**IN THE CENTRAL LONDON EMPLOYMENT TRIBUNAL** **Case No. 2202172/2020**

**BETWEEN**

**MS ALLISON BAILEY**

**Claimant**

**and**

**(1) STONEWALL EQUALITY LTD**

**(2) GARDEN COURT CHAMBERS LTD**

**(3) RAJIV MENON QC and STEPHANIE HARRISON QC sued as Representatives of all members of Garden Court Chambers (except the Claimant)**

**Respondents**

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# CLOSING SUBMISSIONIS ON BEHALF OF THE CLAIMANT

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*The Claimant and First Respondent will be referred to respectively as the* **Claimant** *and* **Stonewall**. *The Second and Third Respondents will be referred to collectively as* **Garden Court**, *save where it is necessary to distinguish between them, in which case they will be referred to as the* **Service Company** *and* **Chambers** *respectively.*

*Key to references:*

| | | |
|---|---|---|
| **[0000]** | = | *pages in the trial bundle* |
| **[Supp/000]** | = | *pages in the Supplementary Bundle* |
| [XX w/s, §00] | = | *paragraphs in the statement indicated by the initials* |
| **[C/000]** | = | *pages in Claimant's witness statement bundle* |
| **[SW/000]** | = | *pages in Stonewall's witness statement bundle* |
| **[GC/000]** | = | *pages in Garden Court's witness statement bundle* |

*References to oral evidence are given as follows:*

| | | |
|---|---|---|
| [Day 00, am/pm] | = | *day of hearing, morning/afternoon session* |

*Where possible, approximate indications of the particular time of the evidence in question are also given.*

*For these purposes, the days of the hearing are counted as follows:*

| | | | |
|---|---|---|---|
| *Day 1* | *25 April 2022* | *am* | *preliminaries/ET reading* |
| | | *pm* | *ET reading* |
| *Day 2* | *26 April 2022* | *am/pm* | *ET reading* |
| *Day 3* | *27 April 2022* | *am/pm* | *case management (C unwell)* |
| *Day 4* | *28 April 2022* | *am/pm* | *case management (C unwell)* |
| *Day 5* | *29 April 2022* | *am* | *Williams, Green* |
| | | *pm* | *case management* |
| *Day 6* | *3 May 2022* | *am* | *case management* |
| | | *pm* | *Lue, Barker* |
| *Day 7* | *4 May 2022* | *am* | *Lue, Taylor* |
| | | *pm* | *Taylor, Claimant* |
| *Day 8* | *5 May 2022* | *am/pm* | *Claimant* |
| *Day 9* | *9 May 2022* | *am/pm* | *Claimant* |
| *Day 10* | *10 May 2022* | *am* | *Al-Farabi, Medcalf* |
| | | *pm* | *Medcalf* |
| *Day 11* | *11 May 2022* | *am/pm* | *Claimant* |
| *Day 12* | *12 May 2022* | *am/pm* | *Claimant* |
| *Day 13* | *13 May 2022* | *am* | *Claimant, Thomas* |
| | | *pm* | *Thomas* |
| *Day 14* | *16 May 2022* | *am* | *Sood-Smith, Knan* |
| | | *pm* | *Knan, Menon* |
| *Day 15* | *17 May 2022* | *am* | *Menon, Sikand* |
| | | *pm* | *Sikand* |
| *Day 16* | *18 May 2022* | *am* | *Sikand* |
| | | *pm* | *Hakl-Law* |
| *Day 17* | *19 May 2022* | *am/pm* | *Khan* |
| *Day 18* | *20 May 2022* | *am* | *Khan, Tennent* |
| | | *pm* | *Harvey, Renton* |
| *Day 19* | *23 May 2022* | *am* | *Willers* |
| | | *pm* | *Willers, Clark, Davies* |
| *Day 20* | *24 May 2022* | *am* | *McGahey, Wainwright* |
| | | *pm* | *Cook* |
| *Day 21* | *25 May 2022* | *am* | *Renton, de Menezes* |
| | | *pm* | *de Menezes, Cronin* |
| *Day 22* | *26 May 2022* | *am* | *Brewer* |
| | | *pm* | *Harrison* |

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## Introduction

1. These Closing Submissions should be read in conjunction with the Opening Skeleton Argument on behalf of the Claimant (the 'Claimant's Opening Skeleton'), which sets out the relevant law and approach that it is submitted the Tribunal should apply. Those matters are not repeated. Where relevant to address points made by the Respondents or otherwise to develop particular issues, further legal submissions are included below.

2. The approach which these Closing Submissions adopt is to address both the primary findings of fact that the Tribunal is invited to make and the inferences which the Tribunal is invited to draw by reference to each of the causes of action in turn. It is to be emphasised, however, that in deciding what inferences to draw the Tribunal should consider all of its relevant findings of primary fact in the round (see Claimant's Opening Skeleton, §57(b)). Therefore, whilst the primary facts are – for convenience and clarity of structure – addressed in relation to the causes of action to which they are most directly relevant, the Tribunal should step back and consider them in the round when deciding what inferences to draw.

3. The parties have prepared a joint overall chronology to assist the Tribunal with navigating the bundle during its deliberations. That chronology is necessarily thin on detail. In addition, two more detailed chronologies, which include comment and submission on many of the relevant points of detail, are appended to these Closing Submissions to support the submissions as to primary fact below:

    3.1. Appendix A covers the principal chronology of Garden Court's actions during the period October-December 2018 and supports the primary factual findings sought in respect of Detriments 2 and 4.

    3.2. Appendix B covers the principal chronology in relation to the Claimant's clerking and practice during 2019 and supports the primary factual findings sought in respect of Detriment 1.

**The Claimant's beliefs**

4. The Claimant's beliefs and their status as protected philosophical beliefs are addressed in detail in §§6-14 of the Claimant's Opening Skeleton, which do not require repetition.

**The claim against Stonewall**

5. The relevant statutory provisions and legal principles are set out in §§37-44 of the Claimant's Opening Skeleton.

6. There is a further issue, which was not apparent from Stonewall's Opening Note but was implicit in some of the evidence and questions put to witnesses on behalf of Stonewall – namely, whether the actions of which the Claimant complains as constituting instructing, causing and/or inducing a basic contravention occurred within the scope of the relationship to which the Equality Act 2010 ('EqA10') applies.

7. The correct approach to that question may be found in the judgment of Underhill LJ in Tiplady v Bradford Metropolitan District Council [2020] ICR 965, CA. That case was a whistleblowing claim concerned with whether the relevant actions of the council, which was both the claimant's employer and her local authority, were 'in the employment field'. However, Underhill LJ made clear (at §42) that on this issue the same principles apply to both whistleblowing and discrimination claims, and there is moreover no reason to limit the principles and approach set out to the 'employment field'. In particular, at §45 Underhill LJ said (with emphasis added):

> 'There remains the question of how exactly a detriment is to be recognised as arising, or not arising, "in the employment field": what are the boundaries of the field?... **Broadly, the test suggested by Mr Lewis to the employment tribunal, and which it accepted, of asking in what "capacity" the detriment was suffered – or, to put the same thing another way, whether it was suffered by the claimant "as an employee" – seems to me likely to produce the right answer in the generality of cases**. This is not strictly the same as the "two hats" analysis which Mrs Tiplady challenges, because **the focus is not on the hat being worn by the employer but on that being worn by the employee**; but in practice these may, if I may mix my metaphors, be two sides of the same coin. **But I do not think the boundaries of the**

**employment field should be drawn narrowly**. Mrs Tiplady suggested, in order to illustrate how arbitrary the concept was, that it would mean that detriments would only be within the scope of section 47B if they occurred in the workplace or during working hours: I do not accept that that is the result. It may be a useful thought experiment to ask whether, if the claim had been based on a protected characteristic under the 2010 Act rather than on the making of a protected disclosure, it would fall under a Part of that Act other than Part 5: if, say, the detriment was suffered by the claimant as a consumer of services or as a student or as an occupier of premises and thus would fall under Parts 3, 4 or 6, it could not be suffered as a worker. But I am chary about suggesting that that is a touchstone which will provide the answer in every case. There are bound on any view to be borderline cases, and I do not think that it would be right for us in this case to attempt any kind of definitive guidance. I would only add that I think it was sensible of the employment tribunal in this case to give Mrs Tiplady the benefit of the doubt as regards detriments (11) and (12).'

8. Applying those principles to EqA10, s111, it is submitted that the correct approach is as follows:

   8.1. Pursuant to s111(7), it is the relationship that puts A (the inducer[1]) in a position to commit a basic contravention in relation to B (the person induced), which brings A's actions within the scope of the Act. That is therefore the relationship on which to focus in order to ascertain whether A's actions are in scope. In this case, the relevant relationship between Stonewall and Garden Court is that of service provider and client through Garden Court's membership of the Diversity Champions scheme.

   8.2. Whether the actions in question are within the scope of that relationship is likely in most cases to be answered by asking whether the capacity in which B experienced those actions was in connection with the relevant relationship. As Underhill LJ makes clear, the focus is <u>not</u> on which 'hat' the alleged discriminator (or, in the context of s111, alleged inducer) was wearing, but on the capacity in which the other party experienced the treatment in question. Whilst in many cases those may in practice be two sides of the same coin, that

[1] The term 'inducer' is used here as a convenient shorthand to refer to a party alleged to have instructed and/or caused and/or induced a basic contravention, or to have attempted to do so, without repeating all of those alternatives on each occasion.

will not always be the case. In particular, the answer cannot depend on the subjective intentions and/or internal arrangements of the alleged inducer as to which 'hat' it thought it was wearing, if those intentions and/or arrangements do not in fact correspond to the substantive reality of how the other party experienced the actions in question.

8.3. Moreover, the boundaries of the relevant relationship should not be drawn narrowly. The general principle that anti-discrimination statutes are to be given a wide, purposive construction should be applied (Claimant's Opening Skeleton, §40.1). The purpose of EqA10, s111 is to prevent persons who are, by virtue of a relevant relationship, in a position to exert pressure or influence on the other party to that relationship from doing so (or attempting to do so) in a way that results (or would result) in a basic contravention by that other party. That again points away from an approach based on a narrow view of the formal arrangements of the alleged inducer (A) and towards a construction which asks whether, taking a broad, substantive view of all the circumstances, the relevant relationship affects, or is capable of affecting, how the other party (B) experiences and responds to the actions in question.

8.4. In short, therefore, the correct approach in this case is to ask whether, having regard to all the circumstances and to the substance and reality of the situation, Garden Court's membership of the Diversity Champions scheme affected, or was capable of affecting, how Garden Court experienced and/or responded to the actions in question. If so, then those actions fall within the scope of EqA10, s111 irrespective of Stonewall's subjective intentions or internal arrangements.

9. The issues to be considered in relation to the claim against Stonewall are therefore as follows:

9.1. Did the actions of which complaint is made amount to instructing, causing or inducing – or attempting to instruct, cause or induce – basic contraventions, applying the principles set out in §§40.1-40.5 of the Claimant's Opening Skeleton?

9.2. If so, were those actions (or any of them) done by individuals acting as employees or agents of Stonewall, applying the principles set out in §§41-44 of the Claimant's Opening Skeleton?

9.3. If so, were those actions (or any of them) within the scope of the Diversity Champions relationship between Stonewall and Garden Court, applying the principles in §§7-8 above?

9.4. If so, was the Claimant subjected to detriment(s) as a result of those actions (or any of them), applying the principles set out in §40.6 of the Claimant's Opening Skeleton?

10. Before considering each of those questions, the relevant primary facts will first be addressed.

***Primary facts***

11. The principal conduct by Stonewall which resulted in detriment to the Claimant was the solicitation of complaints by Shaan Knan and the complaint by Kirrin Medcalf. But in order to appreciate the full implications of those actions, they also need to be considered within the broader context of Garden Court's membership of the Diversity Champions scheme.

12. The factual picture which Stonewall seeks to present is that the Diversity Champions scheme is a mere *'workplace programme'*[2] which is not intended to and does not in fact give Stonewall any significant influence over how its members deal with particular issues[3]; that in this particular case there was no liaison between teams in relation to the complaint[4]; and that Mr Medcalf acted independently and without any thought of inducing action against the Claimant, but solely out of concern about a perceived *'risk'* to trans people attending meetings at Garden Court[5].

[2] [ZAF w/s, §8] **[SW/2]**
[3] [SSS w/s, §10] **[SW/45]**
[4] [ZAF w/s, §49] **[SW/11]**
[5] [KM w/s, §§47-48] **[SW/35]**

13. That picture is not credible having regard to the immediate circumstances and content of the complaint itself, especially when set in the wider context. There are four main aspects of the evidence to consider:

    (a) First, the immediate prompt for Mr Medcalf's complaint, namely the solicitation by Shaan Knan;

    (b) Second, the content of Mr Medcalf's complaint itself;

    (c) Third, the other immediate context of the complaint; and

    (d) Fourth, the wider context of the Diversity Champions scheme and its use by Stonewall.

14. **First**, starting with the immediate circumstances of the complaint, the prompt was of course the solicitation of complaints by Shaan Knan. The evidence shows that what was being encouraged was <u>complaints to support formal action</u> against the Claimant:

    14.1. The minutes of the round table meeting on 23 October 2019 **[3845-7]** record Shaan Knan passing on a message from Michelle Brewer to encourage participants to write to the Heads of Chambers to *'express concern about Allison Bailey's… transphobic comments on Twitter'* in advance of a *'meeting to decide on formal action'* **[3847]**. The evidence indicates that the typed version of those minutes in the bundle was created on 29 June 2020 **[Supp/157]**, but it is apparent from the detail of what is recorded that Mr Knan cannot have produced them entirely from memory and his evidence indicates that he probably typed them up from handwritten notes that he made at the time of the meeting (see evidence of Mr Knan in response to the Judge's questions [Day 14, pm, approx. 3.30pm]). The minutes may therefore be regarded as reflecting a contemporaneous, and broadly accurate, record of what was said.

    14.2. That conclusion is reinforced by the fact that essentially the same message appears in Mr Knan's STAG Wall and Facebook posts 2 days after the meeting. The Wall post again notes that there will be a meeting to discuss *'if any formal actions against Bailey should be taken'* and explicitly passes on

a message from Michelle Brewer encouraging the trans community *'to write messages of support (**supporting action against Bailey**) to the Head of Garden Court Chambers'* **[2327]** (emphasis added). Similarly, the Facebook post notes that *'Trans ally barristers at Garden Court'* were *'hoping to take formal action against barrister Allison Bailey'* and therefore needed messages of support to ensure that the Claimant did not *'get away with it'* **[2332]**. It is clear from these posts that Mr Knan was not merely encouraging generic messages of 'support' for Garden Court, but complaints about the Claimant with a view to securing formal action against her. In his oral evidence, although he commented that the messages were not prescriptive about the particular outcome sought, when it was put to him (by reference to the words in parenthesis in the Wall post) that what was being encouraged was messages to support action against the Claimant, Mr Knan agreed: *'I suppose it was'* [Day 14, pm, approx. 12.30pm].

15. Mr Medcalf certainly understood, as he agreed in cross-examination [Day 10, pm, approx. 3pm], that the clear message given at the round table was to seek to influence Garden Court into taking formal action. Since that was the nature of the encouragement on which he was acting when he submitted his complaint, the strong inference must be that that is indeed what he was seeking to do. That inference might have been rebutted if, for example, the actual terms of Mr Medcalf's complaint had made it clear that he was – as he sought to maintain – not seeking action against the Claimant but simply to address the management of some perceived 'risk' posed by the Claimant.

16. But turning, **second**, to the terms of Mr Medcalf's complaint itself **[699-700]**, they in fact strongly reinforce the conclusion that he was raising concerns to support disciplinary action against the Claimant:

    16.1. The first paragraph of the complaint states that its purpose is *'to raise concerns regarding the barrister Allison Bailey and her association with yourselves'* **[699]**. That is a clear indication that the complaint is directed at Garden Court's 'association' with the Claimant, not merely at the management of some alleged 'risk'.

16.2. The bulk of the complaint then comprises a series of examples of posts alleged to constitute *'making and retweeting multiple transphobic statements'* **[699-700]**. These do not spell out <u>any</u> concerns about any alleged risk to Stonewall employees attending meetings at Garden Court, but are clearly expressed in the manner of a complaint, inviting Garden Court to hold that the Claimant had in fact made *'multiple transphobic statements'*.

16.3. The concluding passage of the complaint then makes clear threats of adverse consequences for Garden Court's *'positive relationship… with the trans community'* in general and its *'position'* with Stonewall in particular if they *'continue associating'* with the Claimant **[700]**, and invites them to *'do what is right and stand in solidarity with trans people'*. The only possible interpretation of that passage is that Garden Court should cease *'associating'* with the Claimant – i.e. expel her – or there would be adverse consequences for their relationship with Stonewall. In cross-examination, Mr Medcalf agreed that is a *'valid interpretation'* and that he did intend to suggest the Claimant's expulsion as at least one possible outcome [Day 10, pm, approx. 4.30pm]. Indeed, it is notable that when responding to the Claimant's Subject Access Request, Stonewall redacted the threatening passages **[3807; 3824]**: it is difficult to escape the inference that they appreciated the implications of those passages and sought to withhold them for that reason.

16.4. There is nothing whatsoever in the concluding passage of the complaint **[700]** which says, or even implies, that the purpose of the complaint is to prompt a further discussion of how to manage some alleged 'risk'. There is a single reference to *'the safety of our staff and community'*, but nothing to indicate that this is to do with attending meetings at Garden Court – still less (as Mr Medcalf sought to insist in cross-examination [Day 10, pm, approx. 4.30-4.35pm]) that the purpose of the complaint as a whole was to start a discussion about risk management. There is simply no description of any alleged safety issues, nor any suggestion of different ways in which they might be managed, nor any invitation to discuss them further. The only outcome sought was for Garden Court to cease *'associating'* with the Claimant. Even Mr Medcalf was constrained to agree (in his final answer in response to cross-

examination on behalf of the Claimant [Day 10, pm, approx. 4.35pm]) that he could see how the complaint could be construed in that way.

16.5. In short, if the sole purpose of the complaint were really to initiate a discussion of safety and risk management, as Mr Medcalf sought to maintain, it was not merely phrased in a clumsy or oblique way, but in a way that was entirely inconsistent with that purpose. Mr Medcalf was unable to offer a satisfactory explanation for this in response to the Judge's questions, other than to say that if he were to do it again, he would write the complaint differently, but was expecting a follow-on conversation [Day 10, pm, approx. 5pm]. This echoed his earlier answer in cross-examination that this was a first email and he *'wanted a discussion'* [Day 10, pm, approx. 4.30pm]. However, not only are the terms of the complaint itself inconsistent with that account, since they invite no such discussion, but Mr Medcalf's own subsequent actions are also inconsistent with it: he took no steps to pursue any further discussion, even though there was another meeting at Garden Court to discuss prison policy just a week later, on 6 November 2019[6]. Mr Medcalf describes in his statement carrying out his *'own risk assessment'* for that meeting [KM w/s, §46] **[SW/35]**, but that does not assist him in relation to the purpose of the complaint. Indeed, the fact that one week later he felt able to address the supposed 'risk' without further discussion with anyone at Garden Court undermines his explanation that the complaint was necessary in order to prompt such discussion – still less can the (only) outcome actually proposed in the complaint (that Garden Court should cease *'associating'* with the Claimant) be regarded as a proportionate or genuine attempt at 'risk management'.

17. The Tribunal is therefore invited to reject Mr Medcalf's evidence that the complaint was intended to be about 'risk management' and to find that the ordinary and natural meaning of the complaint itself reflects its true purpose, and that that purpose was consistent with the encouragement by Shaan Knan to which Mr Medcalf was responding – namely, to complain about the Claimant with a view to securing formal action against her, in particular her expulsion from Garden Court.

[6] See **[593]**.

18. The lack of credibility in Mr Medcalf's evidence as to the purpose of the complaint calls into question other aspects of his account as well – in particular his evidence about the extent to which he discussed the complaint with others before sending it and his assertion that when he sent it he was unaware of Garden Court's Diversity Champions scheme membership.

19. Turning, **third**, to the other immediate context of Mr Medcalf's complaint, his account about the extent to which he discussed it with others and that he was unaware that Garden Court was a Diversity Champions scheme member is further undermined by other features of the chronology and surrounding circumstances:

    19.1. Mr Medcalf said that before he wrote the complaint, he looked at the Claimant's tweets [KM w/s, §23] **[SW/28]**. The tweets he looked at must have included her tweet in relation to the *Sunday Times* article **[2346]** because he included it in his complaint. That article refers to the fact that Garden Court was a Diversity Champion **[295-6]**. Mr Medcalf therefore had to deny reading the article itself in order to maintain his account that he was unaware of that fact, but his explanation for not reading the article was implausible. He said he did not read it because the issue for him had nothing to do with the article but was that, from the Claimant's tweet, he thought she would perceive anyone who worked for Stonewall as likely to be intimidating or coercive and this was a safety concern for Stonewall employees attending meetings at Garden Court [Day 10, pm, approx. 3.15pm]. That explanation is not credible for 3 main reasons. First, the suggestion that Mr Medcalf can seriously have thought that the Claimant's tweet meant that she would regard any Stonewall employee she might encounter as liable to engage, on the spot, in intimidation or coercion, is inherently absurd and implausible. Second, since the tweet related to what was reported in the article, in order to understand the nature of the 'intimidation, fear and coercion' to which the tweet referred it was obviously necessary to read the article. Therefore, Mr Medcalf's assertion that the article was irrelevant to what the Claimant might perceive as intimidation or coercion makes no sense. Third, his explanation also depends on his account that the primary purpose of the complaint was risk management, which for reasons already given is not credible. Ultimately, when pressed Mr Medcalf could go

no further than to say he had no positive recollection of reading the article [Day 10, pm, approx. 3.15pm]. The Tribunal is invited to find that it would be incredible for Mr Medcalf to have submitted his complaint including this tweet without having read the underlying article, that his explanation for not reading it is implausible, that he probably did therefore read it, and that consequently he must also have been aware that Garden Court was a Diversity Champion

19.2. The evidence then establishes the following chronology:

(a) At 9.24am on Monday 28 October 2019, Mr Medcalf posted on the STAG Wall to say that he had submitted a complaint **[3810]**. In fact, as he confirmed in cross-examination, he had at that stage only drafted, but not sent, the complaint [Day 10, pm, approx. 3.40pm].

(b) At 10.30am on Monday 28 October 2019, Ms Al-Farabi did send an email to Mr Lue, copying Jo Estrin from Stonewall's communications team **[2384-5]**. She noted that *'we are aware of some press coverage over the weekend'* (which would have included the *Sunday Times* article) and enquired whether Garden Court needed anything or wished to discuss anything further.

(c) On Wednesday 30 October 2019, Mr Medcalf had a one-to-one meeting with his line manager, Laura Russell, the notes from which indicate that an (unidentified) email was discussed **[6132]**. Mr Medcalf, who had at this point been in post for just 5 weeks, accepted in cross-examination that it was unthinkable that he would have sent the complaint email without having discussed it with Ms Russell and that it therefore makes sense that it is the email referred to in these notes [Day 10, pm, approx. 3.45pm]. Ms Russell was undoubtedly aware that Garden Court were a Diversity Champion (see e.g. **[1233; 1244-9]**).

(d) At 3.08pm on Thursday 31 October 2019, Mr Medcalf submitted the complaint via the Garden Court website **[699]**.

(e) On Monday 4 November 2019, an update briefing from *'the media and trans inclusion teams'* to the Senior Management Team, copied to Mr

Medcalf and Ms Estrin, provided a retrospective overview of coverage of the LGB Alliance ('LGBA') launch, including reference to the *Sunday Times* article, and indicated that action already taken included: *'Memberships have been briefed to be aware and we offered support to the* [sic] *Garden Court via their CAM* [Client Account Manager: Ms Al-Farabi]*'* **[6112-4]**. The timing of the briefing given to the memberships team is not specified but the fact that Ms Al-Farabi's email to Mr Lue **[2384-5]** refers to awareness of recent press coverage suggests that the briefing probably took place before that email was sent. Mr Medcalf maintained that he had no involvement in that briefing, that he and Ms Estrin drafted different parts of this update, and that the section relating to the LGBA launch was drafted by Ms Estrin [Day 10, pm, approx. 3.25pm]. Stonewall's failure to disclose the email at **[6112-4]** in unredacted form makes it impossible to assess the credibility of that evidence by reference to whether the subject matter of other sections is different in character and/or more obviously relates to Mr Medcalf's area of responsibility. Adverse inferences should be drawn from that failure to disclose the full document, and it may in any event be observed that the launch and impact of the LGBA must have been directly relevant to Mr Medcalf's role as Head of Trans Inclusion.

19.3. Stonewall's office is open plan with hot-desking[7] and the teams work collaboratively on issues of common concern[8]. However, Mr Medcalf and Ms Al-Farabi maintained that, despite this and the interrelated actions involving the same individuals from the communications, memberships and trans inclusion teams summarised above, they had no discussion about the Claimant or their respective messages to Garden Court. Mr Medcalf further maintained that he was unaware that Garden Court was a Diversity Champion when he sent his complaint. The Tribunal is invited to consider with care the accounts and explanations given in cross-examination on these points by Mr Medcalf [Day 10, pm, approx. 3.15-3.45pm] and Ms Al-Farabi [Day 10, am, approx.

[7] See Ms Al-Farabi's evidence in cross-examination [Day 10, am, approx. 11.15am].
[8] See [KM w/s, §§7-8 **[SW/25]** and Mr Medcalf's evidence in cross-examination [Day 10, am, approx. 12.30pm].

11.20-11.40am]. In order to accept that there was no liaison between Mr Medcalf and the memberships team before he sent his complaint, and that he was unaware when he did so that Garden Court was a Diversity Champion, the Tribunal would have to accept:

(a) that Mr Medcalf did not, for the implausible reasons he gave, read the *Sunday Times* article when considering the Claimant's tweet about it and including it in his complaint;

(b) that Mr Medcalf drafted his complaint and waited 3 days before sending it, during which time the only discussion he had about it was a discussion with his line manager, Ms Russell, in which (on his account) he did not actually show her the draft complaint or refer to the fact that it related to the Claimant and Garden Court, but merely told her that it was an email about someone targeting a member of staff online who worked at a venue used by Stonewall: the only basis on which this account could *conceivably* be sustainable would be if the Tribunal were to accept that summary as an accurate characterisation of Mr Medcalf's complaint and its purpose, but in any event it is not credible that, at just 5 weeks into the job, he shared, and/or Ms Russell enquired, so little about it;

(c) that despite the joint communications the following week and the obvious relevance of the issues to Mr Medcalf's role as Head of Trans Inclusion, there was no discussion between Mr Medcalf and the communications or memberships teams about these issues before Thursday 31 October 2019 and that (contrary to the implication of the 4 November email) he was not involved in the briefing given to the memberships team, probably on the morning of 28 October 2019;

(d) that Ms Al-Farabi thus sent her email offering support to Garden Court, on what she described in cross-examination as a *'sensitive'* issue, without having discussed that issue with the trans inclusion team: it is a striking and implausible feature of Ms Al-Farabi's evidence in cross-examination that she did not actually articulate *any* clear or coherent purpose *at all* for sending her email;

(e) that despite the fact that these issues had been the subject of high profile news reporting and were plainly important and topical for Stonewall, they were not the subject of general discussion in Stonewall's open plan office; and

(f) that Mr Medcalf thus essentially took it upon himself, at 5 weeks into the job, to write a letter of complaint *'in my role as Head of Trans Inclusion at Stonewall'* alleging that one of Garden Court's members had made multiple 'transphobic' statements and suggesting that they should not *'continue associating'* with her, without actually telling anyone that that was what he was doing.

19.4. Any one of these points seriously calls into question the credibility of the evidence given by Stonewall's witnesses. Considered as a whole, the proposition that Mr Medcalf acted without discussion with others and in ignorance of Garden Court's Diversity Champion status is simply unsustainable – especially when set in the context that Mr Medcalf has also sought to give a misleading account of the purpose of the complaint. The inferences to be drawn are that, prompted by Mr Knan's solicitations, Mr Medcalf drafted his complaint on the morning of 28 October 2019 and then, over the course of the next 3 days, discussed with others including Ms Russell, Ms Estrin and Ms Al-Farabi the best way to seek to engage and influence Garden Court; and that when Mr Medcalf sent his complaint he was therefore fully aware of Garden Court's Diversity Champion status and that the threats in the complaint about Garden Court's *'position'* with Stonewall would be understood in that context.

20. Turning, **fourth**, to the wider context of the Diversity Champions scheme and its use by Stonewall, that further supports those conclusions:

20.1. Contrary to the suggestion by Mr Sood-Smith[9] that the Diversity Champions scheme does not give Stonewall any substantial influence over members of the scheme, Stonewall is a campaigning/lobbying organisation and the whole purpose of the scheme is to increase its influence so as to further its

[9] [SSS w/s, §10] **[SW/45]**

campaigning/lobbying objectives: otherwise there would be no point to the scheme. As Ms Al-Farabi accepted, the scheme is one of the ways in which Stonewall promotes its agenda; the memberships team works with the policy teams to ensure the objective are aligned; and Stonewall keeps an eye on the activities of scheme members [Day 10, am, approx. 10.15am].

20.2. One of the ways Stonewall seeks to further its agenda is by promoting its Workplace Equality Index with Diversity Champions and providing policy and other guidance to help them maximise their score (see **[4530]** and Ms Al-Farabi's evidence in cross-examination [Day 10, am, approx. 10.20am]). As Ms Al-Farabi agreed[10], the working assumption is that organisations that have signed up as Diversity Champions value Stonewall's endorsement and wish to benefit from that as part of their branding. Thus mechanism of influence here is the conferral of reputational benefit by being on and moving up the Index by doing things that Stonewall approves of – and conversely, by necessary implication, the risk of reputational harm from failing to make the Index or moving down it as a result of not doing what Stonewall approves of.

20.3. Part of the policy guidance which Stonewall promotes (and which Ms Al-Farabi provided to Garden Court) is expressly to go *'above and beyond the law'* by adopting the broader characteristic of 'gender identity' in place of 'gender reassignment' as a protected characteristic in internal policies **[1589; 4442]** and as part of that to include, without qualification, 'misgendering' and denying a trans person access to single-sex spaces corresponding with their gender identity as examples of bullying and harassment **[1594; 4453]**. The effect of this guidance is to treat the drawing of any distinction between a trans person's self-identified 'gender' and their sex, or any concern about access to single-sex spaces in the workplace based on self-identification, as transphobic harassment. In short, it treats the expression of core gender critical beliefs as always and inherently unacceptable, when in fact the authorities are clear that 'misgendering' is not necessarily harassment (see Forstater v CGD Europe [2022] ICR 1, EAT, §§99 & 103 *per* Choudhury P) and whether it is appropriate for a trans person to use a single-sex spaces which correspond to

[10] [Day 10, am, approx. 10.20am]

their sex or their gender identity is not automatic and will depend on the particular circumstances (Croft v Royal Mail Group plc [2003] ICR 1425, CA, §§42-53 *per* Pill LJ). Through this policy guidance, Stonewall thus clearly and expressly seeks to induce Diversity Champion members to adopt policies which would, contrary to the correct legal position, effectively prohibit the expression of gender critical views and/or the raising of concerns about use of single sex facilities from a gender critical perspective.

20.4. It is also apparent that Stonewall does in fact intervene to seek to influence how Diversity Champions deal with particular situations or individuals with gender critical views, which Stonewall regards as 'transphobic'. This is apparent from the documents relating to Stonewall's objections to Lucy Masoud's gender critical views **[6166; 6157; 6154; 6177-8; 6170]**. It is also apparent from the intervention with Marks and Spencer and from the briefing to the memberships team following an issue with Centre Parcs, both of which are recorded in the (redacted) parts of the very same email that discusses the Claimant and the launch of the LGBA [C w/s, §§551-5] **[C/161-2]**. Interventions of this kind belie the suggestion that Stonewall lacks influence and does not seek to use it in relation to individual cases. The reality is that Stonewall is the largest LGBT organisation in the country (indeed, in Europe) with considerable profile and influence, with the power to confer reputational benefit through public endorsement or inflict reputational harm through public criticism. Diversity Champions are, by definition, organisations that value the reputational benefit of association with Stonewall and it does seek to exercise that influence including over their actions in individual cases.

20.5. That is what happened in the Claimant's case. Indeed, Mr Medcalf gave a striking answer near the end of his cross-examination which effectively admitted that the influence Stonewall could exert through conferring or denying reputational benefit was in his mind when he urged Garden Court to cease associating with the Claimant or there would be consequences for the relationship with Garden Court. He sought (implausibly) to characterise this as a statement of fact rather than a threat, but then went on:

*'We cannot come to these meetings if the person is still there… Organisations like to have [such meetings] to talk about themselves to make themselves look good…'*

20.6. This answer does indeed reflect the wider context of how Stonewall seeks to exert influence over how organisations deal with particular individuals and issues, including through its Diversity Champions scheme. That context further supports the conclusion that that is exactly what Mr Medcalf was seeking to do through his complaint.

21. **In summary**, the Tribunal is therefore invited to reach the following core conclusions as to the primary facts in relation to the claim against Stonewall:

21.1. Mr Knan solicited complaints against the Claimant to Garden Court to support formal action against her.

21.2. Mr Medcalf submitted his complaint for that purpose and not to address some perceived 'safety' concern.

21.3. Before doing so, Mr Medcalf discussed the complaint with colleagues at Stonewall including Ms Russell, Ms Estrin and Ms Al-Farabi (and/or other members of the memberships team).

21.4. When submitting the complaint, Mr Medcalf was aware that Garden Court was a Diversity Champion and knew and intended that his threats about Garden Court's *'position'* with Stonewall would be understood in that context.

21.5. In any event, Mr Medcalf made those threats to exert influence via the threatened withdrawal of reputational benefit/infliction of reputational harm.

21.6. That is consistent with how Stonewall seeks to exert influence through the Diversity Champions scheme more generally, in particular in order to designate gender critical views unacceptable and transphobic and to silence their expression.

22. Against that background, the issues identified in §9 above will now be addressed in turn.

***Did the actions in question amount to instructing, causing or inducing basic contraventions?***

*Solicitation and coordination of complaints by Shaan Knan*

23. For the reasons set out above, the Tribunal is invited to find that Mr Knan solicited complaints with a view to securing formal action against the Claimant. Mr Medcalf confirmed in cross-examination that Mr Knan's post on the STAG Wall was what prompted him to make his complaint [Day 10, pm, approx. 3.05pm], which in turn did lead to that complaint being upheld in part. Therefore, if the Tribunal upholds the claim against Garden Court in respect of Detriment 4 (upholding the Stonewall complaint) in respect of any of the causes of action, it follows that Mr Knan's solicitation did cause or induce that basic contravention.

24. Alternatively and in any event, whether or not the claim against Garden Court is upheld, Mr Knan intended to instruct, cause or induce formal action against the Claimant because of her gender critical beliefs. Therefore, his actions in soliciting complaints amount at least to an attempt to instruct, cause or induce direct belief discrimination.

25. In that regard, there is ample material from which to infer that in soliciting complaints Mr Knan was materially influenced by the Claimant's protected beliefs:

    25.1. It is apparent from the terms of Mr Knan's solicitations themselves that he was influenced not by any particular manner of expression on the part of the Claimant but simply her beliefs and in particular her support for the LGBA: see his reference to her support for *'the anti-trans LGB Alliance'* in his Wall post **[2327]** and fact that in his Facebook he refers to *'Pro LGB Alliance'* messages as the sole example of *'anti-trans messages'* **[2332]**.

    25.2. His description of the Claimant in his subsequent message to Ms Brewer as *'the terfy barrister'* **[963]** is (despite his protestations to the contrary in cross examination [Day 14, am, approx. 12.50pm] and in response to the Judge's questions [Day 14, pm, approx. 3.25pm]) plainly a derogatory use of the term, not merely a descriptive one. In context, its use implies that being *'terfy'* is

sufficient to merit complaints of transphobia, that *'terfy'* beliefs are inherently transphobic.

25.3. Mr Knan confirmed in cross-examination he *'considered [the Claimant's] views as anti trans'*[11] but did not even attempt in either his witness statement or his oral evidence to identify any particular statement or manner of expression by the Claimant, as distinct from her substantive beliefs and support for the LGBA, as the basis for that view. Therefore, there is simply no evidence to rebut the inference that he simply regarded the Claimant's gender critical beliefs as inherently transphobic and was materially influenced by that prejudice in soliciting complaints against her.

*Kirrin Medcalf's complaint*

26. Again, if the Tribunal upholds the claim against Garden Court in respect of Detriment 4 (upholding the Stonewall complaint) in respect of any of the causes of action, there can be no doubt that Mr Medcalf's complaint did cause or induce that basic contravention.

27. Alternatively and in any event, whether or not the claim against Garden Court is upheld, for the reasons set out above, the Tribunal is invited to find that by his complaint Mr Medcalf sought formal action against the Claimant, in particular by telling Garden Court to stop 'associating' with the Claimant. The complaint therefore constituted at least an attempt to instruct, cause and/or induce such action. Moreover, it is to be inferred that Mr Medcalf was materially influenced by the Claimant's protected beliefs such that the complaint constituted at least an attempt to instruct, cause and/or induce direct belief discrimination.

28. The grounds for inferring that Mr Medcalf was materially influenced by the Claimant's protected beliefs are as follows:

28.1. The terms of the complaint itself explicitly identify the *'transphobic'* elements of the tweets cited as including the core gender critical beliefs that trans women are men and that there should be female-only spaces (based on

[11] [Day 14, am, approx. 1pm]

sex not gender) in order to protect women from predatory and abusive men **[699]**.

28.2. In cross-examination, Mr Medcalf confirmed his view (which he also understood to be Stonewall's position) that to describe trans women generally as male is 'misgendering' and transphobic in any circumstances[12]; that to describe any particular transwoman as male is 'misgendering', inherently transphobic and abusive; and that to argue that trans women should not be given access to certain single-sex spaces is also transphobic [Day 10, pm, approx. 2.55pm].

28.3. The view that such gender critical beliefs are inherently unacceptable is also apparent from Mr Medcalf's witness statement (see in particular [KM w/s, §§30 & 32] **[SW/31-32]**). Indeed, it is notable that in his discussion of survey data about general attitudes towards trans people, Mr Medcalf appears to treat evidence that women have less prejudice against trans people as evidence that women are less likely to hold gender critical beliefs, thus equating prejudice with gender critical belief [KM w/s, §§68-9] **[SW/40-41]**.

28.4. The other tweets cited in the complaint also express aspects of the Claimant's protected beliefs, concerned with the abusive culture that drives the Stonewall trans self-ID agenda and the coercive nature of the 'cotton ceiling' ideology. The substance of those points is addressed in more detail in relation to the claim against Garden Court below (see §114-121 below). None of those tweets justifies the complaint of 'transphobia' against the Claimant. That is again a result of Mr Medcalf's prejudice against the Claimant's protected beliefs.

28.5. Moreover, for the reasons set out above, the Tribunal is invited to reject Mr Medcalf's explanation that the sole purpose of the complaint was to address some perceived 'risk' of attending meetings at Garden Court. In any event, there was no conceivable basis for the proposal that Garden Court should stop 'associating' with the Claimant, whether on grounds of 'safety' or otherwise:

[12] Unless the trans person has asked you to, as the sole exception.

there was no evidence in the tweets or elsewhere that the Claimant would do anything other than behave professionally in chambers.

28.6. There is, therefore, abundant evidence that Mr Medcalf was materially (indeed primarily) influenced by his own prejudices about the Claimant's protected beliefs, and far from rebutting that inference his written and oral evidence largely confirms it. In any event, the outcome which Mr Medcalf sought (that Garden Court should stop 'associating' with the Claimant) was on any view not justified.

28.7. In summary, Mr Medcalf's complaint was (at the very least) an attempt to instruct, cause or induce action – namely, that Garden Court should stop 'associating' with the Claimant – because of her protected beliefs, in circumstances where that proposed action could not on any view be justified. It was an attempt to instruct, cause or induce direct belief discrimination.

*Wider influence through the Diversity Champions scheme*

29. Having regard to the facts and matters set out in §20 above, Stonewall does seek to use its influence through the Diversity Champions scheme to encourage scheme members to treat the expression of gender critical views as inherently transphobic and unacceptable, and did so in this case. Mr Medcalf confirmed his understanding (which as Head of Trans Inclusion must be regarded as accurate) that Stonewall does indeed regard it as inherently transphobic to describe trans women as male and to argue that they should not be given access to some women-only spaces [Day 10, pm, approx. 2.55pm].

30. The influence of Garden Court's membership of Stonewall's Diversity Champions scheme on its actions is addressed in the context of the claim against Garden Court below. The Tribunal will be invited to find that membership did contribute to a desire by Garden Court to align itself with Stonewall's positions and to maintain Stonewall's approval, and in turn to its readiness to treat the Claimant's expression of her beliefs and/or any criticism of Stonewall as transphobic and unacceptable. This is apparent, for example, in concerns about the Claimant's tweets on Chambers' status as a Diversity Champion by those involved in deciding on what action to take in response to the Claimant's tweets, including by Mr de Menezes

**[620]** and Ms Sikand **[2549]**. If the Tribunal upholds any of the causes of action against Garden Court on that basis, then it follows that they were caused or induced by Stonewall via its operation of the Diversity Champions programme.

31. In any event, the way in which Stonewall operates its Diversity Champions scheme both in general and in this particular case, as set out in §20 above, means that it inherently constitutes an attempt to instruct, cause or induce direct belief discrimination by encouraging Diversity Champions to treat the expression of gender critical beliefs as transphobic and unacceptable, contrary to the correct legal position.

***Were the actions in question done by individuals acting as employees/agents of Stonewall?***

*Solicitation and coordination of complaints by Shaan Knan*

32. Although the STAG Memorandum of Understanding drafted by Ms Russell in the summer of 2019 **[4411-4422]** was not finalised or formally adopted [KM w/s, §50] **[SW/36]**, both Mr Medcalf and Mr Knan by and large agreed (with some minor qualifications) that it broadly reflected the status, purpose and operation of the STAG in practice. In particular:

    32.1. The STAG was created by, and operated under the 'umbrella' of, Stonewall, and for its benefit: **[4412; 4414]** §2.B.1; Medcalf xx [Day 10, am, approx. 12.40pm]; Knan xx [Day 14, am, approx. 11.40am][13];

    32.2. One of its principal purposes was to facilitate engagement between Stonewall and trans communities/organisations and 'ally' organisations: **[4412]**; **[4417]** §3.A.4; **[4418]** §3.D.1; **[4423; 4432]**; Medcalf xx [Day 10, am, approx. 12.55pm]; Knan xx [Day 14, am, approx. 11.30am & 11.45am] [14];

[13] Mr Knan later said that he did not believe he was doing anything on behalf of Stonewall in his role at STAG (Knan xx [Day 14, am, approx. 11.50am]), but that cannot be right because it is inconsistent with the undisputed fact that STAG was established by Stonewall and performed its functions for Stonewall's benefit, with Mr Medcalf's evidence and with Mr Knan's own earlier acceptance that STAG operated under the Stonewall 'umbrella'. Mr Knan's evidence was also that he was appointed to his role on STAG by means of an interview with the then-CEO of Stonewall [Day 14, am, approx. noon].

[14] Mr Knan equivocated about how effectively the STAG performed these functions but did not disagree that these functions were part of STAG's core purposes and that it did perform them to some extent.

32.3. STAG members were subject to a selection process operated by Stonewall and were selected for their connections with those communities and organisations: **[4432-5]**; Medcalf xx [Day 10, am, approx. 12.35pm]; Knan xx [Day 14, am, approx. 11.50am];

32.4. STAG members had authority to represent Stonewall when 'interfacing' with other organisations and a degree of flexibility in how to do so: **[4417]** §3.A.4; **[4418]** §3.C.2; Medcalf xx [Day 10, am, approx. 12.55-1pm];

32.5. STAG was not financially independent and any costs were met by Stonewall: **[4416]** §2.F; Medcalf xx [Day 10, am, approx. 12.50pm]; Knan xx [Day 14, am, approx. 11.45am];

32.6. A number of Stonewall managers had standing invitations to STAG meetings and it was ultimately accountable to Stonewall's Executive Director of Campaigns & Strategy: **[4414]** §2.B.1; **[4419]** §E.1(b); Medcalf xx [Day 10, am, approx. 12.45pm];

32.7. Any misconduct by STAG members would have been addressed with jointly with Stonewall and any suspension or removal of a STAG member would require Stonewall's approval: **[4415]** §2.E.2; Medcalf xx [Day 10, am, approx. 12.45pm]; Knan xx [Day 14, am, approx. 11.45am][15].

33. Applying the principles set out in §§43-44 of the Claimant's Opening Skeleton, members of the STAG were agents of Stonewall for the purposes of EqA10, s109(2) when acting in their STAG capacity because they were authorised to represent Stonewall in building connections with the trans communities/organisations and other 'ally' organisations with which they had links.

34. Two points follow from this. First, although Mr Knan did not agree, it must follow from the nature and purpose of the role of STAG members that there was no bright line division between their STAG role and any roles they might have with other organisations because they were selected for STAG membership precisely because of those other connections for the purposes of building Stonewall's relations

[15] Mr Knan said that he could not *'completely verify'* the lines of accountability and was not himself *'thinking in… terms'* of potential discipline, but did not positively dispute the propositions put to him.

through them. In particular, the Trans Organisational Network meeting on 23 October 2019, which was attended both by Stonewall employees and representatives from other trans organisations, was precisely the sort of meeting at which Ms Knan must be regarded as wearing his STAG 'hat' as well as any other. All of the solicitation of complaints undertaken by Mr Knan at and following that meeting was therefore done as agent for Stonewall.

35. Second, it may not ultimately matter whether Mr Knan was acting as agent for Stonewall at the round table meeting because when posting on the STAG wall he can only have been acting in his STAG capacity because that is the capacity in which he had access to the Wall. As he agreed in cross-examination [Day 14, am, approx. 11.40am], access to the Wall was provided by Stonewall to STAG members as a tool to enable them to fulfil their STAG functions and to facilitate communication between members for that purpose. Moreover, Mr Knan explicitly decided to post on the Wall because he thought it was a *'good tool to use'* to get the message out to trans networks broadly [SK w/s, §44] **[SW/22]**. As he agreed in cross-examination, he was thus acting precisely within the functions of his STAG role and for the purposes for which access to the Wall had been provided, namely to liaise with other members and their networks in order to further Stonewall's agenda [Day 14, am, approx. 12.20pm]. In his post, he also invoked the attendance of Mr Medcalf and Mr Bradlow as Stonewall employees to add weight and credibility to what he was saying **[2327]**; [Day 14, am, approx. 12.20pm].

36. Therefore, on any view, Mr Knan was clearly acting in his STAG capacity when he posted on the Wall (and similarly when he posted on the STAG Facebook page) and in doing so was therefore acting as Stonewall's agent for the purposes of s109(2). Since it was, as Mr Medcalf agreed [Day 10, pm, approx. 3.05pm], Mr Knan's post on the Wall that prompted Mr Medcalf to draft and submit his complaint to Garden Court, the fact that Mr Knan was clearly acting as Stonewall's agent in making that post is sufficient, even if (contrary to the Claimant's primary case) he was not acting in that capacity in his solicitation of complaints more broadly.

*Kirrin Medcalf's complaint*

37. There is no dispute that Stonewall is liable for the actions of Mr Medcalf as its employee under EqA10, s109(1) (Stonewall GoR, §20 **[38]**; List of Issues, §19).

*Wider influence through the Diversity Champions scheme*

38. Similarly, there is no dispute that Stonewall is liable for the operation of its Diversity Champions scheme, which in relation to Garden Court was conducted by Mr Kheraj and Ms Al-Farabi (List of Issues, §19).

***Were the actions in question within the scope of the Diversity Champions relationship?***

39. Applying the principles set out in §§7-8 above, whether or not the actions in question emanated from a part of Stonewall's internal organisation with responsibility for and/or knowledge of its Diversity Champions membership would not be and was not in fact apparent to Garden Court and is therefore immaterial. So far as the general operation of that scheme is concerned, that is obviously within scope. So far as the actions of Messrs Knan and Medcalf are concerned, since the ultimate outcome of both their actions so far as Garden Court was concerned was the complaint by Mr Medcalf, it is how Garden Court did or would experience that complaint which matters. Having regard to the substance and reality of the situation, the fact that Garden Court was a Diversity Champion was plainly capable of affecting how it understood and reacted to the complaint. On the basis of the knowledge available to Garden Court, the threats made in the complaint itself were (at the very least) capable of being read as threatening Garden Court's Diversity Champion status if it did not *'do the right thing'*.

40. Moreover, as a matter of fact it is clear that Garden Court *did* consider the complaint within the context of the Diversity Champions relationship and did *not* understand it to have been submitted outside that context: see in particular Ms Sikand's comment in connection with considering how to deal with the Stonewall complaint, *'Given that we are a Stonewall Diversity Champion, I do not think [the Claimant] should be maligning them'* **[2549]**.

41. Therefore, the actions of Mr Knan in soliciting, and Mr Medcalf in submitting, the Stonewall complaint, must be regarded as falling within the scope of the Diversity Champions relationship, irrespective of their internal capacity and/or subjective knowledge or intentions.

42. Alternatively and in any event, so far as Mr Medcalf's actions are concerned for the reasons set out in §19 above, the Tribunal is invited to reject as a matter of fact Stonewall's case that he acted independently and in ignorance of Garden Court's Diversity Champion status, and to find that he did discuss the complaint more widely, was made aware that Garden Court were a Diversity Champion, and submitted the claim in that knowledge and with wider approval within Stonewall. Therefore, Mr Medcalf's complaint is within scope on the facts in any event.

***Was the Claimant subjected to detriment(s) as a result of the actions in question?***

43. It is indisputable that, as a result of the Stonewall complaint, the Claimant was subjected to an investigation of that complaint and it was upheld in part. It cannot be seriously disputed that those are detriments in the sense described in Shamoon (see Claimant's Opening Skeleton, §40.6). As the Claimant made clear in her evidence, the very fact of the investigation and findings was *'hugely traumatic'* for her: for a barrister to be put under investigation by her chambers is a distressing process in itself, on top of which the outcome was for 2 of the allegations to be upheld [Day 8, pm, approx. 2.30pm]. Therefore, at the very least, those are detriments to the Claimant caused by Mr Knan's solicitation of complaints and Mr Medcalf's submission of the complaint in response, which for the reasons set out above constitute instructing, causing and/or inducing direct belief discrimination for which Stonewall is liable.

44. In addition, as already noted (§30 above), the impact of Garden Court's membership of Stonewall's Diversity Champions scheme on its actions more widely is addressed in the context of the claim against Garden Court below. The Tribunal is invited to find that membership did contribute to a desire by Garden Court to align itself with Stonewall's positions and to maintain Stonewall's approval, and in turn to its readiness to treat the Claimant's expression of her beliefs and/or any criticism of Stonewall as transphobic and unacceptable. To the extent that the Tribunal makes

such finding, it will follow that the resulting detriments were caused by Stonewall's operation of the Diversity Champions scheme in a way that, for the reasons set out above, amounts to instructing, causing and/or inducing direct belief discrimination, victimisation and/or indirect discrimination for which Stonewall is liable.

**The claim against Garden Court**

**Direct belief discrimination**

45. It is submitted that the Tribunal should consider, in relation to each of the detriments:

    45.1. first, whether the direct belief discrimination claim succeeds on 'ordinary' principles as set out in §§57-59 of the Claimant's Opening Skeleton – if it does, then that is an end of the matter; and

    45.2. second, to the extent necessary, whether the particular features of the Claimant's expressions of belief relied on by Garden Court are properly separable from the protected characteristic of belief in the sense set out in §§60-65 of the Claimant's Opening Skeleton.

46. In relation to the second of those issues, it is to be emphasised that – contrary to the submission made in §§56-57 of Garden Court's Opening Submissions – the question of whether particular features of an expression of belief are 'properly separable' from the protected characteristic of belief is a different question from that of whether the reason for treatment is 'indissociable' from the protected characteristic: this is made clear by Underhill LJ in Page v NHS Trust Development Authority [2021] ICR 941, CA, at §78. If the particular feature in question is properly separable from the characteristic of belief in the sense described in §§60-65 of the Claimant's Opening Skeleton then, as Underhill LJ makes clear, there is no difficulty in dissociating that feature from the belief in question. But, as is emphasised in §63 of the Claimant's Opening Skeleton, the function of the 'properly separable' test is different one, namely to expand the scope of protection under the EqA10, ss10 & 13, to ensure compatibility with the Claimant's Convention rights, by treating any feature that does not justify the interference in question as inseparable from the protected characteristic of belief.

47. It is the Claimant's primary case that her claim succeeds applying 'ordinary' principles in relation to all detriments. Alternatively, none of the features of her expressions of belief relied on by Garden Court is properly separable in the relevant sense and her claim must therefore succeed on that basis in any event.

***Over-arching points***

48. Before turning to the specific detriments, it is worth stressing 5 over-arching points.

49. **First**, in her Further Particulars, the Claimant was required to identify (amongst other things) the individuals who subjected her to the detriments (**[134]**, §4(a)) having previously been reminded by the Judge both the requirements and limitations of Reynolds v CLFIS (UK) Ltd [2015] CIR 1010, CA (**[132]**, §(6)). It is important to note, as Underhill LJ himself makes clear in Reynolds (§§44-45), that the 'separate act' approach articulated in that case should not be applied so as to preclude claims on technical grounds. The only necessity is simply to identify those who are alleged, by their discriminatory actions, to have caused or contributed to the ultimate detriment about which complaint is made. They may have done so as part of a joint process, or as individual contributors along the way. But provided they have been identified in good time to enable the respondent to meet the case, it then matters not whether they are 'final' decision-makers or influencers. That is therefore the approach adopted in the Further Particulars and the issue now is whether any of the individuals in question did, through discriminatory actions, cause or contribute to the detriments.

50. **Second**, Garden Court's overall approach to this litigation, and Ms Khan's approach to her first witness statement **[4064-4090]** in particular, are relevant to the drawing of inferences. The Tribunal is invited to review with care the early passages of Ms Khan's cross-examination in relation to her first witness statement [Day 17, am, approx. 9.35-10.20am]. It is highly significant that a senior silk and former Head of Chambers was forced to admit that, in making a statement alleging that the Claimant was acting abusively in these proceedings, and despite being aware of the need for care and (she said) having carefully searched her own emails, she nevertheless made positive assertions which were not correct, including:

50.1. Ms Khan positively asserted that redactions in the documents at that stage did not conceal anyone acting on behalf of Garden Court (**[4089]**, §101) when in fact there were redactions of Ms Khan's own name acting as Head of Chambers, for example in the document which now appears at **[1070]**;

50.2. She positively described that same document **[1070]** as a *'private exchange'* to which she was not party (**[4070-4071]**, §§26-27), when in fact it was an exchange with the Heads of Chambers to which Ms Khan was party;

50.3. She positively asserted that there was no correspondence in relation to the Claimant's 14 December 2018 email to which she was party other than that which she identified (**[4070-1]**, §§26-27), which omitted her own exchanges with Mr Neale and the other Heads of Chambers **[560-563]**;

50.4. She omitted reference at **[4077]**, §§51-52 to Ms Brewer's email of 16 October 2018, which was sent to her **[601-3]**.

51. Whilst Ms Khan had some very unfortunate personal circumstances at the time she made her first statement, she did not seek to rely on them to excuse the inaccuracies or suggest that she was unable to check the documents and the statement carefully. Yet she was forced to concede that she must have made those assertions in her statement, in support of a serious allegation against the Claimant and an application to strike-out the claim, without having properly checked the material which she had available to her. That is a striking admission for someone in Ms Khan's position to be forced to make. More broadly, it is of a piece with the deliberately narrow and obstructive approach which Garden Court took in relation to the subject access request (see Detriment 5 below). It indicates that, at best, Ms Khan and Garden Court were prepared to advance serious allegations against the Claimant without properly checking the basis for them, which supports an inference of underlying antipathy; and, at worst, it could suggest an attempt to withhold material that could damage Garden Court's case and argument in favour of strike out, which would again support an allegation of underlying antipathy as well as even more strongly supporting victimisation inferences. It is particularly material to note that, had Garden Court succeeded in the strike out application for which Ms Khan's witness statement was provided, disclosure would not then have been made, and the

inaccuracy of the statements at §50 above would never have been discovered. Further, despite that statement being included in the Bundle for the Full Merits Hearing, Ms Khan made no attempt to particularise those aspects of the statement which were false, despite her acknowledgment that there were false assertions made within it.

52. **Third**, an important part of the background to drawing inferences in relation to all of the detriments is the extensive evidence that (contrary to the notional position that Garden Court has no corporate position on the debate in relation to sex and gender), it had in practice deeply aligned itself with the trans activist cause, including the view that gender critical beliefs are transphobic:

52.1. Garden Court sponsored the launch of TELI **[5907]**, which was co-founded by Ms Brewer and had an explicit lobbying/campaigning purpose **[1303; 1019]** and held or hosted conferences with an activist agenda **[324-5; 336-7 ]**.

52.2. The Trans Rights Working Group ('TRWG') was established by Ms Brewer also with an explicitly lobbying/campaigning aspect **[328-9; 370-374]**.

52.3. Of particular importance is the internal Gender Recognition Act ('GRA') training conducted by Ms Brewer in May 2018 for the TRWG **[5965-6028]**, in which Ms Brewer, Mr Lue and Mr Clark are all recorded expressing the view that gender critical beliefs are 'transphobic' and Ms Brewer in particular displays classic prejudice labelling gender critical feminists as *'white academics… with their Birkenstocks'*: see in particular the passages that were explored with those witnesses in cross-examination at **[5977; 5980; 5996; 6018-6034; 6027-8]**.

52.4. There are extensive tweets from the Garden Court corporate account over several years which support the trans activist agenda and not a single one which expresses gender critical views **[5901-5947]**. These include tweets promoting views expressed by non-Garden Court individuals **[5904; 5909]** and re-tweeting allegations of 'transphobia' from Ms Brewer against a gender critical group at London Pride **[5917-8]**.

52.5. In his engagement with Stonewall under the Diversity Champions scheme, Mr Lue expressly put forward the TRWG as a chambers group with the potential to develop a strategic partnership with Stonewall **[1631]**.

52.6. Ms Brewer attends meetings of various groups with Stonewall and other trans activist organisations identified as attending on behalf of both TELI and Garden Court: see e.g. **[501-2; 1289; 1351]**. In that capacity she is able to offer *pro bono* legal advice on behalf of Garden Court generally **[1290]** and in fact she and various others provide such advice on a number of topics over the years: see e.g. **[1240-3; 1312-6; 1655-6; 1880-9; 1980-1]**.

52.7. Numerous communications from a variety of individuals in October 2018 exhibit the view that the LGBA and the Claimant's association with it are 'anti-trans' and inconsistent with what is understood to be chambers' position: these include Ms Brewer's email of 16 October 2019 **[601-3]** and communications from Ms Hooper **[927-8]**, Mr Wainwright **[5940; 599; 927]**, Mr Clark **[963]** and Ms Harrison **[926]**. Some of these communications were copied to the Heads of Chambers and were generally well-received or even implicitly endorsed **[597-603; 626]** – in marked contrast to how the Claimant's concerns about Alex Sharpe had been essentially ignored in December 2018 **[566-571; 572-3; 578]**.

52.8. More generally, the Tribunal is invited to review the evidence in cross-examination of Mr Lue, Ms Hooper, Mr Clark, Mr Wainwright and Mr Renton, which collectively provides relevant background evidence. Their evidence reveals the depth and strength of the view that the Claimant's beliefs were transphobic or 'anti-trans' and contrary to chambers' collective stance.

53. The above evidence of the deep entrenchment of gender ideology, including the view that gender critical beliefs are transphobic, must carry substantial weight in the drawing of inferences in relation to all detriments.

54. **Fourth**, when assessing the cogency of the rationales advanced by Garden Court for their actions in October-December 2019 and the inferences to be drawn, it is important to pay close attention to the chronology of events and the evidence as to what material had actually been considered by the key decision-makers at each

point. Tracing, step-by-step, the development of the decision-makers' thinking by reference to what they had – and, importantly, had not – actually considered at each step is a particularly revealing exercise in this case because of what it shows about their readiness to give credence to negative characterisations of the Claimant's beliefs and their failure to apply independent critical thought to the issues or engage in independent critical evaluation of the material. This is most striking in relation to Detriment 2 (the responsive tweets) and Detriment 4 (upholding the complaints), the chronology for which is covered in Appendix A to these submissions, and the inferences to be drawn in relation to those detriments about the underlying prejudices of the key decision-makers will of course also inform the wider inferences to be drawn overall.

55. **Fifth**, reference is made in the submissions below to a number of comparable situations. For the avoidance of doubt, these are relied on as evidential (as opposed to statutory) comparators, in the sense described in Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337, HL, §§109-110 *per* Lord Scott, §§139-143 *per* Lord Rodger. The circumstances of those comparators are sufficiently similar to provide a strong basis for inferring that Garden Court would not have subjected a comparator with different, but equally controversial and robustly expressed, beliefs to the same detrimental treatment. Garden Court would have been astute to defend the Article 9 and 10 rights of a member similarly expressing any similarly controversial beliefs that are not regarded as heretical according to progressive orthodoxy in the same way as the Claimant's gender critical beliefs. The Claimant's treatment was because of those particular beliefs and the (prejudiced) willingness to give credence to the perception that they conflicted with Garden Court's 'ethos'.

***Detriment 1: reduction in work***

*Submissions as to the primary facts*

56. There has been an attempt on behalf of Garden Court to paint the Claimant's case in respect of Detriment 1 as if it were pleaded and advanced solely and definitively as an explicit, widespread conspiracy, and on that basis to suggest that it is fanciful.

But that is not and never has been the basis of the case. The core of the Claimant's case on Detriment 1 may be summarised as follows:

56.1. There was a strong adverse reaction to the Claimant's email of 14 December 2018 **[557-8]** opposing Stonewall Diversity Champion membership, which reflects the wider evidence in this case of prejudice against gender critical beliefs.

56.2. This was followed by a significant reduction in the quality of her clerking and a substantial drop in income, which cannot be adequately explained by other factors.

56.3. It is apparent from the overall evidence in this case that disagreements and disputes in chambers are discussed, such that when senior members have formed an adverse view about someone that does become widely known.

56.4. Clerking is inherently dependent on maintaining the important relationships in chambers and in Garden Court is known to be susceptible to influence by the wider culture, politics and relationships in chambers.

56.5. The inference to be drawn from these circumstances is that the adverse reaction to her email of 14 December 2018 caused the change in the quality of her clerking and thus caused or contributed to the reduction in her income.

57. The claim in respect of Detriment 1 is, therefore, necessarily inferential. As the Claimant explained in cross-examination [Day 9, am, approx. 10.20-10.40am], she is not therefore in a position to say with certainty precisely what conversations or communications took place to bring about the reduction in her work and income or who precisely was involved. The fact that she is not able to do so does not make the claim invalid or unsustainable: it is dependent not on any precise set of communications but on the core inference summarised above. The claim was therefore pleaded in the further particulars, §4 **[171]** on the basis that the mechanism could have been explicit (at the behest of and/or in concert with) or implicit (under the influence of) and to identify the 'pool' of potential actors as the members of chambers named elsewhere in the pleading, who were by definition those who were involved in other aspects of the matters about which the Claimant complains. It does

not follow that she was saying that all of those individuals definitely participated in some overt conspiracy.

58. A claim of that kind, based on inference, is perfectly legitimate. It is ultimately for the Tribunal to determine whether the central inference is to be drawn and, to the extent necessary, who was involved – though if the core inference is drawn that may in fact be sufficient by itself. In any event, the Claimant has kept the position under review in light of the evidence given during trial and now pursues the claim only in respect of the senior individuals in respect of whom the inference of involvement in the reduction of work from early 2019 is strongest, namely Ms Brewer, Ms Harrison, Ms Khan, Mr Willers, Mr Thomas and Mr Cook. Again, it is to be emphasised that it is not essential for the inference to be drawn in respect of all of those individuals, or to infer any particular communications: the message that the Claimant was out of favour with the senior individuals in question could have been conveyed explicitly or implicitly. The key question is whether the core inferential case summarised above is made out.

59. Turning, then, to the elements of that core case, there can be no doubt that there was a strong adverse reaction to the Claimant's email of 14 December 2018:

    59.1. Ms Brewer's response **[906]** was essentially a 'slap down' of the Claimant, rejecting the legitimacy of her concerns. The Tribunal is invited to consider both Ms Brewer's answers and her manner when asked about this email in cross-examination [Day 22, am, approx. 12.35pm]: it was apparent that her reaction was indeed a strong one and reflected her similarly strong objections to the Claimant's tweets in October 2018, all of which is underpinned by her clear view the gender critical beliefs are transphobic (see her comments during the internal GRA training, in particular at **[5977; 6018-6021; 6027-8]**).

    59.2. Ms Khan effectively adopted Ms Brewer's response in her correspondence with David Neale, in which she also implicitly agreed with him that the Claimant's email had been transphobic and commented that *'[u]nfortunately some members of Chambers do not always express themselves*

*in a way that we would wish'* **[561-2]**. Mr Thomas in turn agreed with the sentiments expressed by Ms Khan **[560]**.

59.3. At the same time, Mr Lue sought endorsement for the Stonewall association noting that it is *'involved in campaign work that this chambers aligns itself with'* **[1070]** – despite telling the Claimant that he would take her concerns to the Heads of Chambers **[1071]** – and Ms Khan provided that endorsement explicitly rejecting the Claimant's view as *'not representative of Chambers'* and giving *'full support'* to the *'collaboration'* with Stonewall **[1085]**.

59.4. This negative reaction to the (entirely legitimate) concerns about Stonewall raised by the Claimant is to be contrasted with the complete lack of interest shown by the Heads of Chambers in the concerns which the Clamant raised about Alex Sharpe's tweets using 'terf' as an abusive term in which she provided both examples of Ms Sharpe's tweets **[490-493]** and provides in correspondence a full explanation of why the term 'terf' is a slur **[566-571; 572-3; 578]**.

60. This reaction to the Claimant's 14 December 2018 email also needs to be considered within the overall context of the evidence in this case of prejudice against gender critical beliefs, in particular in relation to Detriments 2-4 concerning the response to the Claimant's tweets in the autumn of 2019. When considered in that context, it is apparent that the adverse reaction in December 2018 reflects that wider prejudice against gender critical beliefs.

61. It is also clear that there <u>was</u> a reduction in the quality of the Claimant's clerking from the start of 2019. The Tribunal is referred to Appendix B to these submissions for the relevant chronology of her clerking and practice during 2019. Her supplementary witness statement **[C/188-192]** also provides relevant detail of the level of clerking input into her cases from 2017 to 2019. The following key facts emerge:

61.1. The proportion of primary clerked trials which the Claimant did substantially reduced in 2019. She was primary clerked for only 2 trials that year (BM and DC), both of which were returns.

61.2. Whereas the Claimant was primarily clerked by Mr Tennent in 2018, in 2019 he did not contact her about an actual case until 17 April, and then it was a 2-day sentencing hearing for which the Claimant would not have been paid. Thereafter his contact with the Claimant remained sparse and the only substantial case for which he clerked the Claimant in 2019 was the DC murder, which was a return.

61.3. Similarly, Mr Cook only contacted the Claimant twice during 2019, the first time simply to inform her of a brief for which she had been specifically requested by the solicitor (RS) and the second time to propose her for a low-paid bail application.

61.4. It is notable from the chronology in Appendix B that, after the end of the Claimant's trial in S on 22 January 2019, she was not contacted until 5 February, and then it was about an unsuitable 3-day warned list case for 2 weeks hence. Thereafter, other than the trial for which the solicitor specifically requested her (RS) *all* of the potential cases in relation to which she was contacted by the clerks through to May 2019 were unsuitable junior work. She made her concerns clear during February when booking holiday, copying in Mr Cook, noting the large gap in her diary and seeking a practice review **[1167]**, and on 3 May 2019 she was correct when she noted in an email to Mr Tennent, *'It is May and I have not been offered a single brief of substance…'* **[1405]**.

61.5. Even after that, the Claimant continued to be offered unsuitable, junior work until matters improved in the autumn as a result of a combination of cases which she brought in herself and DC. In that regard, she accepted that DC was a good brief, but again it is to be noted that it was a return, so she was also assisting chambers in covering it. The fact of being clerked for DC does not by any means negate the proposition that, overall, the quality of the Claimant's clerking had significantly deteriorated since the start of 2019, as is apparent from the chronology set out in Appendix B and the Claimant's supplementary statement, in particular as summarised above.

61.6. Throughout 2019, it can be seen that one of the principal 'clerking' activities undertaken in relation to the Claimant was to put her forward on

various lists of potential counsel. However, 'beauty parades' of this kind had been identified in the WTF Report in 2017 as involving *'no real clerking'* and not producing a *'fair distribution'* of work (**[5959-5960]**, §28(g)). The crucial interaction that is likely to determine to whom the brief actually goes is the telephone interaction that the clerk will have with the solicitor. The 'opportunity analysis' records kept **[GC/380]** do not adequately record the reasons why particular counsel were ultimately selected, contrary to the recommendations of the WTF report (**[5960]**, §32). The Claimant's unchallenged evidence was that she was not even aware of many of the potential cases which are recorded on the opportunities list. Therefore, comparing bare numbers of 'opportunities', amounting to no more than putting the Claimant's name on a number of lists, is of no assistance at all in reaching conclusions about the quality of the Claimant's clerking.

62. Corresponding with the reduction in the quality of her clerking, the Claimant experienced a significant drop in billing/income during 2019, which cannot be adequately explained by other causes

62.1. The Claimant accepted, both in her statement and in oral evidence, that there are other factors which also contributed to the reduction in her income in 2019 (such as the change in legal aid payment regime). But the core proposition, from which Mr Menon did not dissent, is that even on Mr Menon's analysis it is not possible to attribute <u>particular</u> amounts of the reduction to the various factors he identifies. Therefore, none of those factors decisively disproves the proposition that a reduction in the quality of the Claimant's clerking contributed to the reduction in her billing/income. If the Tribunal is satisfied that there <u>was</u> a reduction in the quality of her clerking as set out above, it would follow that this did contribute to the reduction in billing/income.

62.2. Turning to the billing/income data itself, that does further reinforce the conclusion that there was a reduction in clerking which contributed because on careful analysis it cannot be adequately explained by the various other causes proposed by the Respondent's witness, in particular Mr Menon.

62.3. The starting point is that billing data is a better measure of the quality of the work actually being provided for the reasons the Claimant explained, namely because although billing might later be reduced on assessment, as a metric of the actual work being done it is the best measure. But whether one uses billing or income, and even if one compares financial years rather than calendar years (which Mr Menon agreed would adjust for the impact of the Claimant's period of absence at the end of 2018), the pattern which emerges is of a healthy developing practice with annually increasing earnings doing fewer, better cases from 2015 to 2018, followed by a cliff-edge drop: see the various figures at [RM w/s, §§34 & 43] **[GC/240, 244]**.

62.4. Mr Menon proposes 4 main factors to explain this drop-off [RM w/s, §35 **[GC/240]**. First, he notes the change in payment regime, which the Claimant accepts had an impact and so will account for some of the reduction. But by comparison with her peers, the reduction in the Claimant's income was joint highest at 54% [RM w/s, §39] **[243]**. And comparing the (better) measure of billings, her reduction was 76%, twice that of the next highest (D) at 38% **[5505]**.

62.5. Second, Mr Menon refers to the number of days marked keep free, holiday or away on which the Claimant did not do work. Two main points may be made about this alleged factor. First, this can only be an explanation for the *reduction* in the Claimant's income if there was an *increase* the number of such days. However, Mr Cook's positive evidence was that the Claimant's approach to marking time out of her diary had *not* changed [CC w/s, §35] **[C/52]**, and that is supported by the data which in fact shows the number of days marked out *decreasing* year on year from 2017 to 2019: the total number of days marked keep free, holiday or away on which the Claimant did not in fact work was 93 in 2017[16], 86 in 2018 and 67 in 2019 [RM w/s, §§54 & 58] **[GC/247, 249]**. (Blank days do not assist in this analysis because they are days on which the Claimant *was* available to work but had not been offered anything suitable.) The second point to be made in respect of the number of days marked out is

[16] This figure was put to Mr Cook in cross-examination by reference to the relevant diary entries and is understood now to be agreed.

that the Claimant's evidence was clear that the clerks knew that unless she was out of the country or had another immovable commitment, she could be contacted when marked out if a good brief came in. Although this was denied by Mr Tennent and Mr Cook, save in respect of briefs from regular solicitors, the documentary record summarised in Appendix B to these submissions supports the Claimant's evidence: the Claimant was contacted on 4 March 2019 and returned from holiday a week early for a trial (for a regular solicitor) starting on 11 March 2019; she undertook short hearings whilst marked away on 25 and 28 February 2019, 26 July 2019, and 9, 12 and 13 August 2019; and, importantly, she was contacted twice further on 4 March 2019 in relation to potential (albeit unsuitable) trials not for regular solicitors. Therefore, for those 2 reasons, the number of days marked out of the diary in 2019 does not explain the reduction in the Claimant's earnings in 2019 at all.

62.6. Third, Mr Menon refers to a number of high paying cases in 2019 either finishing in 2020 or being postponed until 2020. But this is simply a variation of the point already addressed about the potential arbitrariness of where one draws the line. For example, Mr Menon accepted that the fact the DC murder trial was paid in January 2020 (see **[GGC/276]**) is catered for by the cross-check of comparing financial rather than calendar years.

62.7. Fourth and lastly, Mr Menon suggest that 2018 was an 'outlier' for the Claimant. However, as already noted the actual pattern of the Claimant's earnings between 2015 and 2018 is one of steady increase, particularly if one does the cross-check by reference to financial years [RM w/s, §43] **[GC/244]**. The list of the Claimant's most lucrative cases which Mr Menon gives in [RM w/s, §46] **[245]** is similarly consistent with a pattern that the Claimant's practice was maturing during 2017 and 2018, and then deteriorated in 2019. The proper conclusion from the data, therefore, is that the Claimant had a healthy, maturing practice from 2015 to 2018 and that there was indeed a drop of in the quality of her clerking and consequently her earnings in 2019.

63. The factors identified by Mr Menon do not, therefore, fully or adequately explain the reduction in the Claimant's earnings in 2019. There was a reduction in the quality of her clerking in 2019 which contributed to that reduction in earnings.

64. The wider evidence in this case, addressed in respect of the other detriments and the victimisation claim below, shows that the picture which Garden Court has sought to paint of an organisation with little gossip or discussion of disputes and disagreements is wide of the mark. The facts and evidence considered in relation to Detriment 3 show that in October 2019, there was broad discussion and communication about the issue of the Claimant's tweets, with sharing of views and information, and discussion of what action to take and how to secure formal action against the Claimant. Further, the facts and matters considered in relation to the victimisation claim show how an adverse view of the Claimant for claiming discrimination against Garden Court has become widely shared and understood. It is implicit in Ms Cronin's evidence that she is aware generally that people are upset [Day 21, pm, approx. 4.30pm] and that this is therefore something that must have been the subject of wide discussion. The evidence therefore shows that adverse reactions such as that which the Claimant provoked by her email of 14 December 2018 do become the subject of discussion and widely known in chambers.

65. It is also known that clerking at Garden Court is susceptible to the impact of the culture and to the relationships which the clerks most closely maintain, because that is revealed by the WTF Report from 2017 (see in particular §§22(b) & 28(c) **[5956; 5959]**). Both Mr Tennent and Mr Cook agreed on the importance for clerks of building and maintaining relations. Despite their equivocations, the Claimant is clearly right that relations with the senior and influential members of chambers (i.e. the senior members of the Board and those with leading practices) are the most important ones for the clerks to maintain. Mr Cook also focuses on the silks and has a particularly close friendship with Ms Khan.

66. Having regard to all of the facts and matters outlined above, it is inconceivable that the disapproval of the Claimant's 14 December 2018 email that is apparent from the correspondence was not noted and discussed within Chambers. There was a reduction in the quality of the Claimant's clerking and her earnings in 2019 which requires explanation. The explanation to be inferred is that it was because of the adverse reaction to her 14 December 2018 email, which was in turn because of the underlying prejudice against her gender critical views.

*Inferring discrimination on 'ordinary' principles*

67. Since the core of the case on Detriment 1 is an inferential one, the relevant inferences have already been addressed above. For the reasons set out, and having regard to the over-arching background as well, the Tribunal is invited to infer that the Claimant sustained a loss of work and earnings because of her protected beliefs.

*No properly separable feature*

68. The Claimant's email of 14 December 2016 **[557-8]** makes essentially the same points as the her *'appalling levels of fear, intimidation and coercion'* tweet, which is considered in detail below in relation to Detriment 4. The same points are relied on in relation to this email.

69. The only additional element in the email is the reference to *'trans-extremism'*. That is a description of the Claimant's fundamental belief that Stonewall's position on self-ID is an extreme and dangerous one. Stonewall's position is indeed, as a matter of fact, at one extreme of the debate on these issues (see, for example, the views expressed by Mr Medcalf in cross-examination, recited at §28 above) . It must be within the scope of the Claimant's rights under Articles 9 and 10 to express the belief that Stonewall's position constitutes trans extremism. Indeed, that language echoes that of the LGBA Launch tweet which Ms Sikand found to be within the scope of legitimate speech.

70. There is, therefore, no properly separable element of the Claimant's email of 14 December 2016.

*Liability for the acts of the relevant individuals*

71. The Heads of Chambers and Ms Harrison were all officers of Chambers and therefore also members of the Board of the Service Company. Mr Cook is an employee of the Service Company. All were therefore in those capacities acting as employee or agents for Garden Court for the purposes of EqA10, s109.

***Detriment 2: the response tweets***

*Submissions as to the primary facts*

72. The Tribunal is referred to Appendix A to these Closing Submissions for the principal chronology in relation to Detriment 2. The most critical period for the purposes of Detriment 2 is the period from Mr de Menezes' email at 6.05pm on 23 October 2019 **[611]** up to the sending of the response tweets between 5.18pm and 5.34pm on 24 October 2019 [DDM w/s, §§43-44] **[GC/91]**. But in addition, subsequent events up to at least the notice of Ms Sikand's investigation sent to the Claimant on 30 October 2019 **[Supp/111]** are also directly[17] relevant because of what they reveal about the underlying approach and attitude towards the Claimant.

73. It will be apparent from the events covered in the chronology during those periods that the decisions about how to respond, and in particular the decision to publish the response tweets, were in practice joint decisions to which the Heads of Chambers, Mr de Menezes and Ms Hakl-Law all contributed. They are, therefore, to be regarded as joint decision makers, alternatively as all having, through their participation in the process, contributed to the detriment.

74. The actions of the relevant individuals during those periods need to be considered within the following context:

    74.1. It was common and accepted practice for members of Garden Court to identify their membership in their twitter biographies and say their views were their own **[621]**.

    74.2. It was common and accepted practice for members of Garden Court to engage in political activism and express their beliefs on many subjects, including controversial ones, and chambers does not demand or expect advance notice or getting clearance for doing so (**[695]**; MW xx [Day 19, am, approx. 9.35am]).

[17] Of course, the general point that in deciding what inferences the Tribunal should draw, it should always step back and consider all of its findings of primary fact in the round, applies equally here. But the particular period from the sending of the response tweets to the notice of investigation on 30 November 2019 is of specific direct relevance to this detriment.

74.3. Garden Court would not normally respond to or comment on the political activities or beliefs of its members (**[695; 2378; 2431; 2433]**; LT xx [Day 13, pm, approx. 3.15pm]).

74.4. It was, or ought to have been, immediately obvious that the Claimant's support for the LGBA and her tweet about its launch were well within the bounds of free speech and normal political activism in chambers (**[695; 2433]**; RM xx [Day 14, pm, approx. 3.55pm]; LD xx [Day 19, pm, approx. 4pm]).

74.5. Under the complaints procedure, §§7-8, there is no obligation to investigate or appoint an investigator if it is clear that the complaint is without merit or not valid for some other reason **[4390]**. Although some of Garden Court's witnesses sought to suggest that this was not how the procedure operated in practice, in fact that was exactly what was done in January 2020 **[3655]**.

74.6. The procedure also provides for general confidentiality for *'All conversations, records and documents relating to the complaint'* (**[4391]**, §12). That confidentiality is not limited to the complainant: a member of chambers about whom a complaint is made would obviously also have an expectation of confidentiality. In practice, the provision applies to the fact and all aspects of the process of any complaint: the complaint itself will be a 'record' or 'document' and all stages of the process will be conducted by means of 'conversations, records and documents' which by definition will 'relate to the complaint'. It is certainly the case that *'tweeting that we are investigating someone is… a departure from practice'* **[843]**. Even in these proceedings, the subject of the antisemitism complaint has been anonymised.

75. When considering the relevant chronology addressed in Appendix A against that context, the Tribunal is invited to find the following matters of particular note:

75.1. The 'concerns' expressed in the material under consideration at the time of the decision to send the response tweets – in both the tweets directed at Garden Court **[6355-6368]** and the 'complaints' being considered at that time **[6369-6372]** – were all about the Claimant's support for the LGBA. It ought to

have been immediately obvious that that was legitimate activity and legitimate free speech for a member of Garden Court.

75.2. Many of what Mr de Menezes euphemistically described as the *'highly critical'* tweets responding to the Claimant's LGBA launch tweet were in fact extremely abusive and/or threatening **[3582-3590; 2150]** (and it is to be noted that many, including the most threatening/abusive, will have been deleted and so are not now in the material before the Tribunal). It is a striking feature of the evidence of Garden Court's witnesses that all 5 of the individuals involved in deciding how to respond at this time claim to have been oblivious to the level of abuse and threats that the Claimant was getting, whilst she describes being in *'turmoil'* at the *'[d]eath threats, memes with firearms, [and] numerous "fuck terfs" messages and threats'* [C w/s §369] **[C/111]**. It is simply not credible that none of those individuals saw any of the abuse and threats when the relevant link was provided in Mr de Menezes' first briefing email: see comments in Appendix A in relation to **[611]**. The fact that none of them was prompted either to offer support to the Claimant, or to consider whether the nature and level of the abuse might undermine the legitimacy of attack on the Claimant and the so-called 'reputational risk' to Garden Court, suggests that either (a) to the extent that they genuinely did not see the abuse/threats, they cannot have made much if any effort to actually review the relevant material; or (b) that they did not regard the abuse/threats as significant. In either event, that implies a lack of care or concern to ensure that the Claimant was treated fairly, and hence an underlying prejudice against her and a predisposition to give credence to the criticisms being made.

75.3. The level of adverse reaction – in particular the level actually directed at Garden Court – and the 'reputational risk' have been over-stated. At all times the number of 'likes' for the Claimant's LGBA launch tweet substantially outweighed the number of comments (which in any event included both supportive comments and abuse/threats) **[611; 704]**. Moreover, at the time the decision to send the response tweets was made, the total number of visible tweets actually directed at Garden Court was 40 tweets from 24 separate individuals: see comments in Appendix A in relation to **[620-621]**. Moreover,

the level of traction that those tweets had received was objectively negligible: the number of comments, 'likes' and re-tweets they had received at that point can be seen at **[6355-6368]** and are mostly zero or in single figures, and universally very low. (This may be contrasted with the notably larger numbers of 'likes' and 're-tweets' received by later posts criticising Garden Court for its response tweets **[2151-6]** – including for example 47 re-tweets and 259 'likes' for a the post by Helen Steel, a well-known campaigner who has actually used Garden Court barristers **[2153]**.) In short, therefore, the evidence simply does not support Mr de Menezes' assertion that Garden Court was getting a *'hammering'* on twitter. Further, the location and reputability of the individuals posting criticism is plainly relevant to an objective assessment of the 'reputational risk' and even a cursory view of the individuals who were actually sending the tweets directed at Garden Court indicates that many of them should not be treated as reputable (see for example 'Kai' **[Supp/156]**, 'Dolly Dagger' **[6360]**, 'Dick Warlock' **[6360]**, 'My Little War Pony' **[6366]**, etc). The only profile of any of these individuals now available is 'Kai' with just 349 followers **[Supp/156]**. Overall, therefore, the alleged 'hammering' of Chambers and supposed 'reputational risk' are not objectively established by the evidence and even a rudimentary examination of the material circulated by Mr de Menezes at the time ought to have raised serious questions about those assertions of risk. The fact that he made them, and that none of the other individuals involved asked any searching questions about them, again suggests an underlying predisposition to give credence to the criticism of the Clamant, regardless of how questionable its source or manner of expression.

75.4. The proposal to send the response tweets was first raised <u>before</u> any consideration of any actual 'complaints': see comments in Appendix A in relation to **[2044]**. Ms Khan expressly described its purpose as being *'to immediately dissociate ourselves from her comments'* **[2056]**. No actual consideration was given to the complaints procedure or whether an investigation was necessary until much later: see comments in Appendix A in relation to **[2340; 2422; 2468]**. If proper consideration had been given to the procedure, not only ought to have been immediately obvious that no investigation was required (see above) but also obvious irregularities such as

the inclusion of an anonymous complaint **[6370]** should have been identified. All of this again shows a lack of care and attention on the part of the decision-makers and suggests that they were acting on instinct and prejudice rather than as a result of proper and careful consideration. The statement in the response tweets that the concerns were being investigated was clearly a convenient means of 'dissociating' Chambers from the Claimant's tweets and appeasing her attackers, and not a true statement about any actual live investigation that had been instigated following proper consideration of the policy and procedure.

75.5. It was or ought to have been apparent to all of the decision-makers that the language which Mr de Menezes proposed for the response tweets **[2073]** would give credence to the concerns raised in the tweets to which they were replying: the reference to *'concerns'* being investigated would inevitably, in that context, be understood as referring to the concerns raised in those tweets. Moreover, the juxtaposition of the second response tweet against the first would also clearly imply that the views *'expressed in a personal capacity'* by the Claimant were at odds with Garden Court's *'long-standing commitment to promoting equality, fighting discrimination and defending human rights'*. However, it is apparent that none of the Heads of Chambers gave any serious consideration to the actual tweets to which the response tweets would be sent or, therefore, to the context in which they would appear. Ms Khan said that she did not read the examples of tweets directed at Garden Court provided by Mr de Menezes at all [Day 17, pm, approx. 2.45pm]. Mr Thomas could not recall whether he read them [Day 13, pm, approx. 3.45pm]. Mr Willers said that he read them but did not adequately answer the question whether he thought it even relevant to consider whether, before deciding to send the response tweets in the terms proposed, there was any merit at all to the allegations of transphobia and breach of the EqA10 being levelled against the Claimant: the Tribunal is invited to consider this passage of Mr Willers' evidence overall and to conclude that, along with the other Heads, he simply did not consider whether the obvious implications of the proposed tweets were justified [Day 19, am, approx. 10.50-11.23am]. Again, the evidence on this point reveals a lack of care and attention on the part of the Heads of Chambers and a

predisposition to give credence to the allegations of transphobia being levelled against the Claimant.

75.6. Contrary to §93 of Garden Court's Opening Submissions, the purpose of the response tweets cannot have been to inform complainants that their complaints were being investigated because there was never any intention to investigate the tweets and the website complainants could have been informed by email. (The fact that one tweet contained a screenshot of a complaint is irrelevant because the tweet was not the actual complaint and in any event it was not necessary to tweet rather than email.) In sending out the tweets, they were breaching the confidentiality requirements of the policy and departing from normal practice (see above). Moreover, they did so without even the courtesy of prior notice to the Claimant and the evidence indicates that this was only raised by Mr de Menezes after the response tweets had been sent: see comments in Appendix A in relation to **[2059; 6084; 2080; 626]**. Again, there is a strong implication that the decision-makers were acting with little or no care or consideration for the Claimant and were influenced by a predisposition to regard her as being at odds with Chambers' core values and ethos such that her interests were secondary.

75.7. The suggestion, which Garden Court witnesses continued to seek to maintain, that sending the response tweets as replies to a limited number of individuals was intended to limit their circulation, is unsustainable and again undermines the credibility of Garden Court's explanations and evidence. The basic facts about how twitter works explored with Mr de Menezes show that the response tweets would in any event have appeared in the timelines of followers of both Garden Court and those to whom they were responding [Day 21, am, approx. 10.30-10.45am]. Indeed, he explicitly recognised and advised the Heads of Chambers that the response tweets were likely to receive wide circulation to the extent that it was *'safe to assume… [they] might find [their] way into the press, but that's OK'* **[2065; 2073]**. Most fundamentally, Garden Court cannot have it both ways: if the purpose of these tweets was to calm a

'twitter storm' they cannot have been intended to stop at 7 recipients[18]; if they were intended to stop at 7 recipients that cannot have been much of 'storm'. It was striking – and further undermined his credibility – that even when this contradiction was presented to Mr de Menezes, he declined to candidly accept that the tweets were intended for wide circulation [Day 21, pm, approx. 3pm]. The inference to be drawn is that the response tweets were intended for wide circulation in order to appease those who had been calling the Claimant transphobic, by distancing Garden Court from her and implying support for those criticisms.

75.8. The further reactions of Garden Court, in particular of Ms Khan, when the Claimant made them aware of the abuse and threats she was receiving are also telling and further support the conclusion that there was an underlying animus towards the Claimant and predisposition to regard her as being in the wrong. The Tribunal is invited to consider the chronology in this regard carefully, because it contradicts the case which Mr Hochhauser sought to advance on behalf of Garden Court that there were timely offers of support which the Claimant had ignored. As has already been noted, there had not even been any consideration of offering support before the response tweets were sent. The key context for what happened next is that, as even Ms Khan acknowledged, *'I can see why [the Claimant] would be upset by the [response tweet] referring to an investigation'* **[624]**. Some understanding of that position ought to have been reflected in the contact with her. The Claimant was indeed upset and also told Ms Khan on the evening of 24 October about the abuse and threats she was getting, in response to which Ms Khan expressed no sympathy: see comments in Appendix A on **[629-620]**. When the Claimant further complained that night about the lack of support, assistance or compassion **[2164]**, Ms Khan's response was again to offer no support but essentially to blame the Claimant **[6402]**: see comments in Appendix A. Contrary to the suggestion by Mr Hochhauser that it was the Claimant being intransigent at this point, she in fact proposed a compromise way forward the following morning **[661]**. It was not until 1.11pm on 25 October that Ms Khan

[18] In fact, the replies were sent to more than 7 people: see the various @ handles to which they were sent at **[612-9]**.

offered any kind of expression of sympathy or support **[678]** but she made no actual constructive suggestions and by that stage had already effectively blamed the Claimant: see comments in Appendix A. When interviewed by the *Sunday Times*, Ms Khan's condemnation of abuse was half-hearted at best: see comments in Appendix A on **[295]**. And it is notable that Mr de Menezes' motivation for condemning abuse was explicitly about Garden Court's reputation rather than concern for the Claimant: see comments in Appendix A on **[2428]**. None of the Heads of Chambers made any further attempt to reach out to the Claimant or offer support and it was only on the initiative of the women's officers, expressly not mandated by the Board, that some contact to offer support was made the following week **[2461]**. All of this is consistent with the lack of care, attention or consideration for the Claimant's position and the predisposition to regard her as being at odds with Chambers' core values and ethos, which characterised the whole reaction to the LGBA launch tweet as set out above.

75.9. Dismissiveness towards the Claimant and her beliefs is again apparent in the treatment of messages received in support of her. In stark contrast to the failure to apply any critical faculties to the tweets and messages of 'complaint' as described above, in respect of the letters of support completely baseless inferences were drawn that the Claimant had provided email addresses and solicited support and, though apparently collated, those messages were never supplied to either the Claimant or Ms Sikand during the investigation process (even though several of them contained material relevant to the issues under investigation: see comments in Appendix A in particular in respect of **[676-7, 2209, 2212-3, 2333-4, 682-3, 2359-2361, 938, 697-8, 753]**).

75.10. Overall, therefore, the whole reaction which led to the response tweets was fundamentally characterised by a lack of care and attention, a failure properly to consider the materials or the policy, a lack of thought or consideration for the Claimant and her position, an underlying animus towards her, a predisposition to regard her as being in the wrong, and a willingness to give credence to and seek to appease those accusing her of transphobia simply because of her support for the LGBA.

*Inferring discrimination on 'ordinary' principles*

76. There can be no doubt that the response tweets were a serious detriment. There is abundant evidence that the Claimant was extremely angry and upset about them (see e.g. **[629; 2146-7; 2164; 2392; 751]**). They were widely (and rightly) interpreted as Chambers distancing itself from the Claimant and 'throwing her under the bus' (see e.g. **[4550-2; 791-2; 938; 939; 6095]**). Indeed, even Ms Khan could *'see why she would be upset by the one referring to an investigation'* **[624]**.

77. The facts and matters identified above, together with the wider background as to the entrenchment of the trans activist position in Chambers, strongly support the inference that the decision to send the response tweets was materially influenced by prejudice against the Claimant's core gender critical beliefs and by a consequential predisposition or readiness to give credence to her critics.

78. Garden Court seek to suggest that this was a unique situation for them reputationally but they would have responded in the same way to *any* similar reaction to a member's tweets. But that contention is difficult to credit for a number of reasons. First, the general strength of the free speech ethos at Garden Court and engagement of its members on a variety of activist issues suggests that there would be unlikely to be a similar rush to distance chambers from the expression of beliefs that the decision-makers were not predisposed to regard as being at odds with Chambers' general position on a subject[19].

79. Second, there is a clear contrast both with the complete lack of action in respect of Alex Sharpe's tweets **[490-493]** when the Claimant raised concerns about them **[566-571; 572-3; 578]** and with the proactive support provided to Ms Anderson when she faced online abuse **[453-4; 456; 459]**. It is of course accepted that neither of those situations is directly comparable, but what is comparable is the contrasting attitude revealed in respect of each of the situations. There was no follow-up at all with Ms Sharpe: indeed the Claimant raised the issue again in her response to the

[19] Of course, it is no defence to say that Garden Court would respond in the same way to expressions of other beliefs that it does not like, if it would not do so in respect of beliefs it was comfortable with: just as it is still race discrimination to treat people with any colour of skin other than white all equally less favourably, so it is still belief discrimination to treat all beliefs one does not like equally less favourably than those one does.

Stonewall complaint (**[771]**, §44; **[788-790]**) and it was noted that Ms Sharpe still had not included a statement on her twitter bio to state that her views were her own **[794-5]** yet there is still no evidence of any action being taken at all. Conversely the proactive approach taken in respect of Ms Anderson contrasts sharply with the delayed and desultory 'support' for the Claimant. The contrasting attitudes which are apparent from these comparisons undermine any suggestion that Garden Court would have acted in the same way in respect of another belief.

80. Third, the overwhelming inference from the primary facts highlighted above is that Chambers was predisposed to give credence to and seek to appease those who were calling the Claimant transphobic. It is inconceivable that Garden Court would take the same approach in relation a belief that had support, or at any rate did not have the active disapproval, of key decision-makers and others in chambers who were lobbying them. Of course, a desire to appease complainants who are themselves complaining on a discriminatory basis (as these complainants undoubtedly were: see Miller) is itself indissociable from that discriminatory reason (see Claimant's Opening Submissions, §57.3).

81. Therefore, the Tribunal is invited to conclude, on ordinary principles, that the response tweets were less favourable treatment because of the Claimant's beliefs, and not some particular manner of expression of those beliefs or other feature.

*No properly separable feature*

82. The only tweet relevant to the response tweets is the LGBA launch tweet because it was the reaction to that which was being addressed. There can be no question of there being any properly separable feature in the manner of expression of that tweet because Ms Sikand found that it was within the Claimant's right to freedom of speech.

*Liability for the acts of the relevant individuals*

83. The Heads of Chambers were acting in that capacity as officers of Chambers and Board members of the Service Company. Ms Hakl-Law and Mr de Menezes were employees of the Service Company. All were therefore plainly acting as employees and/or agents of Garden Court for the purposes of EqA10, s109.

***Detriment 3: soliciting the Stonewall complaint***

*Submissions as to the primary facts*

84. The main factual issue in relation to this detriment is whether, in her call with Mr Knan on the morning of 23 October 2019, Ms Brewer encouraged him to ask attendees at the round table that evening to complain to Garden Court about the Claimant, or whether she merely *'signposted'* the complaints procedure in an effort to reassure him in response to concerns raised by a participant about the appropriateness of Garden Court as a venue.

85. There are 4 features of the evidence and surrounding circumstances which support the conclusion that Ms Brewer encouraged complaints:

    85.1. First, the evidence of Ms Brewer's other actions at around that time shows that she was engaged in encouraging complaints and pressing for action against the Claimant more generally, supporting the conclusion that that is what she did when she spoke to Mr Knan as well.

    85.2. Second, the evidence as to what Ms Brewer said about a meeting on Monday 28 October 2019 to consider the Claimant's tweets further supports the conclusion that she was pressing for action against the Claimant.

    85.3. Third, Mr Knan's evidence and the documentary record of his communications at the round table and following support the conclusion that Ms Brewer encouraged complaints.

    85.4. Fourth, Ms Brewer's explanation that she was seeking to reassure and advise Mr Knan how to deal with concerns raised about the use of Garden Court as a venue does not adequately explain why she mentioned the complaints procedure at all.

86. Those features will be addressed in turn.

87. **First**, Ms Brewer engaged in the following other actions in the lead-up to and around the time of her call with Mr Knan, which show that she was engaged in

encouraging complaints and pressing for action against the Claimant more generally:

87.1. On 16 October 2019, Ms Brewer sent an email to the Heads of Chambers, Ms Hakl-Law, Emma Nash, Ms Harrison and the Trans Rights Working Group, raising concerns about the Claimant's tweets, suggesting that they were inconsistent with Chambers' commitment to trans rights, and seeking *'guidance on how this can be dealt with'* **[602-3 / 984-5]**.

87.2. On 17 October 2019, Ms Brewer sent a screenshot of one or more specific tweets to Mr de Menezes, which was not provided in her Subject Access Request response, disclosed in these proceedings, or referred to in her statement but she mentioned for the first time in cross-examination [Day 22, am, approx. 11.45am].

87.3. At some point prior to 18 October 2019, Ms Brewer also spoke to both Ms Hakl-Law and Mr de Menezes about the Claimant's tweets, and it is clear that Emma Nash (one of the public law clerks who was involved in managing Ms Brewer's practice: [MB w/s, §59] **[GC/14]**) was also aware of this because she refers to it in an email to Ms Hakl-Law and Mr de Menezes forwarding a website enquiry about the issue **[2028]**. Ms Nash's comment that the website enquiry *'may add some weight to the issue and demonstrate general perception'* implies that the objective was to bolster a case against the Claimant.

87.4. On 21 October 2019, Ms Brewer informed Tara Hewitt (Head of Equality, Diversity and Inclusion at an NHS Trust [MB w/s, §8] **[GC/3]**), following on from earlier exchanges in which Ms Hewitt had raised concerns, that she (Ms Brewer) had raised the Claimant's tweets with the Heads of Chambers. She went on: *'…but this should not stop you putting in a formal complaint as well if you want to. The Bar standards board are taking a tough line now with barristers and social media… You can make a formal complaint to the heads of chambers either in person or as TELI if TELI wants to go down that line'* **[1823]**; [MB w/s, §71] **[GC/16]**. The terms of that communication are plainly an encouragement to complain and are not consistent with Ms

Brewer's attempt to suggest that she was neutrally *'signposting'* the complaint process but leaving it entirely up to Ms Hewitt whether to complain [MB w/s, §71] **[GC/16]**; [Day 22, am, approx. 11.50am].

87.5. On the evening of 23 October 2019, Ms Brewer exchanged text messages with Mr Clark, in which she explicitly solicited copies of further tweets *'so I can send on'* for consideration by the Board on Monday (28 October) **[1818]**. This is clear, active solicitation of material for Ms Brewer to use against the Claimant by sending it on to the Heads of Chambers and seriously undermines Ms Brewer's attempt to portray herself generally as a reluctant conduit who was doing no more than 'signposting' the process to a number of people.

87.6. On 25 October 2019, in response to Mr Renton's email about a telephone conversation he had overheard the Claimant having, Ms Brewer noted that the Heads of Chambers and Board were meeting to discuss the issue on Monday (28 October) and suggested that it *'might be an idea to relay to them your concerns since it is going through those channels'* **[967]**. Although Ms Brewer sought to suggest that this was just another example of her being a reluctant conduit [Day 22, am, approx. 12pm], Mr Renton was clear that he *'took her to be inviting me to make a complaint about [the Claimant]'* [Day 21, am, approx. 9.40am]. Mr Renton's understanding is plainly right.

87.7. Also on 25 October 2019, Ms Brewer had an email exchange with Jay Stewart of Gendered Intelligence (of which she was a trustee) **[2238]**, in which she passed on information about the timing of the internal complaints process, namely that the Heads of Chambers were dealing with the matter over the weekend ready for a board meeting on Monday. She had been given this information earlier that day in an email from Ms Khan **[626]**. She also shared with Mr Stewart that *'very senior members of chambers are livid at the posts'* **[2238]** – a reference to Ms Harrison's reaction at **[926]**. Ms Brewer suggested in cross-examination that the information she gave to Mr Stewart was *'all in the public domain'* and she did nothing to encourage Gendered Intelligence to complain [Day 22, am, approx. 12pm]. But it is not correct that the information was all in the public domain: the fact that the material was being considered

over the weekend and at a Board meeting the following Monday was not public, nor was Ms Harrison's reaction. For a member of a set of chambers to share internal information of this kind about a disciplinary process is astonishing. It is to be inferred (particularly in light of the other matters set out above) that it was intended to convey to Mr Stewart that the view ascribed to *'very senior members'* was widely shared, that formal action was being considered, and to prompt complaint from Gendered Intelligence to support such action. As a matter of fact, Gendered Intelligence did of course both solicit complaints more widely **[793]** and submit its own complaint the following Monday prior to the Board meeting about which Ms Brewer had informed Mr Stewart **[2574-5]**.

87.8. Just one or two of the actions above *might* be explicable as neutral acts in the way Ms Brewer suggests, but considered as a whole – particularly in light of the obvious active solicitation/encouragement in Ms Brewer's messages to Ms Hewitt, Mr Clark and Mr Renton – the conclusion that Ms Brewer was actively pressing for action against the Claimant, and soliciting complaints/material to support such action, is inescapable. That context therefore supports the conclusion that that is what Ms Brewer also did during her conversation with Mr Knan on 23 October 2019.

88. **Second**, the evidence as to what Ms Brewer said about a meeting on Monday 28 October 2019 is telling:

88.1. Ms Brewer accepts that she told Mr Knan on 23 October 2019 that the Heads of Chambers would be looking into the Claimant's posts the following Monday (28 October 2019) [MB w/s, §82] **[GC/19]**. That is reflected in Mr Knan's subsequent communications **[3847; 2327]**.

88.2. However, Ms Khan was clear in her evidence that, as at 23 October 2019, there was no plan to discuss the Claimant's tweets at the Board meeting on 28 October [Day 17, pm, approx. 3.55pm].

88.3. The most obvious explanation for this discrepancy is that Ms Brewer was mistaken about the Claimant's tweets being an agenda item for the Board meeting, but knew about the Board meeting and had discussed with others an

intention to have the issue of action in relation to the Claimant's tweets added to the agenda for that meeting.

88.4. In the course of cross-examination, it emerged that – contrary to her assertion in her supplementary statement that she made no calls during the relevant period to the people identified in paragraph 1 of that statement [MB Supp w/s, §§1 & 6] **[Supp/150-151]** – Ms Brewer did accept that her 3½-minute call to chambers immediately before speaking to Mr Knan on 23 October 2019 **[6394]** could have been a call to Ms Hakl-Law [Day 22, am, approx. 11.45am]. She had previously indicated only that it may have been to an (unidentified) *'member of staff'* [MB w/s, §78] **[GC/19]**. Upon further probing, Ms Brewer conceded the possibility (though she could not remember) that she may have spoken to Ms Hakl-Law to find out when the next Board meeting was and to ask that action in respect of the Claimant's tweets be added to the agenda [Day 22, am, approx. 11.45am]. Given that concession, and the absence of another apparent explanation for Ms Brewer's belief on 23 October 2019 that the Claimant's tweets would be discussed on 28 October, that must on the balance of probabilities be what happened.

88.5. What is revealing about this is that it shows a degree of discussion about taking action in respect of the Claimant's tweets over and above what Ms Brewer initially described in her witness statement. Notably, she also did not refer in her statement to the discussions with Mr de Menezes, Ms Hakl-Law and Ms Nash that are revealed by Ms Nash's email of 18 October 2019 **[2028]**. The fact that the discussion was more extensive than Ms Brewer initially described and that it probably involved her actively asking for the Claimant's tweets to be added to the Board's agenda for 28 October 2019 further supports the conclusion that she was engaged in actively pressing for action during this period – and that that is what she did when she spoke to Mr Knan on 23 October.

89. **Third**, Mr Knan's evidence and the documentary record of his communications at the round table and following support the conclusion that Ms Brewer encouraged complaints:

89.1. The minutes of the round table record Ms Knan passing on a message from Ms Brewer which *'encouraged'* participants to write to the Heads of Chambers to *'express concern'* in advance of a meeting *'to decide on formal action'* **[3847]**. As already noted (§14.1 above), Mr Knan's evidence indicates that he probably typed up these minutes from handwritten notes that he made at the time of the meeting (see his evidence in response to the Judge's questions [Day 14, pm, approx. 3.30pm]). The minutes may therefore be regarded as reflecting a contemporaneous, and broadly accurate, record of what was said.

89.2. His subsequent posts on the STAG Wall **[2327-8]** and STAG Facebook page **[2332]** again expressly record that Ms Brewer *'encourages'* messages *'supporting action against Bailey'*. These messages were undoubtedly sent just 2 days after his conversation with Ms Brewer and must be regarded as a good, near-contemporaneous record of what she had said.

89.3. Although Mr Knan's recollection of the conversation is now limited, his account in his witness statement made clear that he was unaware of the Claimant or her tweets before he spoke to Ms Brewer and that it was she who actively asked him to solicit messages to support formal action against the Claimant [SK w/s, §§17-18] **[SW/17]**. In his responses to cross-examination by Mr Hochhauser [Day 14, pm, approx. 2.15-3.25pm], he was firm on three points. He repeatedly reiterated that he had *'absolutely no recollection'* of concerns raised by another participant about holding the round table at Garden Court and could not accept that called Ms Brewer to discuss such 'safety' concerns. He was clear that he *'would not make… up'* the indication that formal action was being considered and should be supported. And he was clear that Ms Brewer's comments to him *'must have influenced [him]'* to take the steps which he subsequently did.

89.4. In light of that evidence, and the fact that the documentary record of Mr Knan's subsequent actions is the best contemporaneous record of what was said, those matters add further support to the conclusion that Ms Brewer actively solicited complaints in her call with Mr Knan on 23 October – especially when considered within the context of the other evidence already discussed above.

89.5. The exchange between Mr Knan and Ms Brewer the following day (24 October 2019) is also telling **[2136; 2318]**: Mr Knan commented that he *'did bring up the terfy barrister and asked people to support and write to the Head of GC. I hope to put something together tonight'* **[2138]**. In the first place, Mr Knan's use of the term *'terfy'*, which Ms Brewer knew to be derogatory **[963]**; [Day 22, am, approx. 12.30pm], reflects their shared perception of the Claimant. In addition, Mr Knan's description of what he had asked people to do and intended to do himself is consistent with his account that Ms Brewer had encouraged such complaints and <u>not</u> consistent with her account that she had merely signposted the complaints procedure as a possibility *if* concerns were raised by others at the meeting. She did nothing in response to this message to correct that perception. This further supports the conclusion that she had in fact encouraged complaints in their call.

90. **Fourth**, Ms Brewer's explanation for referring Mr Knan to the complaints procedure is inadequate:

90.1. Ms Brewer's explanation for referring Mr Knan to the complaints procedure was that it was an attempt to provide reassurance and advice in relation to supposed 'safety' concerns raised by another round table participant [MB w/s, §§82 & 93] **[GC/19, 21]**.

90.2. However, to refer to a complaints procedure in order to address purported 'safety' concerns about an imminent meeting due to be held that evening simply makes no sense. Raising a complaint would not address any perceived 'safety' concerns, and certainly not in time for the meeting.

90.3. Ms Brewer's only response to this point in cross-examination was to suggest that it was a criticism made with the benefit of hindsight and she had been responding off the cuff whilst on holiday with her children in the car (incidentally underlining the reality that barristers are never really on holiday) [Day 22, am, approx. 12.30pm]. Given this context, one striking feature of Ms Brewer's evidence in cross-examination, which further undermines its credibility, is that she claimed to have a clear recollection of her call with Mr Knan, but cannot clearly recall any of the details of her call immediately before

that or any of the other contact that she had in the period leading up to it. There is no explanation for why she would have a particularly clear recollection of the call with Mr Knan but not any of those other events.

90.4. But that response is again inadequate: the fact that addressing perceived safety concerns is a completely different exercise from adjudicating on a complaint is not a point of great nuance or insight that requires the benefit of hindsight. It is an obvious truth. The only conceivable reason for referring to a complaints procedure is to encourage complaints, not to address safety concerns.

91. **In summary**, the Tribunal is invited to find that the 4 features of the facts and evidence considered above support the conclusion that:

91.1. Ms Brewer was, in October 2019, generally engaged in actively seeking action against the Claimant and soliciting complaints and other material to support such action; and

91.2. When she spoke to Mr Knan on 23 October 2019 that is what she did: she asked him to encourage participants at the round table meeting to write letters of complaint to the Heads of Chambers to support formal action against the Claimant.

*Inferring discrimination on 'ordinary' principles*

92. The successfully soliciting the Stonewall complaint was obviously a detriment to the Claimant. The problems with Ms Brewer's evidence and account highlighted above, together with the general evidence of her views about gender critical feminists (see in particular the passages of her GRA training explored with her in cross-examination **[5977; 5980; 5996; 6018-6034; 6027-8]**) strongly support an inference that she was materially influenced by prejudice against the Claimant's core gender critical beliefs and would not have solicited complaints in the same way in respect of any other beliefs. Therefore, the Tribunal is invited to find, on ordinary principles, that the claim in respect of Detriment 3 succeeds on that basis.

*No properly separable feature*

93. Ms Brewer referred to a number of particular tweets in her email at **[601-3]**. None of those has any properly separable feature:

    93.1. The Claimant's tweets criticising an event at Garden Court **[1642-3]** are entirely legitimate and closely connected with her protected beliefs. It was clear her criticism was aimed at Prof Whittle, but in any event, there was no prohibition on criticising chambers.

    93.2. Her reference to Stonewall having *'gone rogue and… putting women and children at risk'* was only identified by Ms Brewer because it referred to Stonewall, which the Claimant is obviously entitled to criticise. The concern that Stonewall has 'gone rogue' in the sense that its position has put it at odds with its original 'LGB' constituency, and that self-ID would give rise to risks for women and children, is central to the Claimant's beliefs about self-ID and Stonewall's adoption of it and is a legitimate concern shared by many (see e.g. **[Supp/1; 101-2; 67]**. This tweet therefore expresses core aspects of the Claimant's protected beliefs, or as at least sufficiently closely connected with them, and is entirely legitimate speech.

    93.3. Finally, as to the Claimant's tweet that there *'no outrageous levels of violence against trans women'* **[1809]**, the whole tweet needs to be read in context: the point the Claimant was making was to address an assertion commonly made that high levels of violence against transwomen mean that excluding them from safe spaces from women is unjustified, and to use that assertion to shut down debate of objections based on the risks to women. This was again, therefore, expressing a core aspect of the Claimant's beliefs (or at least sufficiently closely connected with them) and well within the bounds of legitimate free speech.

94. Ms Brewer also said in her evidence that she had particular objection to the Claimant's cotton ceiling tweet, which is addressed in detail below in relation to Detriment 4. The same points are relied on insofar as that tweet may also be relevant here.

95. There is, therefore, no properly separable feature of any of the tweets which Ms Brewer identified as causing her particular concern.

*Liability for the acts of the relevant individuals*

96. The relevant individual in respect of Detriment 3 is Ms Brewer. The Claimant's case is that she was acting in her TRWG capacity as agent for Chambers.

97. The starting point is that because the main Practice Groups in chambers are large, in practice the business development and marketing in more niche or cross-Practice Group areas of work of necessity has to be done via smaller working groups (as is acknowledged to some extent in the constitution: **[4278]**, §1.9).

98. Although such working groups may be formed in an informal way, Mr Willers agreed that in practice unless someone steps in such groups have implicit authority to conduct marketing and business development on behalf of chambers in their area, though if they require funding they would need to apply to one of the main Practice Groups [Day 19, am, approx. 9.45am]. Mr Thomas agreed that in the case of the TRWG the Heads of Chambers were aware of it and implicitly approved its business development and marketing activities [Day 13, pm, approx. 2.20pm].

99. In that context, the TRWG was formed with the express purpose of engaging in business and marketing activities **[328-9; 370-374]**. It was not, as some of Garden Court's witnesses sought to suggest, merely an email group. Its activities may in practice have been sporadic and had limited success, but the issue is not whether it was a successful working group, but whether it was a practice group which had implicit authority to conduct marketing and business development on behalf of Chambers in the field of trans rights. Not only was it set up for that purpose without intervention from the Heads of Chambers or anyone else, but it did in fact meet; it did secure budget for at least one training session **[341-2]**; it did conduct other internal training, for example Ms Brewer's GRA training; its members did engage in building the sort of activist links discussed at its inception (see §52.6 above); it was held out to Stonewall as a chambers working group capable of developing a strategic partnership on behalf of chambers as a whole **[1631]**; and in her email of 16 October 2019 **[601-3]**, Ms Brewer did not refer to it as a defunct group but

described a set of activities carried out by an active group (and presumably she was being truthful).

100. The TRWG was therefore precisely within the category of working group recognised by Mr Thomas and Mr Willers as having implicit authority to conduct marketing and business development in its area on behalf of Chambers.

101. It is clear that Ms Brewer saw the impact of the Claimant's tweets as bearing directly on the activities of the TRWG because that is how she framed the issue in her email of 16 October 2019 **[601-3]**. Moreover her engagement with activist organisations was explicitly one of the ways in which the TRWG intended to carry out its business development **[370-374]**.

102. Therefore, applying the test set out in §§43-44 of the Claimant's Opening Skeleton, in engaging with Mr Knan and soliciting the Stonewall complaint, Ms Brewer was acting as agent for Garden Court for the purposes of EqA10, s109(1).

***Detriment 4: upholding the complaint***

*Submissions as to the primary facts*

103. The Tribunal is referred to Appendix A to these Closing Submissions for the principal chronology in relation to Detriment 4. The most critical period for the purposes of Detriment 4 is the period from the Stonewall complaint on 31 October 2019 **[6046]** to the decision by the Heads of Chambers on 15 December 2019 **[3201-2]**.

104. It will be apparent from that chronology that the decision to uphold the complaint was in practice a joint decision by Ms Sikand, Ms Harrison, Ms Khan and Mr Willers, with some input from Mr Thomas. They are, therefore, to be regarded as joint decision makers, alternatively as all having, through their participation in the process, contributed to the detriment.

105. The Tribunal is invited to find the following matters of particular note:

105.1. Ms Harrison explicitly recognised that it would not be appropriate for her to investigate the complaint because of her history on trans rights, both

legally and on campaign work **[723-4]**. She also expressed clear concluded views at an early stage to the effect that the tweets which were the subject of the Stonewall complaint breached the BSB Guidance **[2548; 6389; 2591]**, and had expressed views in relation to the LGBA launch indicating that she regarded it as *'anti trans'* and the Claimant's beliefs as contrary to chambers' position **[926]**. She plainly was not impartial, but nevertheless improperly took the lead in liaising with Ms McGahey (see below) and successfully lobbied to strengthen the findings against the Claimant **[3095-6; 3100-3112]**.

105.2. Similarly, Mr Thomas had agreed to recuse himself because of his position on the BSB **[662-3; 2110]**, but nevertheless expressed clear views about the parameters of the BSB guidance (albeit in relation to other tweets) to Ms Sikand, who was supposed to be investigating independently and impartially **[2545]**.

105.3. Ms Sikand herself, despite purportedly being concerned only with the tweets about which complaint had been made, engaged in a wider review of the Claimant's tweets and expressed views which show clearly that Chambers' membership of Stonewall's Diversity Champions scheme influenced her: *'Given that we are a Stonewall Diversity Champion, I do not think she should be maligning them'* **[2548-9]**; *'Christ I had no idea she was sitting there slagging off Stonewall to that degree'* **[2587]**.

105.4. Ms Sikand also reacted negatively and dismissively to the Claimant's response to the complaint **[799]**: Ms Sikand's explanation in cross-examination for her dismissive reaction to the Claimant's description of her personal experiences when explaining her beliefs continued to display a disinclination to try to understand the Claimant's perspective and the importance to her, having been accused of transphobia, of explaining why her beliefs are genuine, important to her and not rooted in transphobia [Day 15, pm, approx. 3.40pm]. Even more significantly, Ms Sikand also displayed a strong negative reaction to the Claimant's temerity in making allegations of harassment against Stonewall and Garden Court. In her correspondence at the time she described those allegations as *'improper'* and *'threatening'* **[2967]** and in cross-examination confirmed: *'I took issue with being accused of acting in a*

*discriminatory fashion, of course I did. I didn't take it well… Very serious accusations, I was worried she was making these'* [Day 16, pm, approx. 3.50pm].

105.5. Ms Harrison failed to provide Ms McGahey with a fair, complete or accurate account of the Claimant's response to the 2 main tweets. In the first place, the rationale of lack of consent for not simply providing the Claimant's response and the material referred to **[3221-2]** cannot be sustained in circumstances where the Claimant's consent was not even sought. But, despite Ms Sikand's advice to supply at least the Claimant's explanation for the cotton ceiling and why it was coercive **[3220-3]**, Ms Harrison in fact removed the core of that explanation and provided only an obvious non-sequitur by way of partial and misleading summary, which can only have been designed to appear absurd **[297]**. In respect of the tweet about the intimidation and abuse driving the Stonewall agenda, Ms Harrison (as she indicated in cross-examination) did not even bother to read the Claimant's response [Day 22, pm, approx. 3.40pm] and provided none of the Claimant's explanation to Ms McGahey at all. Had she read the response it would have been clear to her (and ought to have been clear to Ms Sikand) that the Claimant's point was that Stonewall's culpability lay in not calling out the misogyny directed at lesbians and women and instead, through its slogans and positions, contributing to a culture in which abusing gender critical feminists was regarded as acceptable or even virtuous (see in particular §47 of the Claimant's response to the complaints **[771]**). None of this explanation was provided to Ms McGahey.

105.6. Similarly, in Ms Sikand's final report, there is little or no evidence of any independent consideration, thought or analysis of the 2 main tweets on the part of Ms Sikand at all. For her substantive analysis, she very largely cuts and pastes Ms McGahey's informal advice: compare Ms McGahey's advice **[2994-7]** with Ms Sikand's substantive analysis in respect of the 2 tweets **[3324-7]**. Necessarily, therefore, that analysis does not engage with the Claimant's explanations or the material supplied in support of them because Ms McGahey did not have that material. Thus, although Ms Sikand summarises the Claimant's explanation of the cotton ceiling at **[3323]**, §49(c), she does not

actually address that explanation in her substantive analysis **[3324-6]**, §§51-55. In respect of the Stonewall tweet, Ms Sikand does not even *identify* the Claimant's point that Stonewall's culpability lay not in perpetrating acts of intimidation, fear and coercion itself, but in contributing a culture in which those acts are seen as acceptable or virtuous **[3323-4]**, §50. Necessarily, she therefore fails to engage with or address that explanation in her substantive analysis **[3326-7]**, §§56-7.

105.7. Whereas Ms Khan and Mr Willers would have been content to accept Ms Sikand's first draft of her final report (though Mr Willers would have approached the Stonewall tweet differently) **[3097; 3191]**, Ms Harrison successfully lobbied Ms Sikand for stronger findings that the tweets were *'likely'* to breach the BSB guidance and Code of Conduct, rather than that there was simply a risk that they might **[3095-6; 3100-3112]**. The correspondence shows Ms Harrison pulling rank on Ms Sikand in relation to this **[302-5]** and it is apparent from the outcome that, whatever her initial objections, Ms Sikand ultimately bowed to that pressure [**3301-4]**.

105.8. Overall, therefore, the process of considering and upholding the complaint was not conducted or approached by any of its participants in a fair or impartial manner.

*Inferring discrimination on 'ordinary' principles*

106. For a barrister's Heads of Chambers to find that she is likely to have breached the Code of Conduct is a serious adverse finding. The Claimant found it extremely upsetting: [C w/s, §§512-4] **[C/150-151]**. There can be no real doubt that it was a detriment. Indeed, in correspondence about whether to publish the outcome, it is clear that Ms Khan and Ms Sikand both recognised that the complaint had been upheld in part and that this was a detrimental finding for the Claimant: **[843; 869]**.

107. The unfairness and partiality apparent in the process and the other primary facts highlighted above, together with the general evidence about the entrenchment and influence of gender ideology within Chambers (particularly amongst those with whom Ms Harrison also corresponded), all support an inference that upholding the complaints was materially influenced by the Claimant's protected beliefs and that a

similar complaint would not have been upheld had it related to different beliefs which were not regarded as in conflict with the predominant view in chambers.

108. Indeed, a comparison with the antisemitism complaint is instructive here. The tweet in question was similarly strong and similarly controversial **[4020]**. In response the member, like the Claimant, set out an explanation and evidence to support his view **[4000-4018]**. In contrast to the Claimant's case the decisions then carefully engage with the member's explanations (see in particular **[4029]**, §§6-11) and a decision reached that there was no breach because the language used was not *'grossly offensive'* (§§5 & 12 **[4028; 4030]**). Unlike the Claimant the member was not *asked* to take down the tweet because it was considered likely to breach the Code of Conduct, but it was merely *suggested* that he might for his own protection because of a lack of clarity in the BSB Guidance.

109. A fair and careful engagement with the Claimant's explanations for the two tweets – instead of the partial and inadequate consideration of them identified above – ought objectively to have led to essentially the same conclusion in her case as in the antisemitism case (see further below). The comparison therefore further supports the inference of less favourable treatment because of the Claimant's beliefs. The claim in respect of Detriment 4 should be upheld on that basis.

*No properly separable feature*

110. As already noted, a finding by a barrister's Heads of Chambers that she is likely to have breached the Code of Conduct is obviously a serious one. It clearly affects that barrister's record and professional standing within chambers and obviously carries a risk of escalation if the barrister is judged to have offended again. It must therefore be regarded as having a serious 'chilling effect' analogous to the effect of recording a 'non crime hate incident' that was considered in Miller, CA, §§68-76 *per* Dame Victoria Sharp P. As that case makes clear, the fact that no immediate further consequence follows does not mean that there is no interference – or in discrimination parlance that there is no detriment. The effect of a recorded finding against a member of chambers that she is likely to have breached the Code of Conduct in expressing certain beliefs on twitter must be regarded as a significant interference, which must be justified.

111. So far as the relevant threshold for justification is concerned, in Garden Court's Opening Submissions, §8, it is asserted as undisputed that the BSB Social Media Guidance is the standard against which the Claimant's tweets must be assessed. That is accepted, with the caveat that Guidance must of course be construed and applied consistently with Articles 9 and 10, meaning that to justify a finding of breach something more is required than the mere causing of offence: there is little scope for interference with freedom of expression in the political sphere and a finding of breach requires at least speech which is *'seriously offensive'* or *'seriously discreditable'*, again to be understood by reference to the parameters of Articles 9 and 10 (see Holbrook v BSB, Case 2021/4441, 25 March 2022, BTAS, §§44-46).

112. As set out in the Claimant's Opening Skeleton, §§64-65, two questions need to be considered in relation to separability. The first is whether there is a sufficiently close connection to the substantive beliefs. If so, the second is whether the interference is justified, in respect of which it is for the Tribunal to determine for itself whether the threshold set out above has been breached (see Miller, CA, §104 *per* Dame Victoria Sharp P).

113. Those question will therefore be addressed in relation to the 2 tweets in turn.

114. So far as the **cotton ceiling tweet** is concerned, the essential point is that a belief that the very concept of the cotton ceiling is inherently coercive is of fundamental importance to many gender critical feminists, especially lesbians, and in particular to the Claimant herself. It goes directly to the heart of the philosophical difference between gender identity theory and gender critical feminism: for the former, same-sex sexual orientation is to be re-defined as same-gender sexual orientation, such that it becomes 'transphobic' or 'transmisogynist' for someone to reject the possibility of sexual relations with a trans person because of their biological sex and that is the idea which fundamentally underlies the cotton ceiling concept and ideology; whereas for gender critical feminists, same-sex sexual orientation is defined (as it is in the EqA10) and (importantly) experienced as attraction to people of the same biological sex, such that labelling lesbians who define their sexual orientation in that way as 'transphobic' or 'transmisogynist' inherently entails applying such a degree of cultural and social pressure, through the shaming power

of those labels, for them to consider biological men who identify as women as sexual partners, that it inherently amounts to coercion.

115. If this Tribunal were to find either that those beliefs about the cotton ceiling ideology, which the Claimant shares with many other gender critical feminists, are not part of, or sufficiently connected with, her protected beliefs; or that it is outside the protection of Articles 9 and 10 for a gender critical barrister to describe <u>any</u> manifestation of the cotton ceiling ideology as involving coercion, but that she may only use that term where she has specific evidence of the use or threat of force, then the implications would be profound indeed. It would involve a serious restriction on the right of many gender critical barristers (and others) who share the Claimant's beliefs about the cotton ceiling to express those beliefs on an issue of profound importance to them.

116. Turning to the particular tweet in question, it reflects precisely the beliefs and issues identified in the preceding paragraphs and is more than justified by the material (both that which was available to Garden Court at the time and that which is before the Tribunal now):

116.1. The tweet itself makes clear that it is commenting on a workshop entitled *'overcoming the cotton ceiling'* and describes that as having *'the sole aim of coaching heterosexual men who identify as lesbians on how they can coerce young lesbians into having sex with them'* **[1839]**.

116.2. The Claimant's response to the complaint explained that the term 'cotton ceiling' refers to *'people who were born as men but identify as women being unable to have sex with lesbians because lesbians do not want to have sex with someone who has a penis'*, and she explained that what she identified as the element of coercion was to *'require a lesbian to have sex with a man and to call her transphobic or otherwise bigoted should she refuse to do so'* **[767-8]**, §§33-34.

116.3. She supplied ample material to support her description of the concept of the cotton ceiling: it is clear that the 'cotton' refers to lesbians' knickers; that it draws an analogy with the 'glass ceiling' and thus inherently involves treating lesbians' same-sex (as opposed to same-gender) attraction as a form of

discrimination; and that it is frequently invoked to vilify, abuse and accuse lesbians of 'transphobia' and 'transmisogyny' for ruling out the possibility of sex with men who identify as women (see e.g. **[Supp/8-57; 102-3; 108]**).

116.4. She supplied the course blurb, which did indeed identify the sole aim of the course as being to overcome *'sexual barriers queer trans women face'*, and described it as *'Overcoming the Cotton Ceiling'* **[767]**. (The words *'and build community'* must be read in the overall context: it clearly formed part of the exercise of overcoming 'sexual barriers', as no other objective is identified.)

116.5. So far as the explanation of Planned Parenthood is concerned, that in fact reinforces the conclusion that it was a fundamental premise of the workshop that the sexual barriers that it was seeking to overcome were rooted in *'ideologies of transphobia and transmisogyny'* **[292-3]**.

116.6. As the Claimant (correctly) explained in her evidence to the Tribunal [Day 8, pm, approx. 2.55-3pm]; [Day 12, pm, approx. 2.20pm], coercion does not have to involve force or the threat of force. It is now widely recognised that coercive behaviour can involve emotional or psychological manipulation. In the context of the cotton ceiling, as the Claimant put it in her evidence, the labels 'transphobic' or 'transmisogynist' are powerfully shaming and to apply them to a lesbian for rejecting the possibility of sex with a transwoman because of her same-sex (not same-gender) attraction is thus inherently coercive. For the Claimant and those who share her beliefs, that coercive element is present even if the suggestion that a lesbian might consider sex with a transwoman is couched in terms of persuasion, because it is the suggestion that not to consider this is discriminatory which carries the shaming, coercive weight.

116.7. Some may of course disagree with this view, but the issue is not whether the Tribunal or anyone else agrees or disagrees, but whether it is within the bounds of freedom of thought and belief to believe and say that, however the persuasion may be couched, to suggest to a lesbian that she might want to have sex with a transwoman because her sexual barriers may be rooted in discrimination, necessarily amounts to coercing her to consider transwomen as sexual partners. For the Claimant and others who hold gender critical beliefs,

and in particular define (and experience) their sexual orientation as same-sex (not same-gender) attraction, it must be regarded as entirely legitimate to regard any exposition of the cotton ceiling ideology as inherently coercive and therefore to use that term to describe it. Indeed, it is, for many, one of the most profoundly worrying and disturbing consequences of gender identity ideology and needs to be described in strong terms which reflect those profoundly disturbing implications. It must be legitimate to do so and there is clear evidence of how important this issue is to many (see e.g. **[676-7; 697-8]; [Supp/102-3]**).

117. In short, therefore, the cotton ceiling tweet expressed a fundamental element of the Claimant's protected beliefs, or was at the very least sufficiently closely connected with them, and is well within the bounds of legitimate free speech. There is, therefore, no properly separable element.

118. Before leaving the cotton ceiling tweet, a word must be said about the evidence and opinions of Ms McGahey. So far as the advice that she gave to Garden Court at the time is concerned, that cannot be regarded as taking the matter very far since she did not have, and could not engage with, the Claimant's explanation or the underlying material she relied on. As regards her updated opinion in her evidence to the Tribunal, the first point is that that is no more than opinion evidence, which Ms McGahey explicitly accepted could not be regarded as a definitive view [Day 20, am, approx. 9.50am]. It is for this Tribunal to determine the issue for itself. Secondly, Ms McGahey's opinion cannot be regarded as reliable because she cited an out-of-date position, having failed to note the successful appeal in the Holbrook case [CM w/s, §§35-36] **[GC/230]** even though that appeal decision was promulgated on 25 March 2022 and Ms McGahey signed her statement on 14 April 2022.

119. Most importantly, however, Ms McGahey's opinion was based on implicitly adopting one side on the very point fundamental philosophical disagreement that is in issue here. This is apparent in her repeated drawing of an analogy between what the Planned Parenthood workshop might have been attempting in a 'non-coercive' way and efforts to reconcile different races in South Africa. This astonishing (and, to many, deeply offensive) analogy implicitly rests on a premise that it may indeed

be discriminatory, in a manner analogous to apartheid racism in South Africa, for a lesbian to rule out the possibility of sexual relations with trans women because she defines and experiences her sexual orientation as same-sex, not same-gender, orientation. This line of argument led Ms McGahey to the proposition that it could be appropriate and non-coercive, instead of telling a lesbian that she *'should'* have sex with a transwomen, to seek to persuade her that '*she might want to, she could want to, have sex with a transwoman'* [Day 20, am, approx. 10.40-10.45am].

120. But the very point in issue is whether it could ever be described as 'non-coercive' to suggest to a lesbian that her same-sex orientation might be influenced by prejudice against trans people and that she *'might want to… could want to, have sex with a transwoman'*. For the Claimant and many gender critical lesbians (and others) it cannot and that is the belief which the Claimant was reflecting in her cotton ceiling tweet. If Ms McGahey's non-definitive opinion were to be adopted by the Tribunal as correct, the effect would be to remove protection for the expression of fundamental beliefs on one side of the debate about the cotton ceiling. That would be entirely contrary to the applicable principles under Articles 9 and 10 (as set out in the Claimant's Opening Skeleton, §65).

121. Turning to the **Stonewall tweet**:

121.1. The tweet **[218]** does not say that Stonewall itself engaged in the intimidation, fear and coercion to which it refers, but that such intimidation fear and coercion is driving such behaviour and that the Claimant's experience, reported in the *Sunday Times*, is an example of this. That is precisely the Claimant's explanation in her response to the complaint, in particular at **[771-2]**, §§46-52. Mr Willers was right that this is what the tweet says **[3191]**.

121.2. The material which the Claimant supplied with her response did show appalling levels of intimidation, fear and coercion against people expressing gender critical views, in particular in the examples she supplied from the *'Terf is a slur'* website **[776-786]**.

121.3. She also supplied material which supported, with examples, her proposition in §47 of her response **[771]** that Stonewall had not called out abuse of this kind but had adopted positions and slogans which contributed to a

culture in which it was regarded as acceptable or even virtuous: see e.g. **[Supp/1; 100]**.

121.4. In those circumstances, it must be legitimate comment to refer to that behaviour as driving Stonewall's agenda. This is a fundamental aspect of the debate. In particular, one of Stonewall's most prominent slogans in recent years has been *'no debate'* and a central concern of gender critical feminists has been that this has encouraged the adoption, as an inherent part of gender ideology, of the view that any dissent is 'transphobic' and therefore cannot be tolerated or debated. These are, in short, points that are central to the debate on sex and gender and on which it must be legitimate for the Claimant and other gender critical feminists to express their belief that Stonewall has contributed to a culture in which dissent from gender ideology is regarded as illegitimate and silenced through various acts of intimidation, fear and coercion.

121.5. In short, this tweet too expressed a fundamental aspect of the Claimant's protected beliefs, or was at least sufficiently closely connected with them, and falls well within the scope of legitimate free speech. There is, therefore, no properly separable element.

122. Consequently, since both tweets must be regarded as not properly separable from the Claimant's protected characteristic of gender critical belief, it follows that her claim in respect of upholding the Stonewall complaint must succeed, since it was undoubtedly upheld because of those tweets.

*Liability for the acts of the relevant individuals*

123. In respect of this detriment, the Heads of Chambers and Ms Harrison (who was an Equality and Diversity Officer and member of the Management Committee and Board) were all acting in their capacities as officers of Chambers and members of the Service Company Board. Ms Sikand was also a member of the Board and was acting as an investigator appointed under paragraph 8 of the complaints procedure on the delegated authority of the Heads of Chambers (see **[3309-10]**, §§4-5). They were all, therefore, clearly acting in their formal capacities as agents of Garden Court.

***Detriment 5: response to the Subject Access Request***

*Submissions as to the primary facts*

124. The central facts in relation to Detriment 5 are not substantially disputed and were covered in the evidence of Ms Hakl-Law [Day 16, pm, approx. 3.40-3.50pm] and Ms Harrison [Day 22, pm, approx. 4.10-4.20pm]:

124.1. The SAR response was dealt with by Ms Hakl-Law, under the supervision of Ms Khan and Ms Harrison [SH w/s, §104] **[GC/151]**. (It may be noted that this adds a further layer of impeachment to Ms Khan's failure to give a full and accurate account in her first witness statement, since she must have been familiar with the documents after reviewing them for the purpose of the SAR.)

124.2. In her SAR, the Claimant set out her core allegation of discrimination **[903]**. Ms Hakl-Law and Ms Harrison both confirmed they were not happy to read that allegation and regarded it as unjustified. In fact, the subsequent correspondence seeks to characterise it as wholly unsubstantiated and manifestly without foundation **[3673]**. It is apparent from Ms Sikand's reaction to the Claimant's earlier allegation of harassment (see §105.4 above), from the evidence of Ms Cronin and Mr Menon in relation to the complaints concerning Mr Simblet and Mr Gatley (considered below in relation to victimisation), and from the matters which were the subject of those complaints that there was a general tendence in chambers to react strongly against any allegation of discrimination or victimisation. The Tribunal is invited to find that that type of reaction also characterised the response to the Claimant's SAR, and that the dismissive and narrow approach which the evidence shows was adopted resulted from that attitude.

124.3. It is certainly clear a narrow approach was taken to the application of the GDPR, which Ms Harrison said was Ms Hakl-Law's department. The approach adopted was to limit searches to employees of the Service Company only **[3763]**. But this ignored the fact that officers of Chambers are members of the Board of the Service Company (**[4284]**, §6.3) and that the Service Company carries out the *'strategic and operational management of Chambers'*

(**[4277]**, §1.7). Therefore, insofar as officers of Chambers (including the Heads of Chambers and other members of the Board) performed any functions in that capacity they were not acting as individual practitioners but as agents for both Chambers and the Service Company. Consequently, any data handling in that regard was not in their capacity as sole practitioners for which they are registered individually with the Information Commissioner, but as agents for Garden Court, in respect of which the Service Company is the data controller just as in respect of its employees. Therefore, there was no proper basis for excluding searches of documents of the Heads of Chambers, Ms Harrison or Ms Sikand in their corporate capacities.

124.4. Even more significantly, both Ms Hakl-Law and Ms Harrison confirmed that they excluded from the data supplied in response to the request all correspondence relating to the investigation on the basis of legal professional privilege and maintained that position until after the strike-out hearing in February 2021, thereby depriving the Claimant of a substantial amount of important material for the strike-out application. This included, for example, the email exchanges about how to address the Stonewall complaint including the exchanges between Ms Sikand and Ms Hakl-Law about the Claimant's tweets **[2548-9; 6389; 2587-2593]**; all of the correspondence between Ms Harrison and Ms McGahey and Ms McGahey's advice; and all of the drafts of Ms Sikand's report and the correspondence in which the Heads of Chambers and Ms Harrison gave their comments and amendments.

124.5. There is simply no conceivable basis on which legal professional privilege could be asserted in respect of that material and none has been spelt out. The investigation itself was an internal disciplinary/complaint investigation not a legal proceeding or done for the principal purpose of any actual or contemplated legal proceedings. The report and decision were all supplied to the Claimant in any event. Ms McGahey's advice was explicitly a confidential *'informal view'* which could be shared by Garden Court **[2994]** but she was not acting as a lawyer retained by Garden Court or providing privileged legal advice. And the late-night correspondence between Ms Sikand and Ms Hakl-Law commenting on the Claimant's tweets is million miles from

anything that could conceivably be privileged. Ms Hakl-Law and Ms Harrison were both given ample opportunity in cross-examination to articulate some possible basis on which privilege might have been asserted but asserted a desire to maintain privilege in the advice they had received as a basis for not attempting any such articulation. However, that is not a sufficient basis for not articulating any possible grounds for claiming privilege: when privilege is asserted as a reason for withholding disclosure the basis is often explained, and certainly can be in any case of dispute, without waiving privilege in any legal advice received in relation to the grounds relied on. There was nothing to prevent Garden Court's witnesses articulating the basis on which privilege was asserted without waiving privilege in the underlying advice, whether as to the merits of the claim or options or otherwise. In any event, the fact that there is no immediately obvious – or even easily conceivable – basis for asserting privilege means that the failure by Garden Court's witnesses to articulate any basis for the claim whatsoever leaves Garden Court in the position that, if the burden of proof shifts in relation to Detriment 5 (either in respect of direct discrimination or victimisation), it is simply not in a position to discharge that burden and the claim must succeed.

*Inferring discrimination on 'ordinary' principles*

125. On the basis of the inadequacies of Garden Court's response to the subject access request, together with all of the background facts both generally and in relation to the other detriments, the burden shifts. For the reasons set out above, Garden Court is not in a position to discharge it. The claim in respect of Detriment 5 must therefore succeed on ordinary principles.

*No properly separable feature*

126. There can be no question of any separable aspect of the subject access request, which is entirely proper.

*Liability for the acts of the relevant individuals*

127. Ms Harrison and Ms Khan were acting as Heads of Chambers and members of the Board of the Service Company. Ms Hakl-Law was an employee of the Service

Company. Therefore, they were all employee and/or agents of Garden Court for the purposes of EqA10, s109.

**Victimisation**

***Protected acts***

128. There is no dispute that the Claimant's response to the Stonewall complaint **[762-793]** was a protected act (List of Issues, §§1.3 & 2).

129. The other protected acts are disputed. They are addressed in §§21 and 76 of the Claimant's Opening Skeleton and the particulars given in relation to the tweets relied on at **[214-234]**. By way of supplementary submission addressing the points made in §62 of Garden Court's Opening Submissions:

129.1. In respect of the first and second protected acts (the 14 December 2018 email and the tweets), the allegations of harassment/discrimination against Stonewall *are* allegations of breach of the EqA10 because the context its Stonewall's exercise of its influence including via its Diversity Champions scheme (as C explained in relation to her 14 December 2018 email [Day 8, am, approx. 11am]). Moreover, Garden Court's submissions do not address the points relied on in respect of subsection 27(2)(c) of the EqA10 at all.

129.2. In respect of the fourth protected act (the subject access request), it is nothing to the point that the subject access request does not *'particularise what facts give rise to any breach of the EqA'*. The only requirement under subsection 27(2)(d) is the making of an allegation of contravention of the EqA10. There is no requirement to 'particularise facts' in support of that allegation: Garden Court may be confusing the requirements of a protected act under EqA10, s27 with the requirements for a protected disclosure under the Employment Rights Act 1996, s43B (which does require the disclosure of 'information' and would not be satisfied by a bare allegation). In any event, the subject access request **[903]** undoubtedly both contains an explicit allegation of discrimination and victimisation and, implicitly, relates that to the Claimant's clerking and income, the response to her tweets and support for the LGBA, and the investigation of the Stonewall complaint.

***Matters relevant to drawing inferences of victimisation***

130. The protected acts fall, broadly, into 3 categories: (1) those which raise matters for the purposes or in connection with the EqA10; (2) those which make allegations against Stonewall; and (3) those which make allegations against Garden Court.

131. So far as the general matters for the purposes or in connection with the EqA are concerned, those generally comprise acts to support the maintenance of definitions and exceptions reflecting a gender critical viewpoint. Broadly, therefore, the victimisation claim in respect of them mirrors the direct belief discrimination claim. Unless the Tribunal were to find that the direct belief discrimination claim is out of time, there will be no need to consider the victimisation claim in respect of those protected acts separately because it will stand or fall with that claim. If the Tribunal were to find that the direct belief discrimination claim is out of time, it will need to consider the victimisation claim in respect of these protected acts, but other than the question of whether they are protected acts, the substance will follow that of the direct discrimination claim. Therefore, no further submissions are made in relation to the victimisation claim in respect of those protected acts: the submissions above on the direct belief discrimination claim are relied on to the extent necessary.

132. So far as the allegations against Stonewall are concerned, there are a number of matters which in general tend to support an inference that key individuals at Garden Court regarded criticism of Stonewall as improper and unacceptable:

132.1. The Heads of Chambers' criticism of the Claimant's email of 14 December 2018 opposing Diversity Championship membership and their support for Ms Brewer's response **[906; 561-2; 1085]**;

132.2. Ms Brewer's repeated objection that the Claimant should be saying anything critical of Stonewall, for example in her 16 October 2019 email **[602]**: she confirmed in evidence that her only real basis for concern in relation to the Claimant's tweet about Stonewall *'having gone rogue'* was that it referred to Stonewall [Day 22, am, approx. 11.15am];

132.3. Mr de Menezes' reference to Chambers' Diversity Champions membership as a *'key issue'* in relation to the Claimant's support for the LGBA

because her views *'clash'* with those of *'LGBT stakeholders we work with'*, which he confirmed in oral evidence meant Stonewall and elaborated further: *'Stonewall were in my mind… It seemed blindingly obvious that if we had one of our members criticising that organisation, it exposes us to criticism'* [Day 21, am, approx. 12.50pm];

132.4. Ms Sikand's comments in November 2019: *'Given that we are a Stonewall Diversity Champion, I do not think she should be maligning them'* **[2548-9]**; *'Christ I had no idea she was sitting there slagging off Stonewall to that degree'* **[2587]**.

133. Turning, then, to allegations against Garden Court, there are again a number of matters which indicate a general tendency to react strongly against allegations of discrimination or victimisation made against Garden Court. An important feature of a number of those matters is they show that such views become widely shared and have a broad influence over how the Claimant has been treated by a number of different individuals. This is important not only for the victimisation claim but because it belies the case on which Garden Court relies in its defence of Detriment 1 generally that the general treatment of members is not influenced by shared views or understanding of when someone is in or out of favour. The matters which support the inference of a general tendency to react strongly against allegations made against Garden Court are as follows:

133.1. Ms Sikand's striking adverse reaction to the Claimant's allegations in her response to the complaints (which is accepted to be a protected act): see §105.4 above and **[799; 2967]**;

133.2. The adverse reaction of Ms Hakl-Law, Ms Harrison and Ms Khan to the Claimant's allegations in her subject access request: see §124.2 above;

133.3. Mr Simblet's highly charged act of obvious victimisation in response to the individual subject access request sent to him **[3944-5]**, in respect of which Ms Cronin's evidence was illuminating: she volunteered that Mr Simblet was *'not alone'* in his strong negative reaction to the Claimant's claims against chambers [Day 21, pm, approx. 3.40pm];

133.4. When it was further put to Ms Cronin ever since the Claimant made an allegation of discrimination against Chambers, there has been widespread and well-understood outrage that she should do such a thing, she confirmed that *'People are upset and that's hardly surprising'* [Day 21, pm, approx. 4.30pm];

133.5. Mr Gatley's deliberate obstruction of the Claimant in express retaliation for her claim against Chambers **[4183-6]**;

133.6. The striking similarity in the erroneous and unreasonable conclusions of both Ms Cronin and Mr Menon in their decisions in the Claimant's respective complaints against Mr Simblet and Mr Gatley **[3917-3929; 4239-4249]** – in both cases they failed to uphold the obvious victimisation complaints on an erroneous approach to detriment and in both cases they then turned the tables on the Claimant and found she should apologise for her aggrieved reaction. Such findings imply a well-understood animus against the Claimant for claiming discrimination against Garden Court such that any finding in her favour, however obvious the victimisation she has received, is to be avoided at all costs.

134. What those matters clearly illustrate overall is both how without any conscious or overt 'conspiracy' an adverse view of a member of chambers who is out of favour can easily spread and become a shared understanding; and more specifically for the purposes of the victimisation claim, that there was indeed a general tendency to react adversely to allegations of discrimination or victimisation against Garden Court, which was explicitly on display in relation to Detriments 4 and 5 in particular.

***Submissions as to the detriments***

135. The primary facts in relation to each detriment are addressed above in relation to direct belief discrimination and are not repeated. The deficiencies of Garden Court's approach identified in the primary facts concerning each detriment, together with the general matters identified above, are relied upon to support an inference of victimisation in each case. Brief further observations only are offered in relation to each detriment.

136. **Detriment 1** – The only protected act relevant to this detriment is the 14 December 2018 email. The case on victimisation essentially mirrors the direct discrimination case.

137. **Detriment 2** – The response tweets primarily relate to the second protected act tweets (save insofar as those post-date the response tweets) and it is therefore those which need to be considered. For reasons already addressed above, the case on victimisation therefore essentially mirrors the direct discrimination case.

138. **Detriment 3** – Similarly, it is the first two protected acts which are relevant to Detriment 3 and for the same reasons the case on victimisation therefore essentially mirrors the direct discrimination case.

139. **Detriment 4** – The reaction of Ms Sikand to the Claimant's allegations of harassment in her response to the Stonewall complaint (which is admitted to be a protected act) is of particular relevance to Detriment 4 and strongly supports an inference of victimisation.

140. **Detriment 5** – The primary facts in relation to Detriment 5 (as set out in relation to direct discrimination) also provide specific and strong support for an inference of victimisation. The burden clearly shifts and, for the same reasons set out in relation to direct discrimination, Garden Court is not in a position to discharge it. Therefore, the victimisation claim in respect of Detriment 5 must succeed.

**Indirect sex / sexual orientation discrimination**

141. The relevant principles are set out in §§78-81 of the Claimant's Opening Skeleton.

142. The Claimant's case on the existence of the **PCPs** remains as set out in §82 of the Claimant's Opening Skeleton: reliance is placed on all of the facts and matters relied on to support the inferences of direct discrimination above.

143. As to **particular disadvantage**, many of the questions put to the Claimant's supporting witnesses appeared to proceed on the basis of 3 false premises:

143.1. First, they appeared to proceed on the premise that their evidence sought to extrapolate from the data cited to the population at large. They did not and that is not necessary: the relevant comparison is between the proportion of women/lesbians in the disadvantage pool (i.e. people who actively seek to support and express gender critical views) and the general proportions of those in the population (see Barry v Midland Bank [1999] ICR 859, HL, 869A-E *per* Lord Nicholls). In that regard, the evidence of the Claimant's supporting witnesses does clearly establish that within their gender critical organisations, there are disproportionately more women and lesbians than in the general population.

143.2. Second, they appeared to proceed on the premise that unless there are comprehensive statistics the claim must fail. But as Baroness Hale made clear in Homer, the strict formalistic statistical requirements no longer apply (Claimant's Opening Submissions, §80). On the basis that they represent some of the main gender critical organisations, the evidence of the Claimant's supporting witnesses is sufficiently persuasive to establish on the balance of probabilities that people who actively support and wish to express gender critical views are disproportionately women/lesbians.

143.3. Third, they appeared to proceed on the basis that general survey data as to attitudes to trans people **[4970]** are capable of contradicting the proposition that those who actively support and wish to express gender critical views and disproportionately women/lesbians. But that is comparing apples and pears. The general survey data are about how people answer if prompted (and notably their answers change with the nature of the prompt as the last section of the data shows), they tell us nothing about the proportions of women/lesbians amongst activist gender critical feminists. The evidence of the Claimant's supporting witnesses does that and is to be accepted.

144. As to **justification**, the Claimant continues to rely on the same matters summarised in relation to the issue of separability under the direct discrimination claim.

**Time limits**

145. Time limits have been addressed in detail in §§85-94 of the Claimant's Opening Skeleton and those points are not repeated. In relation to the direct belief discrimination claim, the Tribunal is referred in addition to the Claimant's evidence in cross-examination [Day 13, am, approx. 11.15am], which elaborated further, though the fundamental points remain as set out in the Claimant's Opening Skeleton.

**Remedy**

***Injury to feelings***

146. The matters of which the Claimant complained had a profound effect on her: there is abundant evidence of the distress which she experienced (see for example §§76 and 106 above). The actions against her amounted to a serious violation of her right to hold and express her beliefs and have caused her serious problems in her relations with her chambers. An award at the upper-middle to upper Vento bracket is merited – i.e. in the region of **£27,000**.

***Aggravated damages***

147. Aggravating features of Garden Court's actions include:

147.1. Failing proactively to support the Claimant and Ms Khan effectively telling her that she had brough rape and death threats on herself (see §75.8 above);

147.2. Failing to engage with the Claimant's explanation of her 2 tweets at all or supply it to Ms McGahey (§§105.5-6 above);

147.3. Withholding documents from the Claimant in response to her subject access request and failing to disclose them until after the strike-out application without any proper legal basis for doing so (§§124.3-5 above);

147.4. Ms Khan making a serious allegation that these proceedings were abusive and supporting a strike out application in a statement which included

inaccurate statement and omitted information helpful to the Claimant's case of which Ms Khan was or ought to have been aware (§§50-51 above);

147.5. Failing to uphold the Claimant's complaints in respect of obvious acts of victimisation and instead requiring her to apologise to her victimisers (§133.6 above).

148. On that basis, a substantial element of aggravated damages is warranted. The Claimant seeks **£10,000**.

***Loss of income***

149. Mr Menon accepted that it is not possible to attribute precise sums to particular factors which may have contributed to the reduction in the Claimant's income in 2019. If the Tribunal upholds the claim in respect of Detriment 1, it will therefore be necessary to assess the loss on a relatively broad-brush basis.

150. The Claimant accepted in cross-examination that her schedule of loss required amendment. She accepted that the change in payment regime would have had some impact on her earnings and that it would be necessary to take some account of adjustments to billings.

151. It is submitted that a fair, broad-brush assessment of the loss is as follows:

151.1. Billings, taking account of subsequent adjustments, are the appropriate figure because they reflect the work actually done in the respective periods. The Claimant's adjusted billings for 2018 are £123,347.39 (using the correct adjustments at **[GC/266]** which were put to and agreed by Mr Menon in cross-examination). Those compare with billings of £39,553.55 in 2019, a difference of £83,793.84. That is therefore the starting point.

151.2. In order to adjust for the impact of the payment regime, a reasonable approach is to take the average % change reflected in the figures at **[5505]**. The average % change in billing from 2018 to 2019 across that cohort is a reduction of 16.5%. Applied to the Claimant's adjusted billings figure of £123,347.39 for 2018, that would represent a reduction of £20,352.32. That figure should therefore be subtracted from the starting point difference in order to reflect the

sum by which the Claimant's billings would, on a broad-brush assessment, have reduced in any event by reason of the change in the billing regime.

151.3. That approach produces a final loss figure of **£63,441.52**. That is therefore the sum claimed for loss of earnings.

***Apportionment***

152. Apportionment is primarily a matter between the Respondents. It is difficult to address in the abstract. It is suggested that the Tribunal should determine the overall award and the parties should then seek to agree apportionment, with a further hearing if agreement cannot be reached.

**Conclusion**

153. For the reasons set out above the Tribunal is invited to find that the claims are in time and that:

153.1. Contrary to EqA10, s111, Stonewall unlawfully instructed, caused or induced direct belief discrimination (alternatively victimisation or indirect sex/sexual orientation discrimination) by Garden Court against the Claimant (or attempted to do so) and that as a result she was subjected to the detriments of which she complains;

153.2. Garden Court directly discriminated against the Claimant because of her philosophical beliefs (alternatively victimised her) by subjecting her to the detriments of which she complains and/or subjected her to indirect sex/sexual orientation discrimination by applying PCPs to the effect that gender critical

beliefs are treated as bigoted or otherwise unworthy of respect and/or allowing Stonewall to direct its complaints process;

153.3. The Claimant should be awarded compensation as set out above.

BEN COOPER QC

15 June 2022


**London**
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**IN THE CENTRAL LONDON**

**EMPLOYMENT TRIBUNAL**

**Case No. 2202172/2020**

**BETWEEN**

**MS ALLISON BAILEY**

**Claimant**

**and**

**(1) STONEWALL EQUALITY LTD**

**(2) GARDEN COURT CHAMBERS LTD**

**(3) RAJIV MENON QC and STEPHANIE HARRISON QC sued as Representatives of all members of Garden Court Chambers (except the Claimant)**

**Respondents**

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# CLOSING SUBMISSIONS ON BEHALF OF THE CLAIMANT

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**Doyle Clayton**

REF. PD/PD/B2906

**Ben Cooper QC**

Old Square Chambers