondents, it is properly pleaded, if inadequately particularised, and I am not prepared to say that it stands no or little reasonable prospect of success at this stage given the evidence available in relation to the other claims which has led me to conclude that they are more than reasonably arguable.

49. I turn now to the indirect discrimination claims. The first at paragraph 25(a)(i) relies on a provision, criterion or practice (PCP) that the Chambers and/or Service Company or individuals for which they are liable have a practice of treating gender critical beliefs as being bigoted or otherwise unworthy of respect. The Respondents do not suggest that it is unarguable that this PCP (if it exists) would disadvantage the Claimant as a woman and/or a lesbian. They say there is no basis for the contention that those views which were expressed by certain members of Chambers (as to the Claimant's views being bigoted and unworthy of respect) are anything other than the personal views of individual barrister members and not to be attributed to either Chambers or the service company. In this respect, there is considerable force in the Respondent's position. On the face of it the investigation by Ms Sikand into the Claimant's tweets appears to be measured, reasonable and unobjectionable and I cannot at present see any trace in it of a view that the Claimant's beliefs are bigoted or unworthy of respect. There is also no evidence that the Heads of Chambers who made the ultimate decision about the Claimant hold such views either. However, there is evidence that Ms Brewer and others held such views and sought to communicate them to the Heads of Chambers/ the management committee and that Ms Brewer at least may have been acting as agent of Chambers or the Service Company in relation to her actions (as I have already held). Mr Cooper has also showed me evidence of the way that the request made to Catherine McGahey QC of the Bar Council Ethics Committee for advice in relation to the handling of the complaint against the Claimant was conducted, and the points he made do provide a basis for cross-examination even of Ms Sikand on this issue. As such, it seems to me that even in relation to this claim there is enough material here that I cannot conclude at this stage that it stands no or even little prospect of succeeding at trial.

50. As to the second indirect discrimination claim, the Respondents accept that this is capable of constituting a PCP (even though it could in my judgment be said to be a one-off act, rather than a 'practice'). However, the Respondents submit that it cannot succeed given the facts of this case. That is a difficult

submission to make at a strike-out stage. It may be that the drafting of this PCP is infelicitous, as I would not expect the Claimant to succeed at trial in showing that Chambers allowed Stonewall to "direct" its complaint process - that may be putting it too high. However, the Stonewall complaint of 31 October 2019 in itself plainly seeks to put pressure on Chambers to take action against the Claimant, indeed to the extent of urging Chambers to remove the Claimant from Chambers, and accompanies that with a threat about the ongoing relationship between Chambers and Stonewall itself if Chambers does not take action. There is also evidence that during the investigation there was ongoing interaction between members of chambers (or at least Ms Brewer) and Stonewall (or those associated with Stonewall on the STAG), and that the intention of this interaction was to seek to persuade (at least) Chambers to take action against the Claimant. The factual basis of the alleged second PCP is accordingly arguable. In any event, the factual matters on which this PCP are based are the same as those matters which form the basis of the claim against the Stonewall in instructing causing or inducing Chambers and/or the Service Company to victimise the Claimant in the ways that she has alleged – a claim which I consider stands a more than reasonable prospect of success for reasons to which I shall come. For that reason, even if I were persuaded that this claim stood little prospect of success (and it comes close), I would not consider it appropriate to isolate it for a deposit order.

51. Finally, I deal with the claim against Stonewall, it is plainly arguable from the terms of the complaint of 31 October 2019 that Stonewall sought to induce Chambers to subject the Claimant to a detriment because of her publicly expressed beliefs and the allegations that she had made against Stonewall (some of which were arguably allegations of unlawful conduct under the EA 2010). This is because the email itself sets out examples of the Claimant expressing those beliefs, and then examples of the Claimant making allegations against Stonewall (some of which are on the face arguably protected acts in terms of s 27 of the EA 2010 as they are in much the same terms of the Claimant's email of 14 December 2018 that I have dealt with

above). If the Claimant establishes that taking action against her for her beliefs is unlawful indirect sex or sexual orientation discrimination (which is not a straightforward issue), and that the allegations are indeed protected acts, and if the necessary causal connection to a detriment for the purposes of s 111(5)(a) can be established, then she will succeed at trial. That latter causation element is the only point I have not already dealt with, and the material before me indicates that it is arguable the causal connection will be established because it is the Stonewall complaint that is specifically referenced in Ms Sikand's report.

52. I do not accept that Ms White's point about whether Stonewall is in a position to commit a basic contravention of the Act against Chambers for the purposes of s 111(7) comes anywhere near rendering the Claimant's claim unarguable. Quite the reverse in fact. There is nothing in the Act to suggest there is some sort of threshold for this purpose: if there is a service provision relationship between Stonewall and Chambers (which is not in dispute) that would be caught by s 29 of the EA 2010 if Stonewall discriminated against Chambers and that suffices in my judgment.

53. I have therefore concluded that the proposed amended claim is at least reasonably arguable and stands more than little prospect of success.

54. The nature of the amendment in itself is on its face minor: this is relabelling a pleading and adding a respondent. Moreover, the intimation of that application to amend was done at an early stage in proceedings, a matter of weeks after the responses had been filed. There has been delay in formulating that application and it being brought to a hearing, for which there is no explanation at all, but there has been no suggestion by the parties that they could not be ready for the final hearing listed to start on 1 June 2021 if I granted the amendment, so there is no threat either to the fairness of that or the trial timetable. Mr Johnston argues that there is prejudice because of the nature of Chambers as an unincorporated association, that it brings in potential liability for 200 individuals, most of whom have no involvement with

the case, and some of whom were not even members at the time of the relevant events, but these are points that would have applied equally had the claim been brought against the unincorporated association from the outset and are a feature of the nature of Chambers as an organisation and the constitution to which all members have signed up. The fact that it is sought to add the Chambers by amendment a few months after commencing the proceedings has not in itself caused any prejudice beyond the bare fact of a claim being brought. While it is no credit to those who were originally instructed by the Claimant that there have been three attempts at pleading this case already, the Tribunal is not here to punish claimants for their lawyers' mistakes (even claimants who are lawyers). In my judgment there is very little prejudice to the Respondents from permitting this amendment. In contrast, the prejudice to the Claimant is that without the amendment most of her claim would fail as it has been brought against the wrong respondent and under the wrong statutory provision[1]. That is not in the interests of justice given that I have determined that it has sufficient merit to proceed.

Overall conclusion

55. I therefore permit the amendment and dismiss the applications for strike-out/deposit orders.

Employment Judge Stout

Date 14 February 2021

JUDGMENT & REASONS SENT TO THE PARTIES ON
16 February 2021

FOR THE TRIBUNAL OFFICE

[1] Subject possibly to the Claimant's argument about s 6 of the Interpretation Act 1968 and s 47 of the EA 2010 (i.e. that the reference to "a barrister" includes the plural and thus includes a "group of barristers"), about which I am doubtful given that that would not be the natural interpretation of s 47 and there is no need to stretch its interpretation given that s 57 does apply to barrister's chambers.