Appeal No. UKEAT/0300/15/BA

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 28 & 29 April 2016
Judgment handed down on 27 September 2016

Before

HIS HONOUR JUDGE DAVID RICHARDSON

MR P GAMMON MBE

MRS G SMITH MBE

UNITE THE UNION — APPELLANT

MISS S NAILARD — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEAL AND CROSS-APPEAL

APPEARANCES

For the Appellant	MR OLIVER SEGAL (One of Her Majesty's Counsel) Instructed by: Thompsons Solicitors LLP 17 Wellington Street Leeds West Yorkshire LS1 4DL
For the Respondent	MR JAMES WYNNE (of Counsel) Instructed by: Richard Slade & Company 9 Gray's Inn Square London WC1R 5JD

SUMMARY

JURISDICTIONAL POINTS - Worker, employee or neither

HARASSMENT

SEX DISCRIMINATION - Direct

TRADE UNION RIGHTS

The appeal concerned sexual harassment by elected officers of the Respondent trade union against a paid (employed) officer.

1. The ET held that the elected officers were employees of the Respondent under the extended definition in section 83(2) of the **Equality Act 2010**. Appeal allowed on this ground. The elected officers were not employees under the extended definition. **Allonby v Accrington & Rossendale College** [2004] IRLR 224, **Jivraj v Hashwani** [2011] IRLR 827 and **Halawi v WDFG UK Ltd** [2015] IRLR 50 considered and applied

2. The ET held that the Respondent was responsible for the harassment of the elected officers by virtue of section 109(2). Appeal dismissed on this ground. **Kemeh v Ministry of Defence** [2014] IRLR 377 and **Heatons Transport v Transport and General Workers' Union** [1972] ICR 308 considered and applied.

3. The ET held that the paid officers themselves harassed the Claimant by failing to take action against the elected officers to prevent harassment and by deciding to transfer her elsewhere. Appeal allowed on this ground, but matter remitted to ET for reconsideration. The ET had applied the wrong legal test; the question was whether the conduct of the elected officer in question was "related to sex"; it was not "related to sex" merely because it was concerned with earlier harassment by the elected officers which was related to sex. **Conteh v Parking**

Partners Ltd [2011] ICR 341, **Equal Opportunities Commission v Secretary of State for Trade and Industry** [2007] ICR 1234 and **Sheffield City Council v Norouzi** [2011] IRLR 897 considered.

4. The ET held that, if it had not found that the paid officers harassed the Claimant, it would have found that they had discriminated against her because of sex - direct discrimination. The finding in this respect would also be remitted. The ET was required to focus on the mental processes of each paid officer and ask whether that officer's conduct was because of sex. **CFLIS (UK) Ltd v Reynolds** [2015] IRLR 562 applied.

5. Section 64(2)(f) of the **Trade Union and Labour Relations (Consolidation) Act 1992** is not concerned with decisions relating to the employment of a paid officer employee of the Respondent (who may or may not be a member of the Respondent union).

HIS HONOUR JUDGE DAVID RICHARDSON

1. By a Judgment dated 1 July 2015 the Employment Tribunal sitting in Watford (Employment Judge Manley, Mr Underwood and Mrs Low) upheld certain claims brought by Miss Sally Nailard ("the Claimant") against Unite the Union ("the Respondent"). The Respondent has appealed, and the Claimant has cross-appealed, against aspects of its findings.

2. The appeal is mainly concerned with the application of the **Equality Act 2010** to the conduct of certain elected branch officers of the Respondent towards the Claimant, its paid officer and employee. There are grounds of appeal concerning the status of the Respondent's branch officers, the liability of the Respondent for sexual harassment by its branch officers and the liability of the Respondent to the Claimant because its paid officers (its own employees) did not address harassment by its branch officers and decided to transfer her elsewhere.

3. The ET's Reasons ran to some 70 close-typed pages; and the appeal has raised a wide range of issues. We will begin with a summary of the background and issues; and we will then deal with them in turn.

Background and Issues

4. The Claimant was employed by the Respondent as a regional officer with effect from 6 June 2012. In January 2013 she transferred to the Respondent's office at Heathrow. She became a regional officer in respect of Heathrow Airports Limited ("HAL") within the Respondent's London and Eastern Region. Her immediate line manager was Mr Wayne King, the Respondent's senior regional officer. Senior to him were Mr Kavanagh, the regional

secretary, and Mr Murray, the Respondent's chief of staff. These were all paid employees of the Respondent.

5. The Respondent's rule book - in effect its constitution - makes provision for local branches, generally based upon a workplace. They are to have elected officials, including a chair, a treasurer, an equality officer and a secretary. The rule book also provides for shop stewards and workplace representatives to be elected within a workplace. Two such officials within Heathrow were Mr Saini, a convenor, and Mr Coxhill, a branch chair. By agreement between the Respondent and HAL they carried out full-time union duties while remaining employed by HAL.

6. The ET found that there was an unfortunate history of conflict between the paid officers of the Respondent and the locally elected officers. The Claimant was the fourth paid officer in respect of HAL in as many years. The ET found that Mr Saini and Mr Coxhill bullied and harassed the Claimant in a way which amounted to sexual harassment as defined in section 26(1) of the **Equality Act 2010**. There is no appeal against that finding.

7. The ET went on to find that the Respondent was vicariously liable for this unlawful conduct under section 109 of the **Equality Act 2010** because either (1) Mr Saini and Mr Coxhill were employees of the Respondent, applying section 109(1) and the extended definition within section 83, or (2) they were agents of Respondent, applying section 109(2). The Respondent appeals against both these findings.

8. The Claimant complained to the Respondent about the conduct of Mr Saini and Mr Coxhill, eventually presenting a formal grievance on 17 March 2014. Mr Murray asked Mr

Peter Hughes, another paid official of the Respondent, to carry out an investigation. The ET found that the Respondent - in particular Mr Hughes, Mr Murray and later Mr Kavanagh - failed to deal firmly or decisively with Mr Saini and Mr Coxhill, even though they accepted that they were bullying and harassing the Claimant, and despite at least one occasion when there was obvious serious sexual harassment.

9. By August 2014 Mr Kavanagh was involved. He decided to transfer the Claimant away from Heathrow. At a meeting on 1 August he offered the Claimant a transfer to Southampton or alternatively to offices in the London area. The Claimant protested; and then on 4 August 2014 she resigned with immediate effect. The ET found that the reasons for Mr Kavanagh's decision and the Claimant's resignation were in each case "complex". It made careful findings about them to which we will return later in this Judgment.

10. The ET upheld the Claimant's claim of constructive unfair dismissal. It found that the failure to deal firmly and decisively with the individuals concerned was a breach of the implied term of trust and confidence; it said that it would have reached that conclusion irrespective of its conclusions about sexual harassment, and it said that the decision to transfer her was the "last straw". There is no appeal against the finding of constructive dismissal itself. The Claimant is therefore on any view entitled to compensation for unfair dismissal.

11. However, the ET went on to find that Mr Hughes, Mr Murray and Mr Kavanagh were themselves guilty of sexual harassment. Their failure to investigate, take appropriate action including disciplinary action, and then the decision to transfer the Claimant was unwanted conduct which had the effect of violating her dignity and creating a hostile and intimidating environment. These decisions were related to sex. The Respondent appeals against these

findings; it accepts that it would be liable for such harassment by Mr Hughes, Mr Murray and Mr Kavanagh, but it says that the ET's findings are vitiated by error of law.

12. The Claimant had argued, in the alternative, that the conduct of Mr Hughes, Mr Murray and Mr Kavanagh was direct sex discrimination on the basis that it subjected her to detriment: see section 39(2)(d) of the **Equality Act 2010**. However, section 212(1) of the **Equality Act 2010** defines detriment so as to exclude conduct which amounts to harassment. Having found the conduct to amount to harassment, the ET therefore did not make a finding of direct sex discrimination; but it said that it would have reached this judgment if it had not found them guilty of sexual harassment. The Respondent appeals against this conclusion, which will come into sharp focus if the appeal in respect of sexual harassment is successful.

13. The ET found that the dismissal itself was an act of direct sex discrimination for which the Respondent was liable. The Respondent appeals against that finding, and a finding that the decision to transfer was a "last straw".

14. It was argued on behalf of the Claimant that she had been subjected to unjustifiable discipline by virtue of sections 64 and 65 of the **Trade Union and Labour Relations (Consolidation) Act 1992** ("TULRCA"). The ET rejected that argument. The Claimant cross-appeals against that finding.

15. At this point it is important to recognise that the Employment Appeal Tribunal can interfere only if an error of law on the part of the ET can be identified: see section 21(1) of the **Employment Rights Act 1996**. It has no power to impose its own view of the facts: these are for the ET to decide. The issues which we have identified concern questions of law.

The Rule Book

16. Before we turn to the various grounds of appeal it is convenient to refer to some provisions of the Respondent's rule book relating to branch officers and workplace representatives.

17. Rule 17 makes provision for branches. Generally they are to be based on the workplace though there may also be provision for branches based on locality or industrial sector or both. Rule 17.7 makes provision for each branch to have a chair, treasurer, equality officer, secretary and "such other officers as the Branch may elect". Elections are every third year. Branch meetings and business are regulated by standing orders issued by the executive council. The regional committee is required to ensure that the branch meets at regular intervals and operates in accordance with standing orders: it may suspend the branch members if this does not happen. The property of the branch belongs to the Respondent. Rules 17.10 and 17.11 set out the responsibilities of the chair, secretary and treasurer.

18. Rule 18 makes provision for workplace representation. The members employed at a workplace are to elect, at least every three years, one or more of various categories of representative. These include "Shop stewards/workplace representatives".

19. The rule book contains no specific provisions for the discipline of branch officers or workplace representatives as such. Rule 27, however, deals comprehensively with membership discipline. A member may be charged with acting contrary to the rules "whether in his/her capacity as a member, a holder of a lay office or a representative of the Union" (rule 27(1)). Disciplinary sanctions may include withdrawal of workplace credentials, removal from office and barring from holding office (rule 27.5).

20. We do not need to refer in detail to other provisions concerning union membership. Suffice it to say that the rule book provides for categories of membership, application for membership, an approval process and membership contributions, benefits and obligations. Rule 5.1 provides that a member must comply with the rules and with any duty or obligation imposed on that member by or pursuant to the rules, "whether in his/her capacity as a member, a holder of a lay office or a full time officer."

Liability of Employers and Principals: Statutory Provisions

21. Section 83(2) of the **Equality Act 2010** defines "employment". By section 83(2)(a) it includes:

> **"employment under a contract of employment, a contract of apprenticeship or a contract personally to do work"**

22. Section 109 makes provision for liability of employers and principals in the following terms:

> **"(1) Anything done by a person (A) in the course of A's employment must be treated as also done by the employer.**
>
> **(2) Anything done by an agent for a principal, with the authority of the principal, must be treated as also done by the principal.**
>
> **(3) It does not matter whether that thing is done with the employer's or principal's knowledge or approval.**
>
> **(4) In proceedings against A's employer (B) in respect of anything alleged to have been done by A in the course of A's employment it is a defence for B to show that B took all reasonable steps to prevent A -**
>
> > **(a) from doing that thing, or**
> >
> > **(b) from doing anything of that description."**

23. The **Act** contains no further definition of the term "agent", "authority" or "principal".

24. It is important to keep in mind that the definition of "employment" does not only govern the circumstances in which an employer will be liable for the actions of another. It is also

important in defining the scope of protection afforded by the **Equality Act** in the field of work. Employees are given rights under section 39 of the **Act** which are not afforded to (for example) the truly self-employed. However, there are also equality rights in the field of work which do not depend on employment status: for example, there are rights for those who are members of or apply for membership of an organisation of workers (section 57).

Were Mr Saini and Mr Coxhill employees?

The Employment Tribunal's Reasons

25. The ET held that Mr Saini and Mr Coxhill were employed by the Respondent under a contract personally to do work (see section 83(2), quoted above). Its reasoning starts in paragraph 87:

> **"87. … These two individuals, whilst 'employed' in the normal sense by Heathrow Airports Limited and paid by it, are elected officials under the rule book. They are on full time facility time to work on behalf of the trade union and its local members. They need "credentials" from Unite in fulfilling that role and have the support of Unite in carrying out their role. The respondent is made up of its members and is governed by the rule book between its members and the trade union as a whole. That amounts to a contract. The next question is whether they were personally doing work for Unite. We find that there is indeed a fairly high level of control. This is indicated by the fact that the respondent did take action albeit, as we find above, too limited. It arranged for investigations, it suspended one elected official's credentials and suggested that disciplinary action could be taken. Indeed, Mr Hughes' report, as indicated above, stated that, if the claimant did not accept the apology, disciplinary action would have to be undertaken. A number of rules in the rule book appear to us to indicate a relatively high degree of control as between the respondent and those elected officials. These two individuals personally provide services and they do so to the members of the trade union. Rules 17.7, 17.9, 17.12 and 18.1 taken with rules 5.1 and 5.2 all set out the sort of control the respondent has both over the structure and over the behaviour of members. The tribunal does not suggest that all members would fit into the category of employees under the extended definition of the Equality Act. Not all members would be contracted personally to carry out services on behalf of the members unlike elected officials who are on full time facility time and therefore on "union business" as suggested by the respondent itself. We heard no evidence and assume that there is no right to substitution and, given that the officials have been elected, this would seem very unlikely. …"**

26. After referring to **Halawi v WDFG UK Ltd t/a World Duty Free** [2015] IRLR 50 CA the ET continued (paragraph 89):

> **"89. We find that, in this case, there was no right of substitution (nor was one suggested) and that there was sufficient control by the respondent to indicate subordination. There is no suggestion that Mr Saini and Mr Coxhill as elected officials were independent contractors. The respondent's representative sought to argue that they are providing services to their local membership rather than to the trade union as a whole but it seems to us that that is a rather circular argument as the respondent is itself made up of the membership both local and**

nationally. We find these elected officials were in employment under [section 83(2)(a) Equality Act].”

Submissions

27. On behalf of the Respondent Mr Oliver Segal QC submitted that the rule book did not constitute a contract of employment, even in the wider sense of a contract personally to do work; properly understood, it was the constitution of the union on the basis of which a contract of membership was made. The rule book did not provide for the Respondent to have a “fairly high level of control” over lay officers. As rule 27 showed, lay officers were disciplined in the same way as members. There was no power to instruct a lay officer to do any particular work, and the Respondent did not undertake any obligation to pay him or provide him with work. There was no mutuality of obligation or subordination. Mr Segal placed reliance on **Windle v Ministry of Justice** [2014] IRLR 914 EAT and **Halawi v WDFG UK Ltd** [2015] IRLR 50 CA.

28. On behalf of the Claimant Mr Wynne submitted that the question whether there was a contract personally to do work between the Respondent and the elected officials was essentially a matter of fact for the ET. The rule book regulated not only the position of members but also the position of officers; when a lay officer took office he undertook a contractual obligation to represent the interests of members. In this case Mr Saini and Mr Coxhill had submitted themselves to a full-time role working for the union as its representatives. Mutuality of obligation is required for employment not for worker status: see **Windle** (EAT) at paragraph 54. The ET was entitled to find that the Respondent was entitled to exercise control and that the two officers were in a position of subordination.

Discussion and Conclusions

29. The law relating to the extended definition of employment within what is now section 83(2) of the **Equality Act 2010** is well-travelled territory. The leading case is **Jivraj v Hashwani** [2011] IRLR 827 in which the Supreme Court examined section 83 in detail. It recognised that the meaning of "employee" had to be determined in accordance with EU law. It cited **Allonby v Accrington & Rossendale College** [2004] IRLR 224 where the Court of Justice held:

> **"66. Accordingly, the term worker used in Article 141(1) EC cannot be defined by reference to the legislation of the Member States but has a Community meaning. Moreover, it cannot be interpreted restrictively.**
>
> **67. For the purposes of that provision, there must be considered as a worker a person who, for a certain period of time, performs services for and under the direction of another person in return for which he receives remuneration (see, in relation to free movement of workers, in particular case 66/85 *Lawrie-Blum* [1986] ECR 2121, paragraph 17, and *Martínez Sala*, paragraph 32).**
>
> **68. Pursuant to the first paragraph of Article 141(2) EC, for the purpose of that article, pay means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his employment, from his employer. It is clear from that definition that the authors of the Treaty did not intend that the term worker, within the meaning of Article 141(1) EC, should include independent providers of services who are not in a relationship of subordination with the person who receives the services (see also, in the context of free movement of workers, case C-337/97 *Meeusen* [1999] ECR I-3289, paragraph 15).**
>
> **69. The question whether such a relationship exists must be answered in each particular case having regard to all the factors and circumstances by which the relationship between the parties is characterised.**
>
> **70. Provided that a person is a worker within the meaning of Article 141(1) EC, the nature of his legal relationship with the other party to the employment relationship is of no consequence in regard to the application of that article (see, in the context of free movement of workers, case 344/87 *Bettray* [1989] ECR 1621, paragraph 16, and case C-357/89 *Raulin* [1992] ECR I-1027, paragraph 10)."**

30. Thus it is clear that the existence of the relationship of employment does not turn on whether the parties entered into a formal contract which would be recognised in domestic law as constituting employment. It depends on whether it meets the criteria laid down by European law, and the ET must look at the substance of the situation: see **Halawi** at paragraph 4 (Arden LJ).

31. The cases show that these criteria can be difficult to apply (though of course so can the English criteria for assessing whether a person is an employee in the strict sense). See **Bates Van Winkelhof v Clyde & Co** [2014] IRLR 641 at paragraph 39 (Lady Hale) and **Halawi** at paragraphs 28, and 37 to 44. Generally, speaking "key factors are the element of subordination and the receipt of remuneration" (Arden LJ in **Halawi** at paragraph 29). Even the element of subordination may not be a universal touchstone - see paragraphs 42 to 44 of **Halawi**, where Arden LJ said that "an important factor is the measure of integration into the putative employer's business".

32. Against this background we turn to the ET's reasoning.

33. A trade union is not a corporate body, although statute has bestowed upon it some "quasi corporate" features: see section 10 of **TULRCA**. It is a contractual association of subscribing members, the terms of the contract of membership being set out in a rule book. The ET was therefore correct to identify that there was a contract based on the rule book. However, for the purposes of section 83(1) a contract will only be relevant if it is a contract "personally to do any work". The ET appears to have proceeded on the basis that the rule book constituted such a contract: it certainly did not identify any other contract.

34. We do not think it is possible to spell out of the rule book any contract personally to do any work. The rule book lays down certain minimum responsibilities for the branch secretary and treasurer; it does not require them to undertake the work personally, though they will be answerable for ensuring the work is properly done. The rule book provides that the chair will preside over all meetings of the branch, but it makes provision for a substitute if he is absent. Even if the responsibilities of office can be described as entailing an obligation to work

personally, which we doubt, the rule book makes no provision for any payment of any kind. The rule book was therefore, with respect to the ET, not the source of any agreement to work personally in the sense explained in **Allonby** and **Hashwani**.

35. In our judgment it is plain that a union member who is elected to office under a provision similar to rule 17 is not thereby making an agreement to work personally for the purposes of section 83(2), nor is the union making such an agreement with the member. The member is voluntarily undertaking the duties of office; there is no commitment to any particular amount of work and no right conferred by the rules at all to remuneration.

36. Nor, in our judgment, can it be said that the rule book places elected officials in a position of subordination; they are afforded a great deal of independence by the rule book in the way they carry out the duties of office on behalf of their members. The disciplinary charges within rule 27 will apply where an elected official fails to perform the duties of the office or brings injury or discredit upon the union; but they will not permit the union to charge a lay official with a disciplinary offence merely because the union disagrees with the elected official in the way the duties are performed.

37. Nor, in our judgment, can a contract to work personally for the union be spelt out because an employer continues to pay an elected official while undertaking the duties of office. An employer is required by law to permit paid time off work for the officials of recognised trade unions for certain activities: see section 168 of **TULRCA**. An employer is also required by law to allow time off work to a representative at a grievance or disciplinary hearing; this work may also fall to such an official, and if so there will be a right to time off for such duties: see section 10 of the **Employment Relations Act 1999**. Against this background there may be

sound pragmatic reasons why an employer with a large workforce, such as HAL, will pay an elected official full-time. It does not follow, and cannot be implied by invoking the union's rule book, that the official thereby undertakes a duty to the union to work personally for it in the **Allonby** sense.

38. In our judgment the ET erred in law in holding that Mr Saini and Mr Coxhill were employees of the Respondent even in the extended sense for which section 82(2) provides. We consider that it is clear they were not.

39. For the sake of completeness we should add that the decision of the EAT in **Windle** has been reversed by the Court of Appeal: see [2016] IRLR 914. But the reasoning is concerned only with the relevance of mutuality of obligation between contractual assignments which undoubtedly amounted to contracts personally to do work. Here the question is more fundamental. We hold that the Respondent never made a contract with its elected officials for them personally to do work.

Vicarious Liability for Mr Saini and Mr Coxhill

The Employment Tribunal's Reasons

40. In case it was wrong in its finding concerning section 83(1) the ET went on to make the following finding:

> **"90. If we are wrong about that we must consider whether the agency provisions apply to these two individuals. The case of *Kemeh v Ministry of Defence* [2014] IRLR 377 is helpful in this case and also the extract provided to us by the claimant's representative with respect to agency. We do find that they were acting as agents for the respondent. They were carrying out work on behalf of the respondent in their dealings with local members, officers, other trade unions and the employers. They had express authority to do so through the rule book and on the basis of credentials provided by the respondent. The respondent's representative's argument that the claimant was herself an agent for the respondent does not prevent these elected officials being agents."**

Submissions

41. Mr Segal submitted that the ET's finding of vicarious liability was plainly wrong: the relationship between the Respondent and the lay officials was not such that the acts of harassment were done "by an agent for a principal with the authority of the principal". He referred us to **Kemeh** (on which the ET relied) but placed particular emphasis on **Cox v Ministry of Justice** [2016] 2 WLR 806 SC. He submitted that Mr Saini and Mr Coxhill (1) were not carrying out activities assigned to them by the Respondent; (2) were not under the control of the Respondent, which could not direct what they did; (3) were not in a fiduciary position; (4) did not have any express or implicit authorisation from Respondent to act as they did. On this last question he submitted that the authority of shop stewards and elected officials was limited: they were not authorised to do any act outside union rules or policy - see **Heatons Transport v Transport and General Workers' Union** [1972] ICR 308 HL at 405G.

42. Mr Wynne submitted that the ET committed no error of law. The findings in paragraph 90 were all supported by evidence; they were sufficient to support the ET's conclusion, which could not be described as unreasoned or perverse.

Discussion and Conclusions

43. The words and acts found by the ET to constitute sexual harassment generally took place in the context of meetings. Thus Mr Saini was found to have conducted himself in this way at a meeting with HAL management on 24 February 2014. He attacked, abused and threatened her at a branch meeting so she felt physically unsafe. At pay negotiations in December 2013 and on other occasions he informed HAL negotiators that they were not to contact her about certain issues. He would cut across her, shout her down and accuse her of being "on the take" at meetings. He called her "headmistress". Mr Saini said at a meeting of

HAL chairs and convenors that he "wanted that woman off the airport". He wrote to HAL informing them that the Claimant was no longer to act on behalf of the members of his branch in any capacity. The findings against Mr Coxhill are less extensive; but they include a specific finding that he used overtly sexual language towards her at a meeting on 11 March 2014.

44. The ET was correct to take as its starting point the decision of the Court of Appeal in **Ministry of Defence v Kemeh**. This was a decision upon provisions in section 32 of the **Race Relations Act 1976**. The **1976 Act** was repealed and replaced by the **2010 Act**. The provisions of section 32 were broadly the same as those of section 109, and there is no warrant for giving section 109 a different construction.

45. It is clear from **Kemeh** that there is an important distinction between section 109(1), which applies to employers and which is subject to a statutory defence in section 109(4), and section 109(2), which applies to principals. In the case of an employer section 109(1) applies "a principle whose effect is similar to the common law concept of vicarious liability" (Elias LJ, paragraph 10). Section 109(2), however, applies only where "the agent discriminates in the course of carrying out the functions he is authorised to do" (Elias LJ, paragraph 11). If he does this, it does not matter whether the principal knew or approved of what he did (Elias LJ, paragraph 11, now put beyond doubt by section 109(3)).

46. In determining whether a person is an agent of a principal for the purposes of section 109(2), the legal concept of agency cannot be disregarded (Elias LJ, paragraph 46). The ET must therefore have regard to what, if anything, the putative agent was authorised to do. On the one hand, it is not essential that the putative agent should have the authority to bind the principal contractually; many agents - estate agents being an example - do not have that

A authority, but still carry out functions on the principal's behalf (Elias LJ, paragraph 38). On the other hand, it is not enough that a person performs work for the benefit of a third party employer (Elias LJ, paragraph 39).

B

47. Although Mr Segal referred us to **Cox v Ministry of Justice** we do not think that case is directly on point. There the Supreme Court applied general principles of vicarious liability in tort. Lord Reed JSC, handing down a judgment with which the other members of the Court C agreed, expressly stated that the judgment was not concerned with vicarious liability in the area of agency: see paragraph 15. The ET was required by section 109(2) and **Kemeh** to consider the liability of the Respondent in the context of agency.

D

48. The leading case concerning the responsibility of a trade union for its elected officials is **Heatons Transport v TGWU** [1972] ICR 308 HL. In that case the question was whether shop E stewards were acting on behalf of and within the scope of the authority conferred by the principal (see the speech of Lord Wilberforce at page 392B).

49. After noting that an agent generally has authority only to perform a particular task on a F particular occasion, and has no general authority to act for his principal, Lord Wilberforce said (page 392H):

> **"But there are cases in which an agent who is not a servant does have authority of considerable generality. He may be elected or appointed to some office or post for a substantial period and he may have to perform acts of several classes on behalf of the principal and he may have to exercise a discretion in dealing with a series of situations as they arise. The position of such an agent and the scope of his authority are very similar to those of a servant."**

G

50. In the case of a shop steward Lord Wilberforce said that the starting point was the rule H book of the trade union, which represented the agreement between the members of the union. But it would not be right to take a narrow view of the rule book. He said (page 393G-H):

> **"…The basic terms of that agreement are to be found in the union's rule book. But trade union rule books are not drafted by parliamentary draftsmen. Courts of law must resist the temptation to construe them as if they were; for that is not how they would be understood by the members who are the parties to the agreement of which the terms, or some of them, are set out in the rule book, nor how they would be, and in fact were, understood by the experienced members of the court. Furthermore, it is not to be assumed, as in the case of a commercial contract which has been reduced into writing, that all the terms of the agreement are to be found in the rule book alone: particularly as respects the discretion conferred by the members upon committees or officials of the union as to the way in which they may act on the union's behalf. What the members understand as to the characteristics of the agreement into which they enter by joining a union is well stated in the section of the T.U.C. Handbook on the Industrial Relations Act which gives advice about the content and operation of unions' rules. Paragraph 99 reads as follows:**
>
> > **"Trade union government does not however rely solely on what is written down in the rule book. It also depends upon custom and practice, by procedures which have developed over the years and which, although well understood by those who operate them, are not formally set out in the rules. Custom and practice may operate either by modifying a union's rules as they operate in practice, or by compensating for the absence of formal rules. Furthermore, the procedures which custom and practice lays down very often vary from workplace to workplace within the same industry, and even within different branches of the same union." "**

51. Lord Wilberforce summarised their Lordships' opinion as follows (page 405F-G):

> **"In accordance with the policy of devolution followed by the Transport and General Workers' Union, and consistently with its rules and practice, shop stewards of the union have a general implied authority to act in the interests of the members they represent and in particular to defend and improve their rates of pay and working conditions. They may do so by negotiation or by industrial action at the relevant place of work. They are not authorised to do any act outside union rules or policy."**

52. The ET found that Mr Saini and Mr Coxhill were acting as agents for the Respondent because they were carrying out work on behalf of the Respondent in their dealings with local members, officers, other trade unions and employers. We consider that the ET was entitled to reach this conclusion. It is important to keep in mind that a union is a contractual association of subscribing members; this association authorises its officers to act on its behalf in a variety of ways - conducting branch meetings, representing the union at meetings with other unions and employers, liaising with paid officers and holding internal meetings to prepare for external meetings. Such matters are core union work. It is well within the scope of authority of local officers to speak on the Respondent's behalf at such meetings and to correspond with the employer about matters concerning the manner and scope of negotiations. It is well within the scope of authority of local officers to liaise with paid officers. As Lord Wilberforce observed,

an office holder may have to perform a variety of functions in the course of the duties of office; we have no doubt that this applied to the Respondent's office holders at HAL.

53. Contrary to Mr Segal's submission we consider for these reasons that the ET was entitled to find that the branch officers were acting within the scope of their authority as officers of the Respondent when speaking at meetings concerning matters to be negotiated with HAL and when corresponding about such negotiations.

54. We accept, as Mr Segal submitted, that once Mr Coxhill and Mr Saini were elected the Respondent had limited control over what they did - but that will often be true of a principal who commissions an agent to undertake tasks on his behalf. The Respondent did, however, have ample power to discipline them under rule 27.

55. Mr Segal submitted that branch officers were not agents of the Respondent because they owed no fiduciary duties to the Respondent. We do not think this is the place for a detailed consideration of the fiduciary duties of a branch officer; but in principle we see no reason why these should not exist. Take, for example, the extreme case of a branch officer who used his position to take bribes; we see no reason why he should not be accountable to the Respondent as owing a fiduciary duty.

56. We turn finally to Mr Segal's submission that the Respondent cannot be responsible for the acts of Mr Coxhill and Mr Saini because they were contrary to union policy.

57. It is of course true that the specific words and conduct amounting to sexual harassment were not approved by the Respondent or even known in advance. But it is plain from section

109(3) that this does not matter if the perpetrators were acting on behalf of the Respondent within the scope of the authority vested in them to do so. That seems to us to be the position here.

58. A principal cannot avoid responsibility for acts done with his authority merely by saying to his agent "Of course you must not do anything illegal" or (in the context of the **Equality Act**) "Of course you must not do anything against equality law". Such a statement does not limit the scope of the agent's authority to act on the principal's behalf. It merely spells out the obvious: the principal does not approve if he carries out authorised functions in an unlawful manner. But the fact that the principal would disapprove does not prevent the agent's act being treated as done by the principal: section 109(3).

59. For these reasons we uphold the ET's judgment that the Respondent was liable for sexual harassment of the Claimant by its elected officers.

Harassment and Direct Discrimination by Paid Officers

Statutory Provisions

60. We now turn to that part of the case which concerns the ET's findings of harassment and direct discrimination against the Respondent by virtue of what its paid officers failed to do (in addressing her complaints of sexual harassment) and did (in deciding to transfer her away from Heathrow).

61. It is unlawful for an employer to harass an employee: section 40(1)(a) of the **Equality Act 2010**. Harassment is defined in section 26. Sex is a relevant protected characteristic for

A the purposes of section 26: see section 26(5). This case is concerned with the definition in section 26(1) and (4), but it is convenient also to set out section 26(2):

> **"26. *Harassment***
>
> **(1) A person (A) harasses another (B) if -**
>
> **(a) A engages in unwanted conduct related to a relevant protected characteristic, and**
>
> **(b) the conduct has the purpose or effect of -**
>
> **(i) violating B's dignity, or**
>
> **(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.**
>
> **(2) A also harasses B if -**
>
> **(a) A engages in unwanted conduct of a sexual nature, and**
>
> **(b) the conduct has the purpose or effect referred to in subsection (1)(b).**
>
> **…**
>
> **(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account -**
>
> **(a) the perception of B;**
>
> **(b) the other circumstances of the case;**
>
> **(c) whether it is reasonable for the conduct to have that effect."**

62. It is also unlawful for an employer to discriminate against an employee by dismissing the employee or subjecting the employee to any detriment: see section 39(2). Direct discrimination is defined by section 13(1): "A discriminates against B if, because of a protected characteristic, A treats B less favourably than A treats or would treat others". Sex is a protected characteristic: section 4 and 11.

63. The principal European Directive concerning equal treatment of men and women is the **Equal Treatment Directive 2006** (2006/54/EC). This prohibits "direct or indirect discrimination on the grounds of sex" in relation to employment and working conditions: article 14(1)(c). Discrimination is defined to include both harassment and sexual harassment: article 2.2(a). These are defined as follows (article 2.1(c) and (d)):

> **"(c) 'harassment': where unwanted conduct related to the sex of a person occurs with the purpose or effect of violating the dignity of a person, and of creating an intimidating, hostile, degrading, humiliating or offensive environment;**
>
> **(d) sexual harassment': where any form of unwanted verbal, non-verbal or physical conduct of a sexual nature occurs, with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment;"**

The Employment Tribunal's Reasons

64. The ET was very critical of the failure of paid officials to investigate and take effective action, including disciplinary action, to protect the Claimant: see in particular paragraphs 74 and 76 of its Reasons. It had to consider whether these failures, together with the decision of Mr Kavanagh to transfer her, amounted to harassment or direct discrimination.

65. In paragraph 84 the ET said:

> **"84. … To make it clear we do not find that Mr Kavanagh or the other employees who made decisions and are in a "normal" employment relationship with the respondent acted with a discriminatory motive. The decision makers in this matter were Mr Hughes, Mr Murray and Mr Kavanagh …"**

66. Given this statement it is necessary to examine quite closely how the ET came to reach its findings of harassment and direct discrimination against the paid officials.

67. There is a passage in the ET's findings of fact which helps to explain its reasoning. Paragraphs 14.15 and 14.16 are concerned with Mr Kavanagh's decision to move the Claimant. A DVD had been revealed of the Claimant, some 9 years earlier, saying that industrial action was not justified in a particular context at Heathrow. Mr Kavanagh took the decision to transfer the Claimant not long after a threat to distribute the DVD around Heathrow. He said that he was not himself concerned about what the Claimant had said, but he was concerned about the distribution of the DVD. The ET said the following:

> **"14.15. Mr Kavanagh had mixed reasons for his decision to move the claimant. It was to remove her from the bullying and the harassment. That included an element of harassment related to sex carried out by the elected officials, Mr Saini and Mr Coxhill, as well as more**

> **generic bullying. It is also clear that the DVD played a part … It appears to the tribunal that the emergence of the DVD acted as a trigger for Mr Kavanagh to communicate his decision. Other matters were of greater concern. He was aware, of course, of the sexual harassment carried out by Mr Coxhill. He was also aware that the claimant had stated that the reasons for Mr Saini's treatment of her were because she was a woman. He must have understood that the environment she was working in was hostile and intimidating. Those factors played a material part in his decision to transfer the claimant. It was therefore tainted by discrimination.**
>
> **14.16. We say here for completeness and will confirm in our conclusions that the decision to transfer the claimant itself amounted to unwanted conduct that was related to sex (because of the background of harassment related to sex) and had the effect of violating her dignity and of creating a hostile and intimidating environment. Although Mr Kavanagh was not guilty of any discriminatory motive, it cannot be said that the decision to transfer which was made, against the wishes of the employee, part of which was because of sexual harassment, was itself free of any discrimination. The decision to transfer the claimant was tainted by discrimination. It was also unwanted conduct related to sex which had the effect of violating her dignity."**

68. In its conclusions the ET - following an agreed list of issues - addressed direct discrimination in its Reasons before it came to harassment. It found that the acts in question were detriments. It then said (paragraphs 102 and 104):

> **"102. … We do find that the claimant was less favourably treated than a hypothetical male comparator because of the specific nature of the treatment from Mr Coxhill and Mr Saini. That treatment was because she was a woman. The use of negative gender specific language and the dropped pen incident are clearly because of her gender. The failures by the respondent to protect her, take appropriate steps in investigating and disciplining those responsible and the decision to transfer her without her consent arose from those difficulties she faced because she is a woman. The burden therefore shifts to the respondent to explain.**
>
> **…**
>
> **104. The respondent has not satisfied this tribunal that the evidence that male officers had also been badly treated, shows that the treatment afforded to the claimant was not because she was a woman. We accept that there was similar treatment but there no [sic] discriminatory treatment of those male officers. Indeed, Mr Kavanagh accepted that none of them had complained of discriminatory treatment. The respondent failed to acknowledge the specific nature of her concerns clearly expressed on a number of occasions and has failed to discharge the burden."**

69. The ET then turned to harassment. It found that the conduct of the decision makers was unwanted. It said that the failure to investigate, take appropriate action including disciplinary action and to transfer the Claimant was unwanted. It said, however, that it was not done with the purpose of violating her dignity or of creating an intimidating, hostile, degrading humiliating or offensive environment for her: paragraph 106 of its Reasons.

70. It found, however, that this was the effect of the decision makers' conduct. It said:

> **"107. … Although we accept that the decision makers did not have that purpose in mind, we find that the conduct did have that effect and that it was reasonable for the claimant to consider that it did have that effect. Her perception of the treatment is abundantly clear from her complaints. Taking into account that perception, we judge that the effect was indeed one of violating her dignity and creating a hostile and intimidating environment."**

71. It went on to say:

> **"109. Although we accept that the conduct of those investigating matters and taking other decisions affecting the claimant is less obviously related to sex, we have found that it is so related. The claimant's complaints were clear and unambiguous and the respondent's failure to act appropriately with respect to those matters must therefore also be related to sex. The final decision to transfer the claimant, who was a victim of bullying and harassment which included an element of sex discrimination, was related to sex. …"**

72. Finally the ET said, in a concluding paragraph:

> **"138. … It cannot be said that the decision to transfer and the consequent resignation was "in no way" tainted by unlawful discrimination. It cannot be said that the protected characteristic in question, that of sex, did not influence Mr Kavanagh when he decided to transfer the claimant, as he was under no illusion that there had been sexual harassment of the claimant. The dismissal is therefore also an act of discrimination."**

Submissions

73. We will begin with direct discrimination. Mr Segal submitted that it was not sufficient for the ET to have found that the failures to act, or the decision to transfer were "tainted by discrimination" on the part of the elected officials. The ET was required to focus upon the decision maker in question: see **CFLIS (UK) Ltd v Reynolds** [2015] IRLR 562 CA. For the purpose of direct discrimination the issue was whether the Claimant was treated less favourably than a true comparator, actual or hypothetical, by reason of her sex: see, in the context of an allegation of failure to prevent harassment, **Macdonald v Ministry of Defence** [2003] ICR 937 HL. The ET's Reasons show that it did not apply this test. It found that the decision makers did not act with a discriminatory motive. The "taint" was derived from the behaviour of Mr Saini and Mr Coxhill, not from anything in the state of mind of the decision maker.

74. In response Mr Wynne, in seeking to support the ET's reasoning, drew attention to **Amnesty International v Ahmed** [2009] ICR 1450 EAT. There are cases where the ground or reason for the treatment complained of is inherent in the act itself. The reason for the failure to act and the transfer lay directly in the sexual harassment of Mr Saini and Mr Coxhill.

75. We turn to harassment. This, of course, was the actual ground of the ET's judgment; and it was the main focus of the argument before us on this part of the appeal.

76. Mr Segal's primary submission was similar to his submission concerning direct discrimination. The ET was required, for the purposes of harassment as well as direct discrimination, to focus upon the decision maker concerned and decide why he acted as he did. It was not sufficient for the ET to find that the conduct of the decision makers was "tainted" by Mr Saini and Mr Coxhill's behaviour when they were themselves free from any discriminatory motive. In support of this submission he relied strongly on **Conteh v Parking Partners Ltd** [2011] ICR 341 EAT at paragraphs 30 to 32 - a decision upon the wording of the **Race Relations Act 1976**, where the statutory test involved considering whether the unwanted conduct was "on the grounds of" race or ethnic or national origins. He submitted that the wording in section 26 ("related to") bore essentially the same meaning. He pointed out that the **2010 Act** had originally contained provisions to impose duties on employers to prevent third party harassment (section 40(2)-(4)). These provisions would have been unnecessary if section 26 is to be read in such a way that an employer, even if innocent of discriminatory motives, will be liable for harassment if he does not act to prevent sex discrimination by others.

77. Mr Wynne supported the ET's Reasons. The Respondent's decision makers, knowing that the Claimant was the victim of sexual harassment, first took no action to prevent it and then

A decided to transfer her rather than deal with her perpetrators. Their conduct - both inaction and action - was unwanted; it violated her dignity and contributed to the hostile and intimidating environment which it should have prevented. It would be surprising and unfortunate if neither UK nor European law provided a remedy in such circumstances.

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78. Mr Wynne pointed to the change of wording from the **Race Relations Act 1976** to the **Equality Act 2010**. Section 26 required the ET to be satisfied that the unwanted conduct "related to" the relevant protected characteristic, here sex. This was different to the "on the grounds that" test applied in **Conteh**. The law was changed to bring the definition of harassment into line with European Directives in consequence of **Equal Opportunities Commission v Secretary of State for Trade and Industry** [2007] ICR 1234. This case was not considered in **Conteh**. The tension between **Conteh** and the **EOC** case was noted in **Sheffield City Council v Norouzi** [2011] IRLR 897 EAT; in effect the ET's application of section 26 was in line with the way it was applied in **Norouzi**. On the question whether the **Equality Act 2010** and European law imposed duties relating to third party harassment he referred to *Monaghan on Equality Law* (2nd edition), especially at paragraphs 6.513-519 and 6.534-535.

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79. Mr Segal additionally submitted that the ET was not entitled to find that the decision to transfer violated the Claimant's dignity or created a hostile and intimidating environment for her. At the highest the evidence was that she was "incredibly distressed" (as she said in her resignation letter). The Claimant had described Mr Kavanagh as "nothing but supportive". He had taken the decision at least in part to protect her from an environment where she was being harassed.

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80. Mr Wynne replied that this conclusion was essentially a matter of fact for the ET. In the light of the treatment she had received it was not perverse.

Discussion and Conclusions

81. We begin with the question of direct discrimination.

82. Here the law is now well established. The fundamental question in a direct discrimination claim is whether less favourable treatment is "because of" a protected characteristic. This formulation in section 13 bears the same meaning as formulations using the word "grounds" in prior discrimination legislation. It requires the ET to consider the reason for the treatment. Sometimes the reason is inherent in the act itself: such as an explicit prohibition on the basis of race, sex, or age. In such a case there will be no need to look further at the reasons of the person responsible for the prohibition.

83. Usually, however, the reason will not be inherent in the treatment. It will be appropriate to enquire into the mental processes of the person or persons responsible for the treatment to see whether the protected characteristic is part of the reason, conscious or unconscious, for the treatment. If it is, a benign motive is irrelevant: see **Amnesty International** at paragraph 34, and **Nagarajan v London Regional Transport** [1999] ICR 877 HL at 884-885, quoted in **Amnesty International** at paragraph 29. Sometimes the word "motivation" is used in the cases to address the "reason why" mental processes as opposed to motive in a more general sense. It is also essential to keep in mind that behaviour can be thoroughly unreasonable without being in any sense because of a protected characteristic.

84. Often the question whether treatment is less favourable will be so closely linked to the reason why it has been imposed that the two will stand together, and it may be easier, keeping provisions about the burden of proof in mind, to go straight to the question why the treatment took place.

85. In this case the ET was dealing with a case of the second kind. Transferring a person to a different role, or failing to deal with a complaint, even a complaint of sexual harassment, are not forms of treatment necessarily linked to a protected characteristic: see **Conteh** at paragraphs 30 and 31, a passage we will quote later in this Judgment. We reject Mr Wynne's submission to the contrary. The ET was required to consider the reason why the decision makers failed to act, or acted, as they did.

86. The ET was also required to consider the mental processes of the individuals concerned. The reasons for this are apparent from **Reynolds**, especially paragraph 36 (Underhill LJ):

> **"36. … I believe that it is fundamental to the scheme of the legislation that liability can only attach to an employer where an individual employee or agent for whose act he is responsible has done an act which satisfies the definition of discrimination. That means that the individual employee who did the act complained of must himself have been motivated by the protected characteristic. I see no basis on which his act can be said to be discriminatory on the basis of someone else's motivation. If it were otherwise very unfair consequences would follow. I can see the attraction, even if it is rather rough-and-ready, of putting X's act and Y's motivation together for the purpose of rendering E liable: after all, he is the employer of both. But the trouble is that, because of the way the Regulations work, rendering E liable would make X liable too: see the analysis at paragraph 13 above. To spell it out:**
>
> **(a) E would be liable for X's act of dismissing C because X did the act in the course of his employment and - assuming we are applying the composite approach - that act was influenced by Y's discriminatorily-motivated report.**
>
> **(b) X would be an employee for whose discriminatory act E was liable under reg.25 and would accordingly be deemed by reg.26(2) to have aided the doing of that act and would be personally liable.**
>
> **It would be quite unjust for X to be liable to C where he personally was innocent of any discriminatory motivation."**

87. **Reynolds** was a tainted information case and it was concerned with legislation prior to the **Equality Act 2010**; but the reasoning is equally applicable to the **2010 Act** and it cannot be

restricted to tainted information cases. It is not just, and not in accordance with the scheme of the legislation as regards direct discrimination, for employees to incur liability where they are innocent of any discriminatory motivation. Whether the position is any different in respect of harassment is a question to which we will return.

88. In our judgment Mr Segal's criticisms of the ET's Reasons concerning direct discrimination are well founded. In order to decide whether the treatment of the Claimant by the paid officers was less favourable treatment on the grounds of sex the ET was required in each case to focus upon their mental processes. It was not correct to say that their decisions were because of sex simply on the ground that they were "tainted" by the conduct of Mr Coxhill and Mr Saini. This seems to have been a key part of the reasoning of the ET: see especially paragraphs 14.15, 14.16 and 102.

89. Given this error, the question of direct discrimination will have to be remitted to the ET unless on the ET's findings only one result is possible: **Jafri v Lincoln College** [2014] ICR 920 CA. If the ET meant, in paragraph 42 and elsewhere in its Reasons, to find that the paid officers, in the failures to act or the decision to transfer, were not themselves influenced by the protected characteristic of sex, that would seem to indicate that the Respondent discharged any burden of proof on the "reason why" question. But we are not sure whether this is what the ET meant. There is, as we have seen, a difference between motive and "reason why"; and it is possible that the ET used the word only on the question of motive. The question of direct discrimination will therefore have to be remitted.

90. We now move on to the findings of harassment. Two preliminary points are appropriate.

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91. Firstly, on the findings of the ET - and our findings above - this is not strictly a case of "third party harassment": the elected officers were agents for whom the Respondent was responsible. But the question whether the paid officers committed acts of sexual harassment by failing to address the Claimant's complaints and deciding to transfer her still has to be addressed: it is potentially relevant to compensation. Moreover, if the question is whether section 26 in effect imposes a duty in the employment field to prevent sexual harassment by others, it would seem to apply whether the others are or are not third parties.

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92. Secondly, in our judgment the fundamental scheme of the legislation, explained in **Reynolds** (above) applies also to sexual harassment. Liability can only attach to an employer where the employer or an employee or agent for whom the employer is responsible has committed an act of harassment. In a case such as this, where the allegations of sexual harassment are directed against individual employees, as in most cases of corporate bodies and associations they usually will be, there is no escape from the fact that a finding against the employer will only be made where the employee is also liable; so the inescapable consequence of the ET's decision is that Mr Hughes, Mr Murray and Mr Kavanagh would also be liable.

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93. It is convenient to start with **Conteh**. In that case the Claimant complained to her manager that she had been racially abused. When the manager did not take any effective action to deal with the matter she brought claims of direct race discrimination and harassment. The ET dismissed the claims. Giving the judgment of the EAT, Langstaff J addressed the various elements of the definition of harassment as it then stood. He allowed that "conduct" could include inaction where action was wanted, and that inaction could - though it would not necessarily - contribute to the process of creating a proscribed environment. These propositions are not in issue on this appeal. He then said:

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> **"30. The "unwanted conduct", as it seems to us, therefore can (but not necessarily will) include inaction: but that conduct has to be taken on the grounds of race or ethnic or national origins if it is to create the hostile environment and thereby come within the heading of harassment. Thus, if inaction occurs because, for instance, the relevant person in the employment of the employer is ill, or for instance because the office is so completely inefficient as to fail to deal with something, or for various other reasons which can easily be imagined which have nothing to do in themselves with race or ethnic or national origin, then the inaction, however regrettable it may be, is not on the grounds of race or ethnic or national origin.**
>
> **31. Ms Brown's argument, as it seems to us, places too much weight upon the nature of the conduct of the third parties. Assuming that third party conduct is to be taken as inherently racist, which must depend on the particular facts of any particular situation, does that mean that a failure to deal with it is itself inherently racist and therefore must be taken to have been itself on the grounds of race? The question nearly answers itself despite Ms Brown's persistent submissions, but in any event she too drew back from the conclusion which would inevitably follow from her argument that if, for instance in this case, Mr Shipley had had a heart attack which hospitalised him immediately after having had the complaint from the claimant, and that that had been in truth the reason for his not dealing with the complaint, none the less he would have to be condemned and his employer with him as having acted in a racially discriminatory manner by subjecting the claimant to racial harassment. That would be too far, but she acknowledged it was the result of her primary submission. It demonstrates to us that that submission was in error."**

94. Later he said that the legislation required the Tribunal to focus upon the motivation - that is the reason why, not the motive but the motivation - of the employer: see paragraph 33. This is, as one would expect given the wording of the legislation in question, classic direct discrimination reasoning - hence our reference to it earlier in this Judgment. The Claimant in that case did not of course have to prove less favourable treatment: rather she had to prove the elements set out in the definition of harassment. But the "reason why" remained an element.

95. If the "reason why" remains an element of the changed wording of section 26, it will follow that the ET fell into the error we have already identified in connection with direct discrimination.

96. We turn then to Mr Wynne's submission that the meaning of "related to" is wider, the change having been made in consequence of the **EOC** case.

97. We think there is no doubt that the words "related to" were intended to effect a change. In the **EOC** case the argument for EOC, largely accepted by the Department, was that the

words indicated an associative, rather than a causative, link with sex: see paragraphs 3, 10 to 28 and 63. This argument was accepted by Burton J. He set out examples, put forward by Ms Dinah Rose QC on behalf of EOC, where the nature of the linkage might make a difference:

> **"10. The difference in practice between direct discrimination on grounds of sex and harassment related to sex is illustrated by Miss Rose by reference to examples drawn from a number of cases, all of them of course decided by reference to direct discrimination under section 1, *Porcelli v Strathclyde Regional Council* [1986] ICR 564, *Brumfitt v Ministry of Defence* [2005] IRLR 4, *Kettle Produce Ltd v Ward* [EAT] (unreported) 8 November 2006 [EATS/0016/06] and *B v A* [EAT] (unreported) 9 January 2007 [EAT/0450/06]. If, she submits, conduct cannot be shown to have been discriminatory, in that the reason for the conduct cannot be shown to have been on grounds of sex, it should still be capable of being shown, if it is otherwise unwanted conduct with the relevant *purpose or effect,* to have been harassment, if it related to sex.**
>
> **11. Thus the training officer in *Brumfitt* … was found, by dint of the generally unpleasant nature of his language and the fact that the audience was of mixed sexes, not to have discriminated against the claimant on grounds of sex. Given that the tribunal decided that the claimant had been exposed to language which was "offensive and humiliating to her as a woman", it appears likely that she would have succeeded in a claim in respect of unwanted conduct related to her sex. Similarly, by reference to the facts of *B v A*, a claimant, who was unfairly treated on the grounds of jealousy because of her conduct with another man may not be entitled to claim discrimination on grounds of sex, but would appear likely to be able to succeed in a claim for harassment by reference to unwanted conduct related to her sex. Again, by analogy from the facts in *Kettle*, a manager barging into the ladies toilet, when he would be likely to have similarly barged into a men's toilet, may not render his employer liable for discrimination on grounds of sex, but such conduct would be likely to be conduct related to sex."**

98. We have no doubt that the re-cast definition of harassment was intended to encompass cases such as these. We note, however, that these are all cases where the association is between the conduct of the alleged perpetrator and the protected characteristic. They are cases where it is just to impose liability on the perpetrator.

99. In the **EOC** case Ms Rose suggested a further category where a re-cast definition by reference to association rather than causation might make a difference. This related to liability for third party harassment: see paragraphs 36 to 40. We hope we do justice to the discussion in these paragraphs by saying that the arguments on both sides were tentative. Burton J said that the wording of the legislation should be brought into line with the **Directive** and that this would "facilitate' an argument along the lines Ms Rose put forward. He did not reach any definite conclusion upon it. Nor was any definite conclusion reached in **Sheffield City Council v**

Norouzi, where the law had largely been agreed between counsel and the grounds pursued on appeal were case-specific.

100. In our judgment section 26 requires the ET to focus upon the conduct of the individual or individuals concerned and ask whether their conduct is associated with the protected characteristic - for example, sex as in this case. It is not enough that an individual has failed to deal with sexual harassment by a third party unless there is something about his own conduct which is related to sex. We reach this conclusion for the following principal reasons.

101. Firstly, this approach seems to us to accord with the natural meaning of the words in the European and domestic legislation. The first task is to identify the conduct (in which, as in **Conteh**, we would include a settled course of inaction); the next to ask whether *that conduct* is related to the protected characteristic. It is not sufficient to ask whether some other, prior, conduct by someone else is related to the protected characteristic.

102. Secondly, this approach caters for the kind of case which Langstaff J identified in paragraphs 31 and 32 of **Conteh**. If inaction is due to illness or incompetence or some real non-discriminatory constraint upon action one would not naturally say that it was "related to sex"; but if inaction or a cold shoulder is really indicative of silently taking sides with the perpetrator - even without encouraging the perpetrator - one might well say that it was related to sex. The focus will be on the person against whom the allegation of harassment is made and his conduct or inaction; it will only be if his conduct is related to sex that he will be liable under section 26. So long as the ET focuses upon the conduct of the alleged perpetrator himself it will be a matter of fact whether the conduct is related to the protected characteristic.

103. Thirdly, there is far as we can see no other mechanism in any Directive, or in UK domestic law (other than the provisions now repealed in section 40) for distinguishing those cases where liability ought to be imposed in relation to third party harassment and those where it ought not to be. In the **EOC** case and in **Norouzi** there was discussion of steps or practices which an employer might be required to undertake in order to prevent or mitigate the effect of third party harassment; but there is no basis - no legal test - for such measures to be found in the primary instruments of legislation.

104. In our judgment the ET did not apply the correct approach. The error is at its clearest in paragraph 4.16 where the ET says that the decision to transfer the Claimant was related to sex "because of the background of harassment related to sex". This does not follow: as we have seen, it will depend on an assessment of the conduct of Mr Kavanagh rather than that of the perpetrators. Similarly in paragraph 109 the ET thought that because the complaints were plainly related to sex the inaction of decision makers must also be related to sex. Again this does not follow.

105. The appeal must therefore also be allowed on this ground. Once again we do not think that we can say only one result was possible if the ET had applied the law correctly. There was a lengthy period of inaction following the Claimant's complaints about sexual harassment. The decision to transfer the Claimant was made in the knowledge of the conduct aimed at her and without addressing it. The ET's finding about the motives of the paid officers may point in their favour but it does not directly address the statutory question in the way we have indicated. The matter must be remitted.

106. This leaves Mr Segal's submission that the ET was not entitled to find that the decision to transfer violated the Claimant's dignity or had the effect of creating an intimidating and hostile environment for her. We have no doubt that the ET was entitled to reach these conclusions. It is plain that the ET was entitled to find that the transfer violated her dignity. In the context of section 26, which must address continuing courses of conduct as well as individual acts, subsection (1)(b)(ii) must be interpreted to include making an intimidating and hostile environment worse: see **Conteh** at paragraph 28. The ET was entitled to find that this is what happened. Mr Kavanagh's decision to transfer was not necessarily immediate; he envisaged the Claimant might stay for three more months.

Dismissal

107. The ET found that the dismissal was an act of sex discrimination. Dismissal is defined by section 39(7)(b) to include an act of the employee in circumstances where the employee is entitled, by virtue of the employer's conduct, to terminate the employment without notice. The Claimant's resignation was such an act: constructive dismissal is not challenged. But Mr Segal included a ground of appeal, largely dependent on earlier grounds, concerning the question whether the dismissal was an act of sex discrimination.

108. The ET found that the sexual harassment by the paid officers was an effective cause of the resignation: see paragraph 127. Whether the paid officers committed sexual harassment is an issue we have remitted. However the ET also found that the sexual harassment by the elected officers was an effective cause of the resignation. We have upheld that finding on the basis that the actions of the elected officers fell within section 109(2). It follows that the ET's finding that the constructive dismissal was an act of sex discrimination will stand; though the

question whether there was also sex discrimination and harassment by the paid officers may have relevance to remedy.

109. Mr Segal also included a ground of appeal concerned with the doctrine of "final straw" for the purpose of constructive dismissal, questioning whether the decision to transfer could be characterised as a final straw. But the ET found a continuing breach of the implied term of trust and confidence in any event; and we do not think the Claimant was or is required to rely on the "final straw" doctrine.

Unjustifiable Discipline

110. As we have seen, the trigger, though by no means the only reason, for Mr Kavanagh's decision to transfer the Claimant was the emergence of an old DVD in which she had opposed a particular strike action. She argued that she had been unjustifiably disciplined contrary to section 64 of **TULRCA**.

111. The ET rejected this complaint. One issue drafted by the parties for its consideration was whether the determination was "in relation to the claimant's membership of the union". The ET recorded the Respondent's argument as being that the treatment of the Claimant was not connected to her membership of the trade union. The ET said:

> **"The answer to this must be that the comments were made with respect to the claimant's employment rather than membership of the trade union. We do not accept that Mr Kavanagh was concerned about the claimant's trade union membership at all. His concerns were with respect to her position as regional officer."**

112. Mr Wynne submitted that the ET was bound to find in his favour on this point. By limiting the scope of entitlement to work as an officer of the union the Respondent was limiting the scope of a benefit available to her. Since she was subjected to a detriment (see section

64(2)(f)) and the reason was a perceived failure to support industrial action some nine years earlier (see section 65(1) and (2)(a)) her rights were infringed.

113. Mr Segal supported the reasoning of the ET. He pointed out that under the rule book a regional officer was not required to be a member of the Respondent; the officer could be a member of a different union. The rule book was not concerned with decisions concerning the employment of paid officers.

114. Section 64(1) and (2) provide as follows:

> **"(1) An individual who is or has been a member of a trade union has the right not to be unjustifiably disciplined by the union.**
>
> **(2) For this purpose an individual is "disciplined" by a trade union if a determination is made, or purportedly made, under the rules of the union or by an official of the union or a number of persons including an official that -**
>
> > **(a) he should be expelled from the union or a branch or section of the union,**
> >
> > **(b) he should pay a sum to the union, to a branch or section of the union or to any other person;**
> >
> > **(c) sums tendered by him in respect of an obligation to pay subscriptions or other sums to the union, or to a branch or section of the union, should be treated as unpaid or paid for a different purpose,**
> >
> > **(d) he should be deprived to any extent of, or of access to, any benefits, services or facilities which would otherwise be provided or made available to him by virtue of his membership of the union, or a branch or section of the union,**
> >
> > **(e) another trade union, or a branch or section of it, should be encouraged or advised not to accept him as a member, or**
> >
> > **(f) he should be subjected to some other detriment;**
>
> **and whether an individual is "unjustifiably disciplined" shall be determined in accordance with section 65."**

115. The issue which the parties drafted for the ET to consider, which we have quoted above, does not arise from any specific words within section 64. Read expansively, section 64 would apply to any detriment imposed on an ex-member of a union, no matter how long since his membership lapsed and no matter how little connection there was between the detriment and the union membership. But we think the issue drafted by the parties, and the reasoning of the

ET, correctly captured a point which is implicit in section 64. It is concerned with discipline of a member or ex-member in connection with union membership. This is plain from section 64(2)(a)-(e); and (f) should be read in the same general sense. Although this last paragraph is intended to sweep up a wide range of other detriments which a union may impose, it is not concerned with decisions relating to the employment of a union employee who may or may not be a member of the union. The cross-appeal will be dismissed.

Outcome

116. The appeal will be allowed in part. The ET's finding that the elected officers were employees for the purpose of section 83(2) will be set aside. The question whether the Respondent is liable by reason of direct discrimination or harassment on the part of the paid officers will be remitted. Otherwise the appeal and cross-appeal will be dismissed.

117. Where issues are remitted to the ET the EAT decides whether remission should be to the same constitution of the ET, or to a different constitution, in accordance with criteria laid down in **Sinclair Roche & Temperley v Heard** [2004] IRLR 763 EAT. Applying those criteria we are minded to remit to the same constitution of the ET. We will, however, give the parties seven days to make written submissions if they wish to argue the contrary.