EMPLOYMENT TRIBUNALS

Claimant: Miss Sophie Ashley

Respondent: Grayfords Law Limited

Heard at: London Central (by CVP) **On:** 14 February 2024

Before: Tribunal Judge Jack, acting as an Employment Judge

Representation
Claimant: Dr S Ashley (the claimant's father)
Respondent: Mr Y Mahmood (Peninsula)

RESERVED JUDGMENT

The judgment of the Tribunal is as follows:

Wages

1. The claimant's complaint of breach of contract in relation to SQE examination fees is not well-founded and is dismissed.

2. The respondent's complaint of breach of contract in relation to a QLTS course fee is not well-founded and is dismissed.

3. The respondent's complaint of breach of contract in relation to the claimant's failure to return a key fob is well-founded.

4. The claimant shall pay the respondent £42.00 as damages for breach of contract.

REASONS

Introduction

1. The claimant was employed by the respondent from 17 August 2021 to 17 February 2023. Early conciliation took place from 3 February 2023 to 1 March 2023. The claim was presented on 7 March 2023, alleging breach of contract and detriment suffered for asserting employment rights. The response included a breach of contract counterclaim. The complaint of detriment was dismissed by EJ Elliott, following withdrawal by the claimant.

2. There was a case management hearing before EJ Elliott on 25 May 2023. EJ Elliot formulated the issues for determination by the tribunal as follows:

   The claim

   (16) What were the terms of the contract between the parties as to the payment of SQE fees? The claimant says that there was an oral agreement with the senior partner Sheata Karim made in the firm's board room and that no one else was present at that meeting. The claimant's case is that her original contract of employment from August 2021 was varied by a letter from Sheata Karim dated 11 October 2021 and was further varied by an oral agreement in October 2022.

   (17) Was a binding contract formed as to the payment of SQE fees?

   (18) It is not in dispute that the claimant did not sign terms and conditions dated 15 September 2022.

   (19) Was any such binding contract breached on 15 November 2022 when the claimant says Ms Karim indicated to her that the respondent would not pay the SQE fees?

   The Employer's Counterclaim

   (20) Is the respondent entitled to recover from the claimant the sum of £1,690 paid to the Qualified Lawyers Transfer Scheme for the SQE2 course?

   (21) Has the claimant failed to return to the respondent an office key fob belonging to them, at a value of £35 + VAT? The claimant accepts that she has the key fob and said she would return it to the respondent and the respondent will then say whether this part of the counterclaim is pursued.

   Remedy

   (22) If the claim or counterclaim succeeds, the issue of remedy will fall to be determined.

3. At the start of the hearing, I asked if the counterclaim in respect of the key fob had been resolved. It had not. The parties agreed that the existing list of issues should stand with the addition of the following in respect of remedy:

The claimant seeks an ACAS uplift relying in particular on paragraphs 4 and 9 of the ACAS Code of Practice on Disciplinary Procedures.

4. I had the following documents:

   4.1 the Respondent's bundle of 255 pages (referred to as RB);

   4.2 the Claimant's bundle of 125 pages (referred to as CB);

   4.3 the witness statement of Ms Sheta Karim, dated 21 September 2023;

   4.4 the witness statement of Linda Hayes, dated 21 September 2023;

   4.5 the witness statement of Dr Simon Ashley, dated 18 October 2023;

   4.6 the witness statement of Miss Sophie Ashley, dated 19 October 2023;

   4.7 a short recording, which I refer to in more detail below;

   4.8 a Note for the Final Hearing from the claimant.

5. Dr Simon Ashley attended the hearing by phone from Antigua and Barbuda. Citizens or residents of Antigua and Barbuda can give evidence from Antigua and Barbuda by video link in UK tribunals. Dr Ashely is not a citizen or resident of Antigua and Barbuda. Having regard to the *Presidential Guidance on Taking Oral Evidence by Video or Telephone from Persons Located Abroad*, and the fact that permission had not been sought from Antigua and Barbuda to give oral evidence from that state, I explained that Dr Ashely was unable to give evidence. That did not however prevent him acting as the claimant's representative, questioning witnesses and making submissions on her behalf.

6. Linda Hayes did not attend the hearing.

7. I explained that I would take the witness statements of Dr Ashley and Linda Haynes into account, but the fact that they were not available to be cross examined would be likely to affect the weight that I gave to them.

8. A preliminary issue arose. Mr Mahmood submitted that a fair hearing was not possible as: the respondent's witness statements were served before the claimants; the claimant's bundle was served only after the respondent's witness statements had been finalised, and the documents at CB/82-85 had previously not been seen; the claimant had disclosed a covert recording of a meeting on 2 November 2022 only after the respondent's evidence had been finalised. The claimant said that she had initially disclosed a note of the meeting on 2 November 2022 and not the recording itself, as she did not intend to rely on the recording. The claimant said that the documents at pages 82 to 85 of her bundle had been disclosed before she sent the respondent the claimant's bundle. My assessment was that the central issue in the case was whether there had been an oral agreement between the claimant and Ms Karim and, if so, what its terms were. This agreement was said to have been reached on 6 October 2022. The two people in the room at the time that agreement was

said to have been reached were here and could give evidence. Ms Karim could, if so advised, be asked about any documents which she had not addressed in her witness statement at the start of her evidence. And, if necessary, I would be able to take the points made by the respondent into account when deciding how much weight to give to particular items of evidence. I considered that it was possible to have a fair hearing, and that as the two most important witnesses were present, the hearing should proceed.

9. The parties each made short oral closing submissions at the end of the hearing. I limited the time each party had to make closing submissions to 10 minutes, because of the lateness of the day by the time evidence concluded. Mr Mahmood was concerned that the claimant had put in written submissions before the start of the hearing (the claimant's Note for the Final Hearing) whereas the respondent had not. I therefore gave both parties the opportunity to make further closing submissions in writing, an opportunity both parties took.

Findings of Fact

10. The claimant began her employment with the respondent on 17 August 2021. She was initially employed as a paralegal under a contract dated 28 July 2021. Her salary was £26,000.

11. On 7 October 2021 Ms Sheata Karim, senior partner, wrote to the claimant offering her a trainee solicitor role. She was subsequently employed as a trainee solicitor. Her job title changed, but all other terms and conditions of her employment contract (including her salary) were said to be unchanged.

12. Ms Karim's letter of 7 October 2021 also said that the respondent would pay the examination fees for the Solicitors Qualifying Examination (SQE) provided that the claimant continue to work for the respondent for a period of time after she had qualified. The period of retention would be specified in a new employment contract that would be issued to closer to the time she qualified as a solicitor (CB/73).

13. The claimant wrote to the respondent on 8 October 2021 in response to this letter, seeking a salary review (RB/96).

14. Ms Karim wrote to the claimant on 11 October 2021 with a further version of her letter of 7 October, revised to take account of the claimant's letter (RB/98-99). This version of the letter (unlike the earlier version) said that there would be a salary review in January 2022. It said:

> "I further confirm that Grayfords will fund the examination fees for the SQE, on the condition that you remain working at the firm for a specified period of time upon qualification, which will also qualify you for an increase of your hourly rate and therefore a guaranteed salary rise. We discussed that there can be a provision for you to leave earlier upon repayment of your fees.
>
> Closer to the time, we will issue you with a new employment contract, which sets out the terms and conditions for Grayfords

> paying your examination fees and period of retention time at the firm post qualification."

15. It also said:

> " … you will be entitled to 'study leave' allowing you to prepare and attend the SQE exams."

16. On 12 October 2021, the claimant accepted the offer made in the letter of 11 October, by signing it (RB/99).

17. The claimant says that prior to 12 October 2024 she and Ms Karim agreed that the respondent would pay the claimant's SQE examination fees and study materials (including SQE1 books and a course), that she would have study time of one full day a week during work hours and that her salary would be the market rate for in London for trainee solicitors and that the period of retention would be determined in the future (claimant's witness statement, paragraph 9). I do not accept that this was agreed. It goes well beyond what is set out in the letter, and the best evidence of what was agreed prior to 12 October 2024 is the letter of 11 October 2024 itself, which was changed to reflect requests made by the claimant, and which both parties signed.

18. The respondent paid for the claimant's SQE books, which were ordered on 8 November 2021 (CB/75).

19. The claimant's salary was increased with effect from 1 January 2022 to £28,000 (RB/101).

20. The claimant says that this increase was lower than she had expected and that she and Ms Karim agreed orally that the respondent would pay her examination fees without the claimant being committed to a period of retention (Claimant's witness statement, paragraph 21). Having heard the oral evidence of both the claimant and Ms Karim I am not satisfied, on the balance of probabilities, that this was agreed. The letter of 11 October 2021 was not revisited, and there is no evidence that the claimant asked that it should be revisited.

21. The respondent paid £1,558 for the claimant's SQE1 examination, the relevant invoice being dated 17 March 2022 (RB/198).

22. The claimant was paid a discretionary bonus of £1,000 on 5 August 2022.

23. The SQE exams were postponed to August, and following technical difficulties with the exams, the fees of £1,558 paid by the respondent were refunded to the respondent.

24. On 15 September 2022 Ms Karim wrote to the claimant. Her letter refers to the Qualified Lawyers Transfer Scheme (QLTS) course, which is preparation for the SQE2 examinations. Ms Karim said:

> "… further to Grayfords funding the examination fees for the SQE and the materials to prepare for SQE1, we now agree, as per your request, to fund your preparation for SQE2 by booking the QLTS basic course for £1,690 under the condition that you will be

attending the course outside of working hours, apart from 1 hour studying time each morning.

As previously agreed, all the above is binding on condition that you remain working at the firm for 12 months post qualification. We discussed that there can be a provision for you to leave earlier upon repayment of SQE fees, preparation materials and any courses booked and paid by Grayfords in relation to SQE." (RB/109.)

25. The claimant sent an email on 21 September 2022 in which she said that it was previously agreed that only the exam fees would have to be repaid and not preparation materials and courses. She said that her understanding had been that all costs except the exam fees would be paid outright by the respondent. She also said that it was difficult for her to sign a 12-month retention period on her existing salary as well as being liable for these costs (RB/112).

26. On 5 October 2022 the claimant received her SQE1 exam results and had failed the first attempt.

27. On 6 October 2022 the claimant and Ms Karim met. Ms Karim said that the claimant's results changed nothing and that Grayfords would continue to support her SQE in the way they had done to date (claimant's witness statement, paragraph 42).

28. I cannot infer on that basis that the respondent agreed in this meeting to support her SQE without the need for a retention agreement. Paragraph 43 of the claimant's witness statement contains legal analysis rather than evidence about what Ms Karim said. Having had the benefit of having heard oral evidence from both the claimant and Ms Karim, and taking into account the contemporaneous documents, I am not satisfied on the balance of probabilities that Ms Karim agreed in the meeting of 6 October 2022 to fund the claimant's fees regardless of whether the claimant agreed to a retention period. I say that having taken into account all of the relevant material in the claimant's witness statement and not only the paragraphs just mentioned. Further, that Ms Karim said that the claimant's results changed nothing and Grayfords would continue to support her SQE in the way they had done to date is consistent with the agreement of 12 October (that the respondent would pay the claimant's SQE fees on condition that she remain at the firm for a period post qualification) remaining in place.

29. On 7 October 2022 the claimant booked onto SQE exams (CB/80).

30. On 13 October 2023 the respondent paid £1,980 for the claimant's SQE2 course (RB/199).

31. On 10 November 2022 the claimant asked for the SQE exam invoice to be paid today, and Ms Karim replied that it should not be paid today (CB/82-83).

32. On 10 November 2023 the claimant paid £1,622 herself to re-sit the SQE1 exams (RB/202).

33. On 15 November the claimant and Ms Karim met in person. A note was taken by Linda Hayes. The claimant had suffered a recent family bereavement and had been asked if she wanted to reschedule the meeting. She had declined. The claimant said "I have realised that I should have spoken to you in person I just assumed that it was all agreed before". The claimant's having said "I just assumed that it was all agreed before" (which the claimant agrees having said) undermines her case that it had been agreed on 6 October 2023 that her fees would be paid regardless of whether or not she committed to a retention period. If that had been agreed, there would have been nothing else to discuss and no need to speak again to Ms Karim.

34. Ms Karim replied that it was not agreed as the claimant had needed to sign a retention period and she was not happy to sign. She said that nothing had changed in terms of the claimant's employment, and that "I have made a decision that I will not pay for your SQE going forward but everything that Grayfords paid so far, you do not need to pay back if you decide to leave" (RB/118). Towards the end of the meeting Ms Karim read out the letter of 11 October 2021 and asked the claimant if she was trying to challenge the letter. The claimant replied "Not at all" (RB/119).

35. The claimant was asked to agree to a 12-month retention period in writing. She was not however offered a new employment contract at the same time, and the letter of 15 September 2022 did not refer to a guaranteed salary rise when she qualified. The claimant was not willing to agree to a 12-month retention period in the absence of an agreement as to what her salary post qualification would be. So the claimant did not sign the letter of 15 September 2022 to accept the terms outlined in the letter. Once it was clear that the claimant would not agree in writing to a 12-month retention period, the respondent was not willing to continue paying SQE fees.

36. The claimant resigned on 17 November 2022, giving three months' notice.

37. The claimant sent a grievance email on 4 January 2023 at 18:02 (CB/93). This did not refer to fees not having been paid.

38. A grievance meeting took place on 5 January 2023, which was recorded. The claimant said that she agreed to sign a retention agreement, but asked for some expectation to be given in terms of salary and what the retention agreement would look like. She continues that Grayfords were unable to give her those expectations. The transcript continues "So we agreed that we can sign a retention agreement" (RB/178, transcript number 256). There is a dispute between the parties about whether the transcript is accurate. The respondent says that the transcript is accurate. The claimant says that it is not accurate and that what she said that that *couldn't* sign a retention agreement. The parties each said that they were happy for me to listen to the short portion of the recording that had been sent to the Tribunal, and for me to treat it as evidence. In my judgment the transcript is accurate i.e. that claimant said that she could sign a retention agreement. I consider that this passage of the transcript is accurate and, read as a whole, undermines the claimant's case that there was an oral agreement on 6 October 2022 that the respondent would pay her fees even if she did not sign a retention agreement.

39. The grievance meeting ended early because connections problems led to difficulties with the claimant hearing and being heard. On 7 February 2023, in the context of discussions about the timing of the resumed grievance meeting, the claimant asked for her grievance to be addressed in writing.

40. The claimant sent a detailed letter regarding her grievance on 9 February 2023 (RB/143-146) This did not refer to her fees not having been paid.

41. On the same day, 9 February 2023, the respondent responded to her grievance.

42. Clause 26.1 of the claimant's contract of employment states:

> "On the termination of the Employment (however arising) or at the reasonable request of the Firm at any time the Employee shall immediately return to the Firm:
>
> - All Firm credit cards, security cards, and other property of, or relating to, the business of the Firm in his/her possession or under his/her power or control." (RB/90)

43. The respondent's letter of 9 February 2023 required the claimant to return the firm's property comprising of laptop, telephone, and the full set of office keys including fob and alarm fob by 14 February 2023.

44. The respondent booked a courier to collect the respondent's property from the claimant's home on 17 February 2023. The respondent returned the laptop and phone but did not return the fob.

45. The claimant came to the respondent's offices on 7 March 2023 (accompanied by the police) and collected her property. The claimant did not however return the fob. On the same day the claimant informed ACAS that the fob would be left with her concierge for the respondent to collect at any time it wished by courier.

46. The respondent paid £35 plus £7 VAT (i.e. £42) to replace the claimant's key fobs: invoice dated 22 May 2023 (RB/200).

The Law

47. Article 3 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994/1623 ('the Order') provides that proceedings may be brought before an employment tribunal in respect of a claim by an employee for damages for breach of a contract of employment or any other contract connected with employment, providing that the claim is not one to which article 5 applies, and the claim arises or is outstanding on the termination of the employee's employment. (Article 5 of the Order does not apply to the claimant's claim, as the respondent rightly concedes.)

48. Article 8 of the Order sets out the circumstances in which an employment tribunal can entertain a complaint in respect of an employer's contract claim.

49. Section s. 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 concerns the effect of a failure to comply with the ACAS Code of

Practice on Disciplinary and Grievance Procedures. In proceedings before an employment tribunal relating to a claim by an employee under the jurisdiction conferred by the Order, if it appears to the tribunal that the claim to which the proceedings relate concerns a matter to which the ACAS Code of Practice on Disciplinary and Grievance Procedures applies, the employer has failed to comply with that Code in relation to that matter, and that failure was unreasonable, the tribunal may, if it considers it just and equitable in all the circumstances, increase any award it makes to the employee by no more than 25%.

50. An agreement to agree will not be a binding contract if its terms are so uncertain that they cannot be enforced.

51. An agreement between two parties to enter into an agreement in which some critical part of the contract matter is left undetermined is no contract at all: *May & Butcher v R* [1934] 2 K.B, HL. In an employment context, *Minter v Julius Baer Investment Management Inc London* [2004] EWHC 2472 (Ch) paragraph 76 states that "A purported contract which incorporates certain specific terms but also purports to incorporate others which still remain to be "worked out" and agreed is not something which can be regarded as amounting to a contract at all. It is no more than an agreement to agree". An agreement which lays down criteria for determining matters which are left open may however be binding: *Openwork Ltd v Forte* [2018] EWCA Civ 783, CA, at [24]–[28], [30]–[33]. Further, an agreement is not incomplete where it provides machinery for resolving the matters left open: *Anderson v London Fire and Emergency Planning Authority* [2013] EWCA Civ 321, CA.

52. The claimant relies on course of dealing principles. If two parties have made a series of similar contracts each containing certain conditions, and they make another one without expressly referring to those conditions, it may be that those conditions ought to be implied. Conditions will not necessarily be incorporated into a contract by reason of the fact that the parties have, on previous occasions, dealt with each other subject to those conditions: *McCutcheon v David MacBrayne Ltd* [1964] 1 W.L.R. 125, HL. But they may be incorporated by a "course of dealing" between the parties where each party has led the other reasonably to believe that they intended that their rights and liabilities should be ascertained by reference to the terms of a document which had been consistently used by them in previous transactions: *Provimi France SAS v Stour Bay Co Ltd* [2022] EWHC 218 (Comm). (See *Chitty on Contracts*, 35th edition, 16-015.)

Conclusions

53. Was a binding contract formed as to the payment of SQE fees? And if there was a binding contract regarding the payment of SQE fees, did the respondent breach it?

54. The claimant's employment contract as a trainee solicitor was, except for her job title, the same as her earlier contract as a paralegal. It did not mention SQE fees.

55. There may however have been another contract connected with the claimant's employment regarding the payment of SQE fees. The starting

point is obviously the agreement recorded in the letter of 11 October 2021, which both parties signed. This said that the respondent would fund the claimant's examination fees for the SQE, on condition that she remain at the firm after she qualified "for a specified period of time". However the period of time was not specified. It also said that working at the firm post qualification would qualify the claimant for a "guaranteed salary rise", although the amount of the increase in salary was not specified. It was also explicitly envisaged that there "can" be a provision for the claimant to leave before the end of the retention period, subject to her repaying her SQE examination fees. There was not yet any such provision because it was explicitly envisaged that the respondent would provide the claimant with a new employment contract, which would set out the terms and conditions for the respondent paying the SQE examination fees, and which would specify the length of the retention period. A contract cannot simply be "issued". It has to be agreed. So this was an agreement to agree. Critical parts of the contract were left undetermined: how long the period of retention would be; by how much the claimant's salary would increase on qualification; and what provision there would be allowing the claimant to leave before the end of the retention period if she repaid the SQE examination fees. There were no criteria for determining these matters and no machinery for resolving them. This was, then, an agreement to agree and not a binding contract.

56. The claimant says that the letter of 11 October 2021 was supplemented or varied by an oral agreement that her SQE fees would be paid without her entering into a retention agreement. For the reasons given above, I am not satisfied on the balance of probabilities that there was any such agreement.

57. The claimant also says that there was a course of conduct which supplemented or varied the agreement recorded in the letter of 11 October 2021. The respondent paid for her SQE books in or shortly after November 2021, her SQE1 examination fees in or shortly after March 2022 and her QLTS course fees in October 2023, in each case without there being a retention agreement in place. But this is not a case of a series of similar *contracts* containing certain conditions followed by another contract which does not explicitly refer to those conditions.

58. Further, even if the agreement recorded in the letter of 11 October 2021 had been a binding contract regarding the payment of SQE fees, the respondent did not breach it. The agreement was explicitly that the respondent would pay SQE fees provided that the claimant remained at the respondent post qualification. The claimant resigned before she had qualified, and so did not remain at the firm for a period post qualification.

59. The claimant's claim for damages in respect of SQE fees fails.

60. The issue of remedy therefore does not arise. For completeness, however, the claim for an ACAS uplift would have failed even if the claimant's claim for breach of contract had succeeded. The claimant was not subject to a disciplinary process in respect of her complaint that her SQE fees had not been paid (as she conceded in cross examination). And her grievance did not relate to the failure to pay her SQE fees. The breach of contract claim to which these proceedings relate therefore does not concern a matter to

which the ACAS Code of Practice on Disciplinary and Grievance Procedures applies. That is, s. 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 would not have applied even if the claimant's claim for breach of contract had succeeded.

61. The respondent's breach of contract claim in respect of fees for the QLTS course fees also fails. The letter of 11 October 2021 was agreed but there was merely an agreement that, when the claimant's new employment contract was agreed when she became a solicitor, there *could* be a provision enabling the claimant to leave before the end of the as yet unspecified retention period, if she repaid her SQE fees. The letter of 15 September 2022 envisaged that there *could* be similar provision regarding the repayment of course fees. But the claimant did not agree to this letter, and even if she had agreed to this letter, there was never in fact a new employment contract requiring repayment of the LQTS fees. There was no contract requiring the repayment of the QLTS fees.

62. The respondent's breach of contract claim in respect of the key fob succeeds. The claimant's contract required her to return the respondent's property on the termination of her employment and at the reasonable request of the respondent at any time. The claimant's employment came to an end, and the respondent's letter of 9 February 2023 was a reasonable request that she return the respondent's property. She was contractually required to return the fob. The claimant failed to return it. The respondent paid £42.00 to replace it. So the claimant should pay the respondent £42.00 as damages for breach of contract in respect of the key fob.

_____

Employment Judge Andrew Jack

_____

Date 13 March 2024

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

22 March 2024

.....

.....

FOR EMPLOYMENT TRIBUNALS

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

Recording and Transcription

Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral

judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here:

https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/