Neutral Citation Number: [2016] EWHC 1194 (Admin)

Case No: CO/1636/2016

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/05/2016

Before:

THE HON. MRS JUSTICE PATTERSON DBE

- -

Between:

THE QUEEN (on the application of) MK LAW SOLICITORS LIMITED	**Claimant**
- and -	
THE LORD CHANCELLOR	**Defendant**

- -
- -

Jason Coppel QC and Zoe Gannon (instructed by **MK Law Solicitors Limited**) for the **Claimant**
Sarah Hannaford QC and Fiona Scolding (instructed by **Legal Aid Agency**) for the **Defendant**

Hearing date: 11 May 2016

- -

Approved Judgment

Mrs Justice Patterson DBE:

Introduction

1. This is a challenge by the claimant firm of solicitors, MK Law Solicitors Limited, to a decision by the Lord Chancellor dated 11 March 2016, made through the Legal Aid Agency (LAA), that the claimant was not entitled to join an additional duty solicitor scheme, in circumstances where it determined that certain additional firms who had succeeded in the duty procurement tender, that was then abandoned by the Lord Chancellor, should be permitted to join additional schemes in certain circumstances.

2. Admission to the additional duty solicitor scheme was contingent upon the successful firms meeting certain criteria set out in a letter dated 8 February 2016 from the LAA.

3. The claimant's case is that it came within the criteria set out in the 8 February letter as it:

   i) was successful in the duty provider contract;

   ii) had opened an office in Hackney at 2 Underwood Row; and

   iii) had employed supervisors and staff to deliver criminal legal aid at its Hackney office.

4. In the impugned decision letter of 11 March, the LAA determined that because the claimant's office had been operational since February 2012, it was open prior to the claimant receiving notification from them of its success in the duty provider crime contract tender. Further, the office was not open and operational as required and there had been no employment of staff at the Hackney office by 8 February 2016. As a result the claimant did not meet the conditions set out in the letter of 8 February and was not eligible to be included in any additional duty scheme.

5. The issues which arise from the claim are:

   i) Whether the defendant (LAA) correctly understood the criteria in the 8 February letter?

   ii) Whether the defendant applied those criteria, properly understood, to the claimant's position?

   iii) Whether the defendant acted in a way which gave rise to inequality of treatment contrary to public law and regulation 4(3) of the Public Contract Regulations 2006?

Background

6. The case arises out of reforms sought to be brought into effect by the Lord Chancellor to the provision of criminal legal aid. A policy of two-tier contracting was proposed to be introduced whereby criminal legal aid solicitors would be able to provide services to their own clients under an "own client contract" and separately under a "duty contract" which was awarded by competition giving firms of solicitors that were successful the right to be on the duty legal aid rota in 85 procurement areas

around the country. The award of a duty contract allowed a limited number of firms to represent new entrants to the criminal justice system. Some 1,600 firms secured own client contracts. The intention of duty contracts for duty provider work (DPW) was to offer some 527 DPW contracts with the objective of forcing consolidation in the criminal legal aid market. It was hoped that if fewer larger firms performed DPW that service could be provided at less cost to the LAA.

7. In 2015 the defendant invited responses to its invitation to tender to procure 2015 duty provider crime contracts under which DPW would commence on 16 January 2016.

8. The claimant is a firm of legal aid solicitors which primarily practices in criminal law. DPW is an important part of their business model.

9. The claimant was amongst those firms which responded to the invitation to tender. On 15 October 2015 it was informed that it had won contracts in ten procurement areas; six in South London and four[1] in North London, in Hackney, Waltham Forest, Haringey and Islington. The award was on the basis that the claimant had an office at 2 Underwood Row, N1 7LQ, which would serve all four areas in North London in respect of which its bid had been successful.

10. The process of introducing the new dual contracts scheme was controversial and the results of the tendering process were the subject of litigation. On 28 January 2016 the Lord Chancellor announced in a written statement to Parliament that the dual contracting model was not to be proceeded with: the LAA was to extend current contracts so as to ensure continuing service until replacement contracts came into force late in 2016.

11. The litigation had the effect that the defendant was prevented from placing contracts with successful bidders in areas where challenges had been brought. As a result, the defendant decided to implement a contingency legal aid scheme to ensure that criminal legal aid services could continue beyond January 2016. On 2 February 2016 the defendant wrote explaining the circumstances in which firms may undertake criminal work until replacement contracts came into force.

12. On 8 February 2016 the defendant wrote concerning duty solicitor scheme eligibility. Because of the importance of that letter in the current proceedings the full text is set out below:

> "We have received a number of duty solicitor scheme eligibility queries from organisations who have opened new Offices and employed supervisors and staff following notification that they had been successful in obtaining a 2015 Duty Provider Crime Contract and who wish to join additional duty schemes based on these Offices.
>
> We are contacting all organisations who were successful in the Duty Provider Contract to confirm that if:

[1] The four procurement areas were amended to three because of an administrative error but it is not material to the issues in the case.

> - you have already opened an Office (as set out in your tender for a Duty Provider Contract), **and**
>
> - have employed Supervisors and staff to deliver criminal legal aid at this Office
>
> it will now be possible for you to join Duty Solicitor Schemes for these Offices.
>
> In order to be eligible for this work you must be able to demonstrate that any new Offices are operational and staffed Employed as at 12th February 2016 and demonstrate that this Office was a component part of your successful Duty Provider Contract tender.
>
> You will only be eligible to join duty schemes that a specific Office is eligible under the provisions of the 2010 Standard Crime Contract and not any wider procurement area under the cancelled tender process.
>
> For the avoidance of doubt; this decision is an exercise of discretion under the terms of the 2010 Standard Crime Contract (as amended). We remind organisations of the provisions of the 2015 crime contract procurement process which confirms:
>
> '*The Applicant Organisation is solely responsible for the costs and expenses incurred in connection with the preparation and submission of a Tender or associated with any cancellation, or suspension of this procurement process by the LAA. Under no circumstances will the LAA, or any of its employees, be liable for any costs.*'"

13. On 9 February 2016 Manisha Knights, Managing Director of the claimant firm, emailed the defendant saying she would like to attach duty solicitors to her Hackney office and raised queries about where she could get duty information forms and other relevant forms for new solicitors and those to be redeployed to the Hackney office from the Bromley office of the claimant.

14. On 9 February also the claimant wrote to the defendant in the following terms:

> "In response to your letter dated 8 February 2016 we confirm we wish to be added on to the 'London Borough of Hackney and surrounding boroughs' duty schemes.
>
> Our office is 2 Underwood Row, London N1 7LQ.
>
> The office is now fully operational and we have acquired sole occupancy since December 2015 (having previously been partially sublet to another firm) as a result of the impending duty contracts and the original January 2016 start date."

15. On 10 February the defendant replied to the first communication from the claimant the previous day that all correspondence needed to be conducted via the eTendering portal and gave certain responses to the queries raised.

16. On 1 March 2016 the defendant wrote to the claimant as follows:

> "**Duty Solicitor Scheme Eligibility**
>
> …on 9 February you warranted that you:
>
> - Had opened new Office(s) following notification that they had been successful under the 2015 Duty Provider Crime Contract tender at 2, Underwood Row, London, N1 7LQ; and
>
> - Had employed Supervisors and staff to deliver criminal legal aid at this Office; and
>
> - Could demonstrate that this Office was a component part of your successful Duty Provider Contract tender.
>
> This letter details the information required to verify your request to join additional Duty Solicitor schemes by **23.59** on **Tuesday 8th March 2016**.
>
> **Information required to verify your Tender**
>
> To satisfactorily verify your request you must provide the information requested in the table below. Information should be submitted via this message board in the LAA's eTendering system.

What we will verify	**Evidence requested**
The date on which your Office(s) became operational	Please provide the following information from the Solicitors Regulatory Authority: • A screen-shot of the entry on the mySRA portal confirming when you registered the Office(s). This should include the date on which the registration was completed; **AND** • A copy of the confirmation email from the SRA which relates to this registration;

	AND • A copy of the confirmation email from the SRA authorising the Office(s). This should include the date on which the authorisation was granted.
The date(s) that Supervisors and staff were employed to deliver criminal legal aid at the Office(s)	The dates that all individuals conducting work from this Office commenced employment.

> **You must submit all necessary verification information by 23.59 on Tuesday 8th March 2016**. Please note that failure to provide this information by the deadline will mean that the DIF and CRM12 submitted for that office will be rejected."

17. The claimant replied on 3 March 2016 saying that the office at 2 Underwood Row was registered with the Solicitors Regulation Authority (SRA) in February 2012 as the firm had a civil contract there, albeit the majority of the office space was sublet to an accountancy firm called iHorizon until July 2015. In July 2015 iHorizon had wanted to further lease the building for five years but that had not occurred as the premises were a component part of the claimant's tender bid. As a result the office premises remained largely unused as the claimant was awaiting the outcome of the tender applications. In fact, the claimant had invested further time and money to have a fully functioning office in anticipation of the original duty contract commencement date. It was now fully operational and had been since December 2015. On staffing issues five new employees had started, a further seven were due to start on 1 April and a further five solicitors had been arranged to be redeployed from Bromley to Hackney.

18. On 11 March 2016 the defendant replied as follows:

> "…In your reply you have confirmed that your office at 2 Underwood Row, London has been operational since February 2012 that means that it was open prior to you receiving notification from us of your success in the Duty Provider Crime Contract tender.
>
> As a result you have not met the conditions as set out in our letter of 8th February and accordingly are not eligible to join any additional duty schemes.

> As you are aware the crime contract you currently hold with us puts in place the contingency measures needed to enable us to provide legal aid services. These contingency measures will allow you to continue to carry out own client work anywhere in England and Wales and we consider these to be fair, reasonable and proportionate given the short-term nature of the arrangement. We are continuing to engage with representative bodies prior to commencing a new tender process later this year, at which point you will be able to tender for new offices."

19. The interpretation that the defendant put on the criteria in the letter of 8 February was queried by Ms Knights in a letter dated 15 March 2016. In that letter she said:

> "On 15th October we were notified that we were successful in obtaining 10 out of the 12 contracts we had applied for – four of which were as a direct result of the office – in the LB Hackney. Since that date we have refurbished the office, invested in IT, invested in furniture in order to get it fully ready and operational for what was originally supposed to be a January 2016 start date.
>
> We spent weeks of our time interviewing candidates for the new office and in meetings and had employed staff (who started in Dec/Jan and Feb 2016) and had indicated to some of the existing team that they would be redeployed to the new offices once the contracts commenced.
>
> …
>
> We met the Criteria set out in the following way:
>
> 1. We had opened an office as matters stood – making the office operational again from December 2015.
>
> 2. We had recruited Staff and recruited more duty solicitors – for the new office and arrangements made to re-deploy some staff from Bromley to Hackney.
>
> 3. We were able to demonstrate that the new office was operational and staffed as at 12th February 2016.
>
> 4. Quite clearly looking at 6 of our 12 tender applications, we provide the office details and location and it formed a component part of the tender for 4 Procurement Areas."

The defendant replied on 17 March 2016 that the information provided by the claimant did not enable the defendant to make a different decision. It advised that the claimant may wish to request a formal review of the decision under clause 27 of the 2010 Standard Crime Contract Terms (2010 Contract).

20. A pre-action protocol letter was sent by Kingsley Napley on behalf of the claimant on 18 March 2016.

21. A pre-action protocol response was served by the defendant on 23 March 2016.

22. Judicial review proceedings started on 29 March 2016.

23. The time for the acknowledgement of service was abridged and on 15 April 2016 Wyn Williams J granted permission to proceed and expedition.

24. After the proceedings were issued the claimant provided information for a formal review to be carried out by the defendant under clause 27 of the 2010 Contract.

25. On 22 April 2016 the defendant provided the outcome of the formal review and informed the claimant that, if it disagreed with the outcome, the dispute resolution procedure under clause 28 of the 2010 Contract could be invoked.

26. The formal review started by considering the chronology, the surrounding events and resulting legal obligations on the LAA. It stated that, as a result of the litigation resulting from the 2015 crime procurement process, it would offer 2010 Contract holders the opportunity to enter into the Crime Contingency Contract for a period ending no later than 10 January 2017. The claimant had entered the Crime Contingency Contract on 17 November 2015. That was a contract offered to existing contractors effectively as a continuation of the previous contract and so provided no reasonable expectation that the claimant would be permitted to undertake duty solicitor work from any other offices. On 28 January 2016, the 2015 crime procurement exercise had been cancelled following which the claimant's crime contingency contract had been extended until 10 January 2017.

27. The review referred to the offer letter of 8 February and said that it invited organisations which met the criteria to undertake duty solicitor work from offices which were not previously authorised under a Contract Schedule to submit representations to the LAA. It set out its position that the offer letter related to those organisations that took action to open offices and employ staff after receipt of notice of the contract award and prior to the date of the offer letter.

28. The author of the letter, Ruth Wayte, a Principal Legal Advisor to the LAA, was satisfied that the LAA had correctly interpreted the terms of the offer letter.

29. Secondly, she was satisfied that MK Law did not meet the criteria for the following reasons:

    i) the Hackney office had originally opened in 2012 and, at that time and subsequently, legal services had been provided from that office which had been registered with the SRA. The office had remained registered with the SRA throughout. She accepted that, for a time, the firm had ceased to use the office for the provision of legal services and that for periods of time a proportion of the premises was sublet to a firm of accountants. However, she was satisfied that the premises remained available to the claimant as an office as defined in the contract with the LAA and by the SRA.

ii) Even if that were not correct there was no evidence that the Hackney office was open and operational at 8 February 2016. Paragraph 2.37 of the 2010 Standard Crime Contract Specification (the Contract Specification) required the office to be physically accessible each day from Monday to Friday with arrangements to ensure that clients are able to arrange appointments and make contact about emergency matters. Ms Wayte accepted that for some periods between 15 October 2015 and 8 February 2016 Mr Puri, a director with the claimant, worked out of the Hackney office on trial preparation and may have seen some clients by appointment. That did not amount to the office being open and operational under the terms of the offer letter. No new staff were engaged at the Hackney office before 8 February and no existing staff were deployed to Hackney before 8 February. Newly appointed staff were due to start their employment with the claimant on 1 April 2016, that being the date when the new duty rotas would come into effect. She accepted that the claimant had taken action to recruit additional staff to enable the office to be open and operational by 12 February but that merely confirmed that the office was not open and operational before the claimant had received the offer letter.

iii) On fairness, she did not accept that there was any obligation on the LAA to expressly advise the claimant that rejected duty solicitor applications could not be transferred back to a previous office. Paragraph 6.10 of the Contract Specification clearly specified the procedure for inclusion on duty solicitor rotas. There had never been any provision for transfer applications and she was satisfied that a reasonably diligent contractor would or ought to have been aware of the fact.

iv) On the failure to give reasons she did not agree that there had been any failure but the formal review set out the LAA's position. Accordingly, the claimant was not eligible to undertake duty solicitor work from 2 Underwood Row from 1 April 2016.

30. It was agreed between the parties that the review showed that the defendant had moved on with its reasoning and it should be taken into account in the current proceedings.

<u>The 2010 Standard Crime Contract – Specification February 2015</u>

31. The 2010 Contract and the Contract Specification contains provisions relating to the office from which own client work and DPW is provided:

> "1.13. … '*Office'* means a building which is registered with your regulatory body, is suitable to cater for the needs of your Clients and employees, enabling you to satisfy all relevant Health and Safety legislation and the quality and service standards of this Contract and to protect Client confidentiality. The requirements of an Office as stated in the Specification must also be met; …
>
> …

> 2.36. You may only perform Contract Work from the Office(s) specified in your Schedule.
>
> 2.37. Your Office must be physically accessible for Clients each day from Monday to Friday, and you must have arrangements in place to ensure that during Office opening hours, Clients are able to speak to a person by telephone to arrange appointments and to contact you about emergency matters. Hotels, retail outlets and vehicles cannot count as Offices for these purposes.
>
> …
>
> 2.40. You must ask our permission under Clause 13 of the Standard Terms if you relocate your Office outside the postcode area in which your services are accessed during the life of this Contract. If we consent, we will update your Schedule to show your new Office address and to remove membership from any Schemes which you are no longer eligible for by virtue of the new Office Location.
>
> 2.41. If we do consent to amend your Schedule to allow you to undertake Contract Work from a new address, we may make it a condition on your revised Schedule that your Duty Solicitors may not undertake work on additional Duty Schemes which are accessible only by virtue of your new Office address. You will not be entitled to join any additional Duty Solicitor Schemes by virtue of any new Office address if you were not a member of that Duty Scheme before your Office relocation."

32. Clause 6 deals with duty solicitor scheme rules:

> "6.2. You may only apply to join Duty Solicitor Schemes when you submit an application as part of the Tender Documents for Contract Work.
>
> 6.3. You cannot apply to join any Duty Solicitor Schemes (save for Virtual Court Duty Solicitor Schemes) during the life of the Contract unless we invite you to apply in accordance with the terms of this Contract.
>
> 6.4. The geographical Location of your Office or Offices determines which Scheme(s) you are entitled to join. An online tool on our website sets out the geographical ambit of each Scheme by reference to postcodes so that you can determine which Scheme(s) you may join by virtue of your Office(s) Location.
>
> …

> 6.6. Duty Slots and places on a Panel are allocated to you (and by reference to the relevant Office, if you have more than one Office) and not to the individual Duty Solicitors who are employed by you."

Grounds of Challenge

Ground One: Interpretation of the Criteria in the Letter of 8 February 2016

33. The claimant contends that the criteria in the letter of 8 February need to be interpreted with the following factors in mind:

    i) Acceptance of firms onto the new duty scheme represented an exercise of discretion under the 2010 Contract: see clause 6.3 of the Contract;

    ii) Successful bidders in the tender process who had been notified of their success on 15 October 2015 and who had mobilised to deliver DPW in new locations were aggrieved with the abandonment of the dual contract scheme;

    iii) The criteria in the letter of 8 February are to be interpreted in the light of their purpose which was to make a gesture of good will to those organisations which had incurred costs as a result of being notified of their success in the tender process on 15 October 2015;

    iv) The criteria in the letter should be interpreted in a manner consistent with the terms of the 2010 Contract, in particular, on the meaning of an Office;

    v) There were very serious implications for the claimant if a narrow construction was taken of the terms of the letter;

    vi) Given the commercial significance of the contingency scheme the defendant owed a public law duty to treat the competing firms equally;

    vii) The results of the interpretation need to be rational and to produce results which are not in breach of the 2010 Contract.

34. The claimant contends that the opening paragraph of the letter of 8 February sets out what has happened to trigger the letter and cause the setting of the criteria but forms no part of the criteria. The criteria to determine eligibility for admission to the duty solicitor scheme are set in the subsequent contents of the letter. The criteria do not set any commencement date of 15 October 2015 after which an office was to be opened.

35. Second, the letter imposed a date of 12 February by which the Office had to be operational. The claimant had taken steps to employ staff by that date. No additional staff had started work by then as there was no work for them to do in the period prior to 1 April.

36. The defendant submits that the letter of 8 February was written to strike a fair balance between new and existing providers. The witness statement of Kerry Wood, Head of Central Commissioning at the defendant, said in an email to representative bodies:

> "In short the plan is that we will write to all those who were successful in their bids for Duty work and give them the opportunity to join rotas for the offices where they would have been awarded a contract if (and only if) they have already opened the office in question and have employed staff to deliver these services. The process will be that we will write to them today with a deadline of this Friday for them to tell us if they meet the criteria above. We will verify the details and then ask that they submit CD12s the following week. This comes with the expectation that only those organisations which have genuinely taken this step will apply for these additional schemes – COLP declarations of course – and we will verify the details as presented to us. Where this is found not to be the case we will view this as a material breach of contract. Hopefully this will address the issue where firms have already opened offices and have staff ready to take on duty work. They will then of course have the opportunity to bid in whatever tender process we will subsequently operate."

37. The office schedules approved for the claimant enabled it to work from six locations excluding Hackney. The complaint that the claimant makes relates to an area into which it wished to expand. The claimant had a presence in the area as a result of holding a family law contract in Hackney. The letter of 8 February makes it clear that the defendant had received queries after notification of the outcome of bids on 15 October 2015. It provided the opportunity for those who had opened an office after that date and employed staff to notify the defendant by 12 February 2016 of their position.

38. The letter is to be read as a whole. Parties who opened offices before 15 October 2015 did so at their own risk and for their own reasons. The category of disappointment that the defendant was trying to deal with were those who had been told that they were winners in the bidding process for the aborted DPW contracts and incurred expenditure in reliance on that award.

Discussion and Conclusions

39. In my judgment it is clear that the letter is to be read and understood as a whole. Undoubtedly it was written in response to enquiries from those who felt aggrieved, as a result of having incurred expenditure, on being informed that they were successful in their tenders for DPW to find that that work had been removed from them so that their expenditure had been wasted. That is a different position from expenditure incurred prior to the tendering process which would be "at risk". Prior to the outcome of the tendering process a tenderer might be confident but could not be certain of its outcome. That changed with the announcements on 15 October 2015 of the successful bidders which led certain firms to initiate steps to progress a new business, including a new office, and incur expenditure in the expectation of being able to carry out DPW which they had been told that they had won.

40. It follows that I cannot accept the claimant's submission that the opening paragraph of the letter of 8 February is to be divorced from the criteria set out in the body of the letter. The use of language in the letter is such that, in my judgment, the only sensible

interpretation is that the criteria apply after the announcement of the successful bidders both in terms of opening an office and employment of supervisors and staff to deliver criminal legal aid at the opened Office.

41. The next question is what is meant by "Office" in the letter of 8 February? The fact that Office is capitalised throughout the letter must mean that it has a particular meaning. The letter also refers to the 2010 Standard Crime Contract (as amended) which contains a definition for its purposes of an office. I have set out above the definition in clause 1.13 of the Contract Specification. Within the 2010 Contract whenever Office is mentioned it is capitalised which confirms, in my judgment, that Office is to be understood consistent with the contractual definition. For interpretive purposes that means that the Office must be:

    i) Registered with the SRA; and

    ii) Suitable to cater for the needs of clients and employees; and

    iii) Satisfy health and safety requirements; and

    iv) Satisfy quality and service standards of the contract; and

    v) Be able to protect client confidentiality.

42. The requirement to "have employed supervisors and staff to deliver criminal legal aid" at the Office means that, in plain and ordinary language, those persons have to have been employed as at the date of the letter. For any other meaning the word "employ" would not be phrased in the past tense.

43. To be eligible to join the duty solicitor scheme from 1 April the applicant had to notify the LAA by 5pm on 12 February through an eTendering message board with confirmation of the address of each office and date on which the office became operational. It had to supply the relevant forms (DIF and CRM12) by 5pm on 19 February. If those criteria were fulfilled then the successful applicant would be able to join the duty solicitor scheme from the already opened office.

44. That leaves the question of what "opened an Office" means? In my judgment, in the circumstances here, it means an Office fit for the purpose of delivering services under the duty solicitor scheme. It was the award of that contract that recipients of the letter dated 15 October 2015 were notified about and working towards that delivery certain firms incurred expenditure after that date.

45. The issue of new entrants I regard as more relevant to the issue of unequal treatment and so deal with it under ground three.

<u>Ground Two: Did the Defendant Err in the Way in which it applied the Criteria within the Letter of 8 February to the Claimant?</u>

46. The claimant refers to the defendant's witness statement of Michael Ray, the Commissioning Manager of the LAA, and paragraph 7 in particular, where Mr Ray says that the LAA developed the criteria in the letter of 8 February 2016 and a verification process as follows:

> "(i) For an office to be considered open it must have been approved by the SRA between 15 October 2015 and 8 February 2016; and
>
> (ii) For an office to be considered operational it must be set up to be able to provide advice to clients, including enabling passing trade to enter and make appointments or receive advice, and, in addition, meet the requirements of 1.13 and 2.37 of the Standard Crime Contract Specification; and
>
> (iii) Staff must have been employed between 15 October 2015 and 8 February 2016 in order to provide that advice to clients."

47. The claimant accepts that its Hackney office was registered by the SRA in 2012. It was never deregistered. It was approved, therefore, during the relevant time period.

48. However, as a result of late disclosure relating to the tendering process the claimant submits that firm 51 which took additional rooms in Hammersmith is in an identical position to the claimant and was treated differently.

49. Second, the claimant submits that the defendant's approach to the criteria is not consistent with what the criteria say. To have "opened" an Office that opening should be within the meaning of the 2010 Contract. In the claimant's case Hackney became an Office after refurbishment took place subsequent to the letter from the LAA of 15 October.

50. Third, there was no difference between what the claimant did and firm 7 which only had one member of staff at Chessington and/or firm 51 which took on extra rooms.

51. Fourth, the claimant relies on the evident misunderstanding on the part of the defendant displayed in the contractual review that only some areas of the office were sublet: that was not the case.

52. Fifth, the claimant agrees that for an office to be operational, in addition to clauses 1.13 and 2.37 of the Contract Specification, a firm must be set up to provide advice to clients but contends that the defendant had no basis to add additional requirements to the contractual ones. Mr Ray's second bullet point is irrational and/or a breach of the claimant's contract as the claimant was not in a position as at 8 February 2016 to deliver criminal legal aid from its Hackney office or to accept passing trade for those purposes. There was no sense in the LAA insisting on having people at their desks in anticipation of providing a service which the claimant was unable to deliver contractually.

53. Sixth, although staff would have to be employed to deliver criminal legal aid it can mean, and here has to mean, that the terms of employment have been agreed with prospective employees. It does not mean that the employees have necessarily started work. It could not mean that here, as the DPW contract had not commenced. Therefore, the claimant had employed staff within the meaning of the offer letter.

54. The defendant contends that the court should only interfere if the decision that it made on 11 March 2016 was irrational. It did not act irrationally on the basis of the

evidence that it was supplied with. The impugned decision was clear that the case did not meet the criteria within the letter of 8 February. The evidence submitted by the claimant was not consistent:

i) In her email of 1 February 2016 Ms Knights had said that the claimant had invested in an office in Hackney in May 2012 and started a family law contract there. The firm was working on the basis then that it would attach duty solicitor cases to that office from 2013 but the 2010 contract was extended to 2015. Because of that the claimant had to sublet two thirds of the building. In June 2015 the tenant vacated the premises and the claimant did not sublet or lease the office on the basis that the claimant had applied to the LAA for a contract there (own client contract and duty contract).

ii) In the claimant's email of 9 February 2016 the claimant said "This office is now fully operational." The claimant had acquired sole occupancy since December 2015 (the office having previously been sublet to another firm).

iii) In its message dated 3 March 2016 to the LAA the claimant said:

> "Please find attached the requested information from the SRA website confirming the office at 2 Underwood Row, N1 7LQ. The office was SRA registered in February 2012 as we have a civil contract there (account Number 2N115U) albeit the majority of the office space was being sub-let to an accountancy firm called I-Horizon from February 2012 –July 2015. In July 2015 I-Horizon wanted to further lease the building for 5 years at which point we were unable to do so as the premises formed a component part of our tender bid so the office premises has remained largely unused as we were awaiting the outcome of the tender applications … [we] have invested further time and money in preparation of having a fully functioning office in anticipation of the Original contract commencement date and is now fully operational since December 2015."

iv) In the further information supplied by the claimant for the contractual review the claimant said:

> "The office was physically accessible to clients during normal working hours from 4th January 2016. From that date, if clients wished to arrange to attend the office at 2 Underwood Row (the Hackney office) they would have been able to do so. Indeed my Co-Director Hesham Puri, who was going to lead the Hackney office, started regularly working from that office from 4th January 2016. He saw a number of private clients at the Hackney office and used the office to prepare two Crown Court briefs he was working on, including a trial at the Old Bailey."

v) In Ms Knights' witness statement she provided evidence that, on 20 July 2015, a gas leak was reported by one of the neighbouring properties as a result of which the engineer from National Grid attended, changed the locks on the

premises and disconnected the gas supply. The gas supply was only restored to the Hackney office as a result of a gas engineer attending on 9 November and 1 December 2015 after the claimant had been successful in the bidding process. The decoration of the premises took place at the end of October, IT infrastructure was installed and an order for furniture was placed on 10 December 2015.

vi) In fact iHorizon held under a licence dated 1 December 2012 and not a lease. Under clause 2.1 the claimant could enter into the property in common with the licensee and, by clause 2.2, retained control, possession and management of the property with the licensee having no right to exclude the claimant.

55. The issue of staff and their employment was only relevant if the defendant was wrong in relation to its contention about the office.

Discussion and Conclusions

56. The definition of Office in clause 1.13 of the Contract Specification makes it clear that not only has a building to be registered with the SRA, it has to be suitable to cater for the needs of the clients and employees enabling the firm to satisfy all relevant health and safety legislation and provide the quality and service standards of the 2010 Contract and to protect client confidentiality.

57. Whilst 2 Underwood Row was clearly registered with the SRA, and had been since February 2012, that was to be able to work under a civil contract. Further, for at least part of the time subsequent to that registration it was not used as an office by the claimant at all but most significantly in 2015 it was unable to be used as an Office.

58. From 20 July 2015 when the gas was disconnected, the Office was not in any suitable state to cater to the needs of the claimant's clients and employees or to enable the office to satisfy all relevant health and safety legislation or the quality and service standards of the 2010 Contract (as amended). That remained the case until the gas was restored sometime in December 2015 as part of the larger refurbishment project. It was only when that refurbishment was completed, including the installation of IT infrastructure, redecoration had taken place and furniture been ordered and delivered that the claimant company was in a position to comply with the requirements of the definition of Office under the 2010 Contract. All of the refurbishment had been undertaken in reliance on the letter dated 15 October. From 4 January 2016 the office was in a condition where it could be and was, in fact, used by Mr Puri for the purposes of criminal legal aid work.

59. The contractual definition of Office is broader than mere registration. It follows that I do not regard the date of registration in itself as determinative as to when the Office was opened. Under the terms of the 2010 Contract any Office opened was to be for the purposes of that contract. Prior to early January 2016 whenever 2 Underwood Row was being used as an office it was not for the purposes of satisfying the 2010 Contract.

60. As to the expenditure incurred by the claimants in establishing the Office, after notification of their successful tender, to an appropriate standard so that it could be open and operational that was entirely indistinguishable from other firms establishing

a new Office after they, similarly, had been informed of their success in the bidding process. There is no requirement in the letter of 8 February for the Office to be sourced between 15 October 2015 and 8 February 2016, as appeared to be suggested in submissions on behalf of the defendant; the requirement in the letter is for the Office to be open and operational.

61. Mr Ray in his witness statement refers to the criteria and verification process used by the defendant. For an Office to be operational he says that the criteria that the LAA applied was that it must be set up to be able to provide advice to clients, including passing trade, to enable clients to enter and make appointments to receive advice, in addition to the contractual requirements.

62. By January 2016 it is clear from the evidence that the office at 2 Underwood Row was set up to be able to provide advice to clients, if required. In Mr Puri's witness statement he says that he saw private clients at the office in early 2016, in addition to working from the office regularly. It was possible, also, for clients to attend by appointment.

63. Mr Ray develops a requirement that the opened Office had to be able to provide for "walk in trade". There are problems with that requirement. First, that requirement does not appear in the letter of 8 February 2016. Second, the office at Underwood Row was physically accessible for clients each day with arrangements in place to ensure that during office hours clients were able to speak to a person by telephone to arrange appointments and to contact the firm about emergency matters consistent with clause 2.37 of the 2010 Contract. There is no contractual requirement that an Office has to be manned and open for walk in trade. Third, I accept the claimant's submission that to impose such a requirement between 15 October 2015 and 8 February 2016 was both irrational and a breach of contract as the claimant, at the relevant time, had no ability to deliver criminal legal aid from its Hackney office until the new 2015 Contract commenced.

64. As to the requirement that staff had to have been employed between 15 October 2015 and 8 February 2016 in order to provide criminal legal aid advice to clients, first, some six new offers of employment were made to staff during that time on the basis that the Hackney premises would be operational by April 1 2016. Second, as set out, Mr Puri worked at the premises regularly during that period and certain redeployment of existing staff was agreed. The criteria do not mean that the staff have to be new staff working at the Office on 8 February but that their employment had to have been agreed by that date. In so far as the claimant seeks to attribute the costs of additional staff hired between 8 February and 12 February to the defendant, I reject those submissions which are based upon a misreading of the terms of the letter of 8 February. As was said in argument, it was not the purpose of the letter to give a window of opportunity to its recipients so as to enable them to engage further staff between 8 and 12 February. It makes no sense for the LAA to insist on firms having newly employed people at their desks between the October 2015 to 8 February 2016 period in expectation of a contractual service which had not begun and could not begin until 1 April. That also would be entirely lacking in reason. The criteria in the letter of 8 February have to be interpreted in a common sense and realistic way.

65. Although, as the defendant submits, firms tendered for the dual contract process at their own risk and the tender documents made it clear that the LAA had a right to

abandon the procurement process without being responsible for costs and expenses associated with the process, in the case of a certain small number of tenderers, who were both successful in the duty solicitor scheme and came within the criteria of the letter of 8 February 2016, the defendant was prepared to make an exception.

66. As to whether the defendant acted reasonably and rationally in the light of the information that it received from the claimant as to the subletting of 2 Underwood Row it was undoubtedly given a confused account as to whether an occupant was there, in whole, in part, and as a tenant. It transpired, apparently shortly before the court hearing, that what had been in place was a licence agreement between the claimant and iHorizon. In the light of the information that it received, and for which the claimant was entirely responsible, in my judgment, the defendant's response was entirely understandable on that part of the claim. The error of the defendant and where it acted irrationally was in its application of the criteria as to when the Office was open and operational.

67. Accordingly, I find that the defendant erred in its application of the criteria contained within the letter of the 8 February 2016 to the claimant.

Ground Three: Did the LAA Treat the Claimant in an Unequal Manner?

68. Strictly I do not need to deal with this ground as the claimant has succeeded on ground two. I deal with it, therefore, more shortly.

69. The claimant seeks permission to amend its statement of facts and grounds to elaborate on its claim of unequal treatment in the light of the recent disclosure of documents relating to the tendering process. No objection was taken to the amendment by the defendant. In the circumstances, it is correct to allow it and I do so.

70. This ground only arises if the criteria are unlawful because they give rise to inequality of treatment.

71. The criteria in the letter of 8 February are on their face lawful and fair. It is the development of the criteria and verification process as set out in paragraph 7 of Mr Ray's witness statement and their application to the claimant that I have found to be unlawful.

72. The claimant contends that the law is clear. It is not in dispute that like cases are to be treated alike and different cases are to be treated differently: see **R (Hossacks) v Legal Services Commission** [2012] EWCA Civ 1203 at [22].

73. The claimant submits that the criteria unjustifiably treated the claimant's situation as, first, being different from that of a firm which acquired office premises after 15 October 2015, rather than bringing into operation an office which had already been acquired but which was vacant; and, second, as being, in principle, the same as a firm which had operated a long standing criminal practice in a procurement area in which it had been awarded a contract.

74. Further, in oral submissions a particular point was made as to the unequal treatment vis a vis new entrants who were competitors to the claimant but who had no greater

claim to inclusion on new duty schemes than any other successful bidder in the tender process. There were some 36 new entrants who applied (out of 63 who could have been eligible) but only two or three of the existing firms allowed as a result of application of the criteria. In reality, the claimant submits there was no difference between the two. By way of example, an immigration firm wanting to move into crime did not have to show a new office or investment in a comparable way to that which the claimant was asked to do.

75. The defendant contends that those who acquired new offices after 15 October acted in reliance on the letter saying that they had been successful in their bid whereas others who had already purchased an office had acted at their own risk. The claimant incurred no capital expenditure on premises acquisition.

76. New entrants had no right to do any DPW whereas the claimant did, at its other offices. What the defendant was doing was to treat new entrants fairly so that they were to be in a position similar to existing contract holders. They were to be allowed to operate from one office. They started, therefore, from a different position so they did not have to be treated in an identical manner to the claimant.

77. The rationale for the defendant's stance was that the LAA was trying to ensure that those who had entered into binding commitments and incurred expenditure were not left in the lurch.

78. On the documents firm 7 warranted that they had an office which had been opened since 28 October and which was intended to operate as the base for the duty provider work contract. A director, supervisor and duty solicitor was working from that office which was approved on 11 November 2015 by the SRA. Firm 51 became operational on 8 February 2016 but had been operating an office from 3 March 2015 with the lease renegotiated for another unit of space on 1 February 2016.

79. The claimant had been treated in the same way as others in a similar situation.

80. There had been some 1,800 contract holders. When the letter of 8 February 2016 was sent out the defendant was not aware of how many firms might seek to come within the contingency criteria.

81. The issue of non-duty work was not relevant because the issue was reliance upon the letter of 15 October 2015 which dealt solely with DPW.

Discussion and Conclusions

82. Stanley Burnton LJ in **R (Hossacks) v Legal Services Commission** [2013] 1 Costs LO 94 said at [21]:

> "21. The classic statement of the duty of the public authority in regard to equal treatment is at para 27 of the Court of Justice's judgment in *Fabricom SA* v *Belgium* (Joined Cases C-21/03 and C-34/03):
>
> 'it is settled case-law that the principle of equal treatment requires that comparable situations must not be treated

> differently and that different situations must not be treated in the same way unless such treatment is objectively justified (Case C-434/02 *Arnold André* [2004] ECR I-0000, para 68 and the case-law cited there, and Case C-210/03 *Swedish Match* [2004] ECR I-0000, para 70 and the case-law cited there).'"

He continued at [23]:

> "23. In my judgment, in order to succeed on this issue, the appellant must first point to one or more instances in which an applicant whose application was as fundamentally flawed as were hers was permitted to change its application or applications and whose application or applications was or were then accepted as compliant with the tender rules. It is only if the appellant can show that there were such instances that the question can arise whether the Commission acted in breach of its duty to treat applicants equally and consistently when it rejected the appellant's applications."

83. The position in regard to new entrants in the criminal legal aid scheme is different from an existing contract holder seeking to expand the number of contracts that it holds. New entrants were to be allowed to operate from the Office stipulated in its bidding document. The Office was required to meet clause 1.13 of the 2010 Contract. Because new entrants started from a different position they did not have to be treated identically to those in the position of the claimant. Although Mr Coppel QC, for the claimant, accepts that the starting point for new entrants will be different he contends that they are less deserving. That, it seems to me, is not an adequate answer. The fact is here that a new entrant is not in a comparable situation to that of the claimant. There is no basis, therefore, for saying that the defendant erred in its approach as between new entrants and the claimant on this ground.

84. However, as is clear from the discussion on ground two there was potential unfairness in treating the claimant differently in determining that the Office was not open and operational simply because certain costs of capital acquisition had been incurred in 2012; the requirement under the 8 February 2016 letter was in fact broader than that.

Remedy

85. The defendant contends that there is an alternative remedy, namely, the use of the dispute resolution procedures set out in clause 28 of the 2010 Contract. As a result no relief should be granted; judicial review has not been used as a course of last resort. Alternatively, if relief is to be granted than it should be no more than a quashing order. The claimant seeks a mandatory order which would involve changing the rotas which might need to be rethought. As it is, rotas are changed on a six monthly basis and the claimant can apply to go onto the rota at the beginning of September.

86. The claimant contends that the defendant's submission in relation to the contractual remedy would lead to a bizarre result where that route would be exhausted only for judicial review to then be commenced on the very same matters.

87. As to reissuing of the rotas, although that is done formally every six months, they can be corrected and amended at any time and are from time to time.

88. Further, in an email dated 12 April 2016 in the context of the formal review under clause 27 of the 2010 Contract Mr Windfield, a lawyer at the Ministry of Justice, had said, "I would like to take this opportunity of reminding you that any potential prejudice of this short delay can be avoided through a redistribution of duty slots during the course of the current rota period should your formal review be successful." That reiterated what he had said on 31 March when he indicated that should the application for the formal contractual review be successful slots could be awarded in sufficient numbers to ensure that the claimant received the same total number over the period of the rota as it would have received had it been on the rota from 1 April.

Discussion and Conclusions

89. I have found that the development and application of the criteria in the letter of 8 February 2016 were unlawful and irrational in part. That is sufficient to lead to a quashing order of the decision of 11 March 2016. I do not think it appropriate in the circumstances here to withhold relief pending the dispute resolution process which, as the claimant contends, could lead to the whole matter being re-litigated some months hence.

90. However, I do not feel able to rewrite the decision as sought by the claimant. The court is not in a position to know enough about the rota system to begin to contemplate what or how that should be done. As it is the defendant will need to remake its decision in a way which is lawful in relation to the claimant.

91. I invite submissions on the form of Order and costs.