Appeal No. UKEAT/0130/14/RN

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 22 September 2014

Before

HER HONOUR JUDGE EADY QC

(SITTING ALONE)

MISS T BLACKWOOD — APPELLANT

BIRMINGHAM AND SOLIHULL MENTAL HEALTH NHS FOUNDATION TRUST — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR JIM TINDAL (of Counsel) Instructed by: Bailey Wright & Co Solicitors Branston Court Branston Street Birmingham B18 6BA
For the Respondent	MR JONATHAN MEICHEN (of Counsel) Instructed by: Birmingham & Solihull Mental Health Trust Legal Department B1 Unit 1 50 Summer Hill Road Birmingham B1 3RB

SUMMARY

SEX DISCRIMINATION

Indirect

Discrimination by other bodies

Indirect Sex Discrimination – Employment service-providers (section 55 Equality Act 2010) – Students: admission and treatment etc (section 91 Equality Act 2010)

This case concerns the relationship between the education and employment provisions within the **Equality Act 2010**. Specifically as to the operation of section 56(5), which precludes training or guidance covered by section 91 of the Act from falling within the employment services protection otherwise afforded by section 55.

Held:

The Employment Tribunal correctly construed the reference to "power to afford access" in section 56(5) as the ability to place students on the relevant training. To require this phrase to be construed more narrowly – as requiring that the educational body in question had the ability to act without the need to obtain the consent of another – would deprive it of any real world meaning, which could not have been Parliament's intention.

This construction was entirely consistent with a purposive construction and was compatible with EU law. The Claimant was not thereby deprived of a protection; it simply fell within a different enforcement regime (education rather than employment) and there was no basis for concluding that it was thereby a second-class form of protection.

Although Employment Tribunals will normally be required to hear evidence before deciding preliminary points of law such as this, in the present case the Claimant did not properly identify any real dispute on the facts relevant to this issue. No error of law was disclosed.

Appeal dismissed.

Permission to Appeal:

Granted, on the basis that the appeal raised a real point of law – as to the correct construction of section 56(5) **Equality Act 2010** – on which there was more than one potential view and which was of some wider importance given the absence of appellate authority on this question.

HER HONOUR JUDGE EADY QC

Introduction

1. This case concerns the relationship between the employment and the education protections contained within the **Equality Act 2010**. In particular, the construction and operation of section 56(5), which precludes training or guidance covered by section 91 from falling within the employment services protection otherwise afforded by section 55.

2. In giving this Judgment I refer to the parties as the Claimant and the Respondent, as they were below. The appeal is that of the Claimant against the Judgment of the Birmingham Employment Tribunal (Employment Judge Kearsley sitting with members on 21 October 2013), sent to the parties on 22 October 2013, with Reasons following on 13 November 2013. The Claimant was then represented by her solicitor, Mr Storey; now by Mr Tindal of Counsel, acting pro bono. The Respondent was, and is, represented by Mr Meichen of Counsel.

3. The ET determined a jurisdictional issue as a preliminary point, albeit at the outset of what had been intended to be the Full Merits Hearing of the claim. It held that, applying section 56(5) of the **Equality Act 2010**, it did not have jurisdiction to consider the claims, which were accordingly dismissed. The Claimant subsequently applied for a reconsideration of that Judgment, but that application was refused. She now appeals to this court.

The Background Facts

4. The ET heard no evidence. It determined the jurisdictional issue as a preliminary question of law. It thus made limited findings of fact and I take the short narrative in this

Judgment largely from the information provided by the Claimant. That provides the context of the claim.

5. The Claimant was a student at Birmingham City University (BCU) undertaking a Diploma of Higher Education in Mental Health Nursing. As part of her course, she undertook a vocational placement with the Respondent, starting on 19 November 2012.

6. At the relevant time the Claimant was a single mother, with a two-and-a-half year-old son. Due to her childcare responsibilities she was unable to comply with shift patterns requiring her to work late or night shifts. That fact led the Respondent to withdraw the Claimant's placement. In her ET1 the Claimant complained that this impacted on her ability to meet the required standards for her Diploma with the BCU. She considered there was a condition or working practice requiring the working of long or inflexible hours which put women at a particular disadvantage and put her at that disadvantage, and which amounted to indirect sex discrimination on the part of the Respondent and/or BCU.

The Tribunal Proceedings and Reasons

7. The Claimant lodged an ET1, claiming indirect sex discrimination against the Respondent as a provider of vocational training and against BCU, as the Respondent's agent. Her ET1 anticipated the possibility of a jurisdictional issue being raised. In its ET3 in response, the Respondent took no issue in respect of jurisdiction. It appears either not to have understood or not to have engaged with the observation the Claimant had made in that respect.

8. In contrast, BCU's response in the ET proceedings expressly raised the jurisdictional issue; contending that it could only be sued in the county court, pursuant to section 91 of the

Equality Act. In the alternative, it denied that it could be found liable of aiding a contravention of the employment provisions of the **2010 Act** in respect of the employment provisions of that Act, for the purpose of section 112 (aiding contraventions). In the further alternative, it denied that there was any relationship of agent and principal between it and the Respondent for the purposes of sections 109-110 of the Act (liability of employers and principals and liability of employers and agents), contending that both were autonomous organisations.

9. In consequence of BCU's response and denial of the ET's jurisdiction, the Claimant withdrew her ET claim against BCU but continued to proceed with her claim against the Respondent. Still not raising any jurisdictional question, the Respondent applied for the Claimant's claim before the ET to be struck out as having no reasonable prospect of success. There was a hearing of that application but it was dismissed (by Employment Judge Kearsley sitting alone). The matter was then listed for a Full Merits Hearing.

10. It was only at the outset of that Hearing that Counsel for the Respondent raised the jurisdictional issue that is now the subject of this appeal. As there had been no advance notice, the ET allowed a 90-minute recess for the Claimant's solicitor to prepare argument on the point. The issue was determined on the basis of submissions. No evidence was heard.

11. The ET concluded that section 56(5) of the **Equality Act 2010** operated in this case so as to exclude its jurisdiction. This was because the Claimant was a student of a university (BCU) and her placement with the Respondent was arranged by the university. Section 56(5) distinguished the cases of those who were undertaking training or guidance to which "the governing body of the institution has power to afford access". Understanding "power" as the "ability to do something", BCU was clearly able to provide students with placements in hospital

trusts such as the Respondent. The Claimant was so placed. That being so, section 56(5) made plain that this was a case falling within section 91 of the Act and, therefore, within the jurisdiction of the county court, not the ET.

12. As the Claimant had not been expecting the jurisdictional point to be raised at the Full Merits Hearing of the case, her representative sought to make further submissions by way of a subsequent application for reconsideration to the ET. The Employment Judge treated that application as having been made under Rule 70 of the **ET Rules 2013**, as being in the interests of justice. Noting that the Claimant's representative had been given time by the ET to prepare submissions, having first heard the Respondent's submissions, and had confirmed that he was ready to proceed, the Employment Judge did not consider that the complaint as to insufficient preparation time outweighed the interests of justice in terms of achieving finality as between the parties. The application was refused.

The Appeal

13. The Grounds of Appeal can be summarised as follows:

(1) the ET erred in concluding that it had no jurisdiction to hear the claim;

(2) the ET erred in reaching its conclusion as to its lack of jurisdiction without first hearing evidence from the parties as to the true nature of the relationship between the Respondent and BCU: to have determined the preliminary issue without first resolving the evidential matters was an error of law;

(3) the ET erred in its interpretation of the **Equality Act 2010**, by reaching a conclusion inconsistent with the UK's obligations under EU law.

14. Having considered the proposed appeal on the papers, HHJ Birtles directed that it should be set down for a Full Hearing. In particular, he noted that there was no appellate authority on this point and also observed that there might be an issue related to the ET's failure to hear evidence before determining the question of law before it.

15. For its part the Respondent resists the appeal. In so doing, it relies on the reasons provided by the ET but also contends:

(1) that the ET did not err in hearing no evidence: the Claimant had not seriously contended other than that BCU had power to afford access to the relevant training and it was unarguable that it did not have such power;

(2) the EU point was new and had not been taken before the ET; in any event, the point went nowhere: the Claimant was able to pursue her claim of discrimination in the county court and, as such, she had an effective alternative remedy and was not thereby deprived of any rights;

(3) the argument that the Claimant sought to put forward as to the meaning of "power to afford access" was unsustainable and would contradict the clear intention of section 56(5) of the **Equality Act**.

The Legislation

16. The relevant provisions of the **Equality Act** first require consideration of section 55, which relates to employment service providers.

> **"(1) A person (an 'employment service-provider') concerned with the provision of an employment service must not discriminate against a person—**
>
> > **(a) in the arrangements the service-provider makes for selecting persons to whom to provide, or to whom to offer to provide, the service;**
> >
> > **(b) as to the terms on which the service-provider offers to provide the service to the person;**
> >
> > **(c) by not offering to provide the service to the person.**

(2) An employment service-provider (A) must not, in relation to the provision of an employment service, discriminate against a person (B)—

(a) as to the terms on which A provides the service to B;

(b) by not providing the service to B;

(c) by terminating the provision of the service to B;

(d) by subjecting B to any other detriment."

17. As the explanatory notes to the Act observe, that section replaced the earlier separate provisions for vocational training and for employment agencies and assisting persons to obtain employment. It introduced one single provision, covering all of those aspects.

18. Section 56 of the **Equality Act** is the interpretation provision for section 55 and relevantly provides:

"(1) This section applies for the purposes of section 55.

...

(3) This section does not apply in relation to training or guidance in so far as it is training or guidance in relation to which another provision of this Part applies.

...

(5) This section does not apply in relation to training or guidance for students of an institution to which section 91 applies in so far as it is training or guidance to which the governing body of the institution has power to afford access.

(6) 'Vocational training' means—

(a) training for employment, or

(b) work experience (including work experience the duration of which is not agreed until after it begins)."

19. Sections 55 and 56 of the **Equality Act** are contained within Chapter 1 - "Employment etc" - of Part 5 "Work". Section 91 falls under Chapter 2 - "Further and Higher Education" - of Part 6 "Education". By section 91 it is (relevantly) provided:

"91 Students: admission and treatment, etc

(1) The responsible body of an institution to which this section applies must not discriminate against a person—

(a) in the arrangements it makes for deciding who is offered admission as a student;

(b) as to the terms on which it offers to admit the person as a student;

(c) by not admitting the person as a student.

(2) The responsible body of such an institution must not discriminate against a student—

(a) in the way it provides education for the student;

(b) in the way it affords the student access to a benefit, facility or service;

(c) by not providing education for the student;

(d) by not affording the student access to a benefit, facility or service;

(e) by excluding the student;

(f) by subjecting the student to any other detriment.

[…]

(10) In relation to England and Wales, this section applies to—

(a) a university;

(b) any other institution within the higher education sector;

(c) an institution within the further education sector;

(d) a 16 to 19 Academy.

[…]"

20. By section 120 of the **Equality Act 2010**, Employment Tribunals are afforded jurisdiction to determine complaints relating to a contravention of Part 5 (Work) or ancillary provisions (sections 108, 111 and 112), relating to Part 5. No jurisdiction is provided to an Employment Tribunal to determine complaints falling under Part 6 (Education). Such claims have to be pursued in the county court (see section 114).

Submissions

The Claimant's Case

21. On behalf of the Claimant the following preliminary observations were made. First, in the Respondent's ET3, it had sought to engage with the substance of the Claimant's complaint, explaining why it contended that she needed to work night shifts, because the only available mentor worked such shifts. It was the Claimant's refusal to work with that mentor, as the Respondent put it, that had led it to take the decision to withdraw the placement. Second, in

BCU's ET3, BCU contended that the decision whether to accommodate night shifts was a matter for the Respondent and it was the Respondent that had decided to terminate the Claimant's placement due to her refusal to do so. Third, it was implicit in the ET's findings that the Respondent was an employment service provider providing vocational training to the Claimant for the purposes of section 56(2) and (6) and her complaint of a breach of section 55 would thus properly be determined by the ET unless section 56(5) came into play.

22. Turning to the Grounds of Appeal, to the extent the Respondent was contending that the Claimant was raising new points on appeal that should not be allowed as not taken below, that was unattractive given the way in which the point had been raised by the Respondent on the first morning of the Full Merits Hearing. In any event, the points raised questions of statutory construction and were pure points of law and accordingly could be taken at any stage (see **HM Revenue and Customs v Stringer and Others** [2009] IRLR 677 HL).

Addressing then the second ground of appeal - whether the ET erred in failing to consider evidence - it was submitted that the Reasons made it apparent that its conclusion was based on a finding of fact made without hearing any evidence, i.e.:

> **"The University was clearly able to provide students with placements in hospital trusts. That is evidenced by the fact that the Claimant was so placed."**

23. The approach taken by the ET in this regard was contrary to that emphasised in the case-law. As the House of Lords had warned in **Anyanwu v South Bank Student Union** [2001] IRLR 305, in the context of the striking out of a discrimination claim:

> **"...discrimination issues of the kind which have been raised in this case should as a general rule be decided only after hearing the evidence. The questions of law that have to be determined are often highly fact-sensitive. The risk of injustice is minimised if the answers to these questions are deferred until all the facts are out. The tribunal can then base its decision on its findings of fact rather than on assumptions..."**

24. Similar warnings in the context of jurisdictional points taken as preliminary issues have been given by, for example, the Court of Appeal in **Smith v Gardner Merchant Ltd** [1998] IRLR 510 (see per Ward LJ) and the EAT in **Moyhing v Homerton University Hospitals NHS Trust and Others** UKEAT/0851/04/MAA per Burton J.

25. There was neither evidence before the ET as to how placements were arranged or commissioned, nor as to any contractual arrangements between the Respondent and BCU. There was no evidence to suggest that BCU could override a decision by the Respondent to terminate the placement. Alternatively the ET's conclusion failed to take account of the fact that the Respondent had consented to the placement and could terminate it.

26. Ultimately the failure to hear evidence meant that this ET made findings unsupported by evidence, and that in itself amounted to an error of law sufficient to set aside the decision, see per Maurice Kay LJ in **Ezsias v North Glamorgan NHS Trust** [2007] IRLR 603 CA at paragraph 29.

27. Turning to the first ground of appeal and the correct interpretation of section 56(5), the approach to be adopted had to be a purposive one (see the guidance provided by Lord Bingham in **Anyanwu**, in particular paragraphs 2 and 4). Against the backdrop of the need for such a purposive approach, the Claimant pursued three main arguments.

28. The first was that the ET erred in its interpretation of the word "power". Section 56(5) speaks of power to afford access. Even if "afford access" only related to the *initial* affording of access - and thus enabled the ET to ignore what happened later, when that access was taken away - the Claimant's placement required both BCU to put the student forward and the

Respondent to accept her. It was thus a joint decision: neither BCU nor the Respondent had overall power to afford access.

29. Moreover, defining "power" as the ability to do something was inadequate. In some contexts it might be appropriate, but in the legislative context it begged the question as to the legal source of the power. In **Garrard v University of London** [2013] EqLR 746 HHJ Birtles, sitting in the Central London County Court, was faced with the reverse situation. In that case the training was undertaken by the Deanery, a joint venture between the University of London and the NHS. The court held that the university did not have the power to afford access to the training for the purposes of section 56(5) since it could not require the Deanery to admit people to the training and so did not have the power to afford access to it. The same was true here. The ET's analysis gave rise to a non sequitur: just because the placements happened did not mean that it was BCU that had the ability to afford access to them.

30. The second argument under Ground 1 related to the question of affording access. It was the Claimant's contention that this must mean on an ongoing basis not merely the initial access. The ET was thus required to take account of the fact that the Respondent had the ability to terminate the access. At that point BCU could not be said to have had the relevant power.

31. The third argument under this ground related to the exclusion of training or guidance for the students of an institution to which section 91 applies. The Respondent relied on that provision as demonstrating that the Claimant had an alternative route for her remedy and argued that - that being so - there was no need for a purposive approach to the legislation.

32. The starting point was, however, to understand that the purpose of the **Equality Act** was to bring together protective measures in the context of discrimination law. It was an act that should not be construed as permitting overlap or gaps, but particularly not gaps. It was unlikely that section 91 would provide a meaningful remedy for the Claimant given that BCU was not liable for the act of which she complained; BCU had taken the point that the Respondent was not its agent. It was no answer to say that liability could stand against the Respondent under section 112; aiding a contravention by BCU. The same problem arose as in **Anyanwu**: there was no unlawful act of BCU which the Respondent would be knowingly helping.

33. Here, a purposive construction would allow section 56 to be read in such a way as to ensure that there was no gap, simply by changing the word "of" to read "by". The Claimant contended that thus section 56(5) should read:

> **"This section does not apply in relation to training or guidance for students [by] an institution to which section 91 applies insofar as it is training or guidance to which the governing body the institution has power to afford access."**

34. On the third ground of appeal - the correct construction of the statute as a matter of complying with EU law - as had been observed by the EAT in **Fletcher and others v Blackpool Fylde & Ware Hospitals NHS Trust** [2005] IRLR 689, the **Equal Treatment Directive** makes no distinction between vocational training and employment. Case-law made clear that vocational trainees working alongside employees were to be seen as operating in the employment context, and the statute should be so construed. See also **Percy v Church of Scotland Board of National Mission** [2006] IRLR 195 HL, which allowed that the protection of the Directive covered working conditions; it was not restricted to any particular kind of contractual relationship.

The Respondent's Case

35. On behalf of the Respondent a number of preliminary observations were made as to the factual background. First, that it was part of the Claimant's course at BCU that she was required to undertake work placements and students at BCU regularly undertook such placements with the Respondent. Second, the purpose of those placements was to give students experience of working within a 24-hour work pattern. That was a requirement of the Nursing and Midwifery Council. Third, the work placement in question was constructed so as to meet NMC requirements. Fourth, when undertaking such placements students were allocated to a mentor to enable assessment requirements to be met. Fifth, when starting her placement, the Claimant informed her mentor that she was unable to work weekends or nights. That being so, the mentor was unable to act as such and there was no other mentor available. That was why the Claimant was removed from her placement.

36. Accepting that it had only raised the jurisdictional question at the outset of the Full Merits Hearing, no point was taken before me as to the Claimant's ability to run questions of law not strictly taken below. The Respondent did submit, however, that the Claimant's case below had not identified points of dispute on the facts, and that was relevant when considering the second ground of appeal.

37. Turning then to the Grounds of Appeal and taking them in the same order as the Claimant had done, the Respondent argued that, in respect of the challenge that the ET had erred by failing to hear evidence before determining the point at issue, the Claimant had been legally represented at the ET, and no suggestion had been made that it was required to hear evidence. In any event, the only finding that could be said to be material to this ground was the ET's statement that the university had been clearly able to provide students with placements in

hospital trusts. That required no evidence; it was not in dispute. The ET's reasoning was based on the proposition that BCU had arranged for the Claimant to go on this placement with the Respondent. That was not a finding that the Claimant could sensibly dispute. This was not a case such as **Garrard** or **Moyhing**, which had both involved third parties: the factual matrix in those cases had been more complex, that was not mirrored here.

38. Turning to the first ground, the clear intention of section 56(5) and section 91 was that students undertaking work placements arranged by their universities should bring claims under the education provisions (Part 6) rather than the employment provisions (Part 5) of the **2010 Act**. The ET had adopted a natural and commonsense approach to the provision, which was consistent with the commentary provided by the editors of the IDS handbook on discrimination at work, that is:

> **"...no complaint of discrimination in relation to work experience, work placements and internships arranged by a school, college or university can be brought in the Employment Tribunal."**

39. That was a commonsense approach to construction of a kind allowed by the House of Lords in **Anyanwu**. Moreover it was consistent with the obligation to adopt a purposive approach in this context. Although that would normally mean that the court should take a narrow approach to an exclusion provision, here it was necessary to see the entire context and how the Act fixed primary liability with the university.

40. The interpretation adopted by the ET was, moreover, consistent with the explanation provided in the Equality and Human Rights Commission's Code at paragraph 11.61:

> **"The provision of employment services does not include training or guidance in schools or to students at universities..."**

41. That the Respondent had the power to terminate a placement did not change the fact that BCU had power to afford access to it. Even if the ET had to consider this question on an ongoing basis, the power would not have to rest exclusively with one party to still be a power. In any work placement, the provider would have the power to terminate the placement, for example if a student misbehaved. That would not change the fact that the student's university had the same power. To suggest that section 56(5) operated only to exclude from the jurisdiction of the ET those cases where the employment service provider was powerless to terminate the work placement would not give it context in the real world; no such placement would exist. The Claimant was suggesting it should be afforded a narrow application, to cases where the university itself provide the training, but that would unduly limit what was meant by "vocational training", which section 56(6) made clear covered both training for employment and work experience.

42. Even if the Respondent could refuse to accept a student on a placement, that would not detract from BCU's power to "afford access", in the sense that it could put a student forward for a placement. The case of **Garrard** did not assist because there the process was controlled by the London Deanery, a third party. The Claimant was not a student and was applying to enter into a contract of employment. Similarly in **Moyhing** there was a third party which controlled access to the training in question. No such factual complexity arose in the present case.

43. As for the third ground, concerning EU law, the statutory regime as a whole was clear. For those service providers who offer vocational training on a standalone basis, the claim would be under the employment provisions, and that would include agencies that provide basic training and work experience opportunities. For those who were students accessing work placements arranged by their school or university, their cause of action would be in the county

court. It was open to the Claimant to argue her claim before the county court, that BCU was acting as principal and the Respondent as agent, and thus liability would arise under sections 109-110 of the **Equality Act**. Or she could seek to fix the Respondent with potential liability under section 112. This was not a case where the Claimant was denied protection of her rights under the Directive.

The Claimant in Reply

44. In response to the Respondent's submissions the Claimant stressed that a plain and ordinary meaning to the term "power to afford access" could not simply give rise to the definition adopted by the Tribunal. The legal definition of power was as laid down in **Lonrho Ltd v Shell Petroleum Ltd** [1980] 1 WLR 627 HL, i.e., the ability to act without the need to obtain the consent of someone else. That had been the approach adopted in **Garrard**. That case had not been decided as it was simply because there was a third party involved but because the arrangement entered into meant that there was no power, in the legal sense as defined in **Monroe**.

45. As for the EHRC Code of Practice, that had referred to training "in schools" and "at universities", which only allowed for the narrowest of exceptions.

Discussion and Conclusions

46. The way in which this point came to be argued before the ET was not wholly satisfactory. Of course, if a jurisdictional point arises, the ET must consider it at whatever stage it is raised. Equally, Counsel has an obligation to draw the point to the ET's attention if they consider it might properly arise. Here, however, the point was taken for the first time at the outset of the Full Merits Hearing, without prior notice having been given to those representing

the Claimant. It was particularly unfortunate as the Claimant had flagged up the potential issue in her ET1 and no point had been taken by the Respondent, whether in its ET3 or at earlier stages in the ET proceedings when the issues were being clarified and directions given. That said, the Claimant has not complained of that, and there is no ground of appeal seeking to challenge the ET's case management decision as to how to proceed in this respect. Given that context, however, the Respondent has rightly not sought to challenge the Claimant's right to run certain arguments of pure law on appeal, which might not have been fully canvassed below (and which, in any event, would fall to be considered as points of statutory construction, even at an appellate stage, see **HMRC v Stringer**).

47. It is also right to observe that it will be very rare that an Employment Tribunal would not be better placed to hear all the evidence and submissions, including arguments on jurisdictional points, and then reach its determination on all the issues that arise. As the Claimant argues, in most cases there will be no ready shortcuts.

48. Ultimately, however, the question arises as to whether that approach caused the ET to fall into error in this case. If I conclude that the matter was clear-cut in this case - that it clearly fell one side or the other of the employment and education protection provisions - then I should not interfere with the ET's conclusion, solely as a point of principle in this regard. If there was no significant dispute of fact between the parties on a point relevant to the ET's determination, nothing would have been gained by a fuller consideration of the evidence and I must so find.

49. The starting point is to ask what the statute provides. In this case, that will determine whether the matter falls one side or other of the divide between employment and education protection under the **2010 Act**. That will depend on the correct construction of section 56(5).

As this case relates to an education provider that happens to be a university, I will use that terminology. I recognise, however, that the relevant point will have wider application.

50. Looking at section 56(5), Parliament's intention is plain: if a university has power in respect of vocational training and guidance undertaken by its students, then that training and guidance should be seen as part of that higher education, and complaints of discrimination should be pursued under the education provisions. In England and Wales that means claims should be brought in the county court, not the Employment Tribunal.

51. In considering this question I take it as plain that the **Equality Act** should be construed, so far as it is permissible, so as not to permit gaps in the relevant protections: the Claimant should not fall between protections. That said, domestic legislation can provide the relevant protections for EU purposes under different parts of that legislation, and rights can be determined by different courts or Tribunals. It is not suggested that EU law would prohibit member states from adopting such an approach: if protection against discrimination in vocational training and guidance is provided by the educational provisions of the Act, the requirements of EU law can still be met. The problem that arose in the context of midwifery training in **Fletcher & Ors v Blackpool Fylde & Ware Hospitals NHS Trust** [2005] IRLR 689 - which was concerned with the payment of a bursary by the Secretary of State to allow training midwives to undertake clinical placements – would, accordingly, not arise.

52. **Fletcher** was decided under the **Sex Discrimination Act 1975**. Section 14 of that Act, which covered persons concerned with the provision of vocational training, excluded (see section 14(2)(a)) cases of discrimination rendered unlawful by section 22; that is, discrimination on the part of bodies in charge of educational establishments. The exclusion

under section 14(2)(a) was in general terms. Section 56(5) is more precise in the terminology used: it does not simply refer to cases that fall within section 91 "Students: admission, treatment etc", but expressly focuses on whether the university (to paraphrase) has the power to afford access to the training or guidance in question. From that, one might surmise that Parliament wished to be clear as to where lines of responsibility would fall and to ensure that, unless a claim fell within what might be seen as a narrow exception, it should otherwise be considered under section 55. In so doing, however, Parliament chose to focus not on which entity might be directly responsible for the discriminatory act in question (it adopted the same structure in respect of vicarious liability for employees and agents as applies elsewhere in the Act) but on whether the university has the "power to afford access" to the training or guidance. If it does, and the actual provider of that training or guidance then commits an act which would otherwise constitute an act of discrimination, the university can be liable under section 91 and the liability of the provider would arise indirectly, for example as an agent of the university for the purposes of section 110 of the Act.

53. So what does it mean for a university to have the "power to afford access" to the training or guidance in question? The Claimant urges that I should adopt a narrow approach to the construction of that phrase. She contends that this is a provision excluding liability and a purposive approach would thus dictate that it should be construed narrowly. I am not sure that is right in this context. Section 56(5) does not exclude liability; it simply places it under a different part of the Act, a separate form of protection.

54. The Claimant says that, if that is right, it thereby affords her a second-class form of protection. I disagree. The structure of the protection is the same in the field of education as it is in employment. Admittedly, such cases are heard before the county court and not the

Employment Tribunal, but I am not persuaded that that, in itself, would render it a second-class form of protection.

55. In my judgment the purposive approach is neutral in terms of the question of construction of section 56(6).

56. I then turn to the question of what is meant by "afford access". Does that simply mean at the point of entry or does it allow for a wider approach, that is to say affording continuing access? I do not find this to be an easy question to answer and can see merit in either approach. On balance, however, I consider that the reference to "access" is likely to mean entry on to a placement. That seems to me to be the most natural interpretation of the word used.

57. I am, however, not convinced that is the crucial question. The real issue, it seems to me, is what is meant by "power" in this context. In approaching this question, the Respondent urges that the exclusion has to have some real-world meaning; it must be possible to think of contexts where, relevantly, universities *will* have power to afford the relevant access and thus of cases where section 91 will apply instead of section 55. Those cases, the Respondent submits, cannot be limited, as the Claimant sought to do in argument, to cases where the university itself provides the training or guidance (for example, where perhaps trainers are invited into the university itself). As section 56(6) defines vocational training as covering both training for employment or work experience, the Respondent contends that it would be hard to think of any real-world example of the latter that would not allow some residual power in the end provider of the work placement. I agree.

58. I do not find that section 56(5) only applies to cases where a university is wholly unconstrained in the placements it can make or where it has the ability to act without the need to obtain the consent of someone else. That, in my judgment, would deprive section 56(5) of real-world meaning. I consider that in this context the ET got it right: "power" here means the ability to do something. In the context of this case, that was the university's ability to put its students into placements it had organised with the Respondent. That the Respondent might have had the ability to terminate those placements (for example, should a student misconduct themselves, or - as here - be unable to meet the relevant working pattern to enable proper supervision) does not detract from the university's ability to place its students and, more generally, afford them access to such vocational training and guidance on an ongoing basis.

59. My conclusion on the construction of section 56(5) thus allows for a broader gateway in respect of the potential liability of universities and other educational establishments that require students to undertake vocational placements as part of their courses. I do not agree that this gives rise to a second-class form or protection. The difficulties that might then arise in terms of the liability of agents of the university simply mirror the difficulties that can arise in that respect in the employment field. The approach will be the same, and the protection afforded should be of equal status.

60. What does that mean for the finding of the ET in this case? On my approach to section 56(5), the ET got the question of construction right. In my judgment, that does not change when one adopts a purposive approach to ensure compliance with EU law. Member states have a discretion as to the way in which rights are to be enforced, provided that allows for an effective means of enforcement of no less a value than that afforded for other equivalent

civil rights. I consider that the different enforcement regimes under the Employment and Education provisions within the **Equality Act** meet that requirement.

61. Did, however, the ET still err in law by failing to hear evidence and make more substantive findings of fact? I am not persuaded in this case that it did. The Claimant's case as presented to the ET did not raise a substantial dispute on the facts. The ET did not err in not seeing disputes between the parties where none had been raised. On any case BCU had been able to place the Claimant with the Respondent; it had the power to afford her access to that training. That being so, the ET was entitled to determine this question as a pure point of law. Having had the opportunity to put her case broadly on appeal, the Claimant has not been able to point to any substantive dispute on the facts taken as read by the ET. In this case and in this context, I am not persuaded that any useful purpose would be served by the ET hearing this matter again and having the opportunity to hear evidence, where the relevant facts are not in dispute. I accept that this will be unusual, but I have not been persuaded that this is a case where there is any other answer on the facts other than that reached by the ET.

62. For those reasons, I uphold the decision reached below and dismiss this appeal.

63. Having given my Judgment in this matter, the Claimant has sought leave to pursue an appeal to the Court of Appeal, identifying as a point of law the question of the approach to agency and how that fits in with the construction of section 56(5) and also submitting that there is a further compelling reason to allow such permission given that there is no previous appellate authority on this point. The Respondent seeks to resist that application.

64. I allow that application and give permission for the Claimant to pursue an appeal to the Court of Appeal should she be so advised. There are arguments as to the correct approach to the construction of section 56(5). I have given my Judgment in respect of that, but that is not to say that a proper point of law is not raised and, given the absence of any other appellate authority on this provision, it seems to me that provides further compelling reason to allow that this matter might proceed to a higher level.