Neutral Citation Number: [2024] EAT 66

Case No: EA-2021-000008-AT

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 3 May 2024

Before:

MICHAEL FORD KC, DEPUTY JUDGE OF THE HIGH COURT

- -

Between:

MISS C BALDWIN **Appellant**

- and –

(1) CLEVES SCHOOL
(2) MR C HODGES
(3) MS S MILLER

Respondents

- -

Ms C Step-Marsden (instructed by Didlaw Limited) for the **Appellant**
Ms G Crew (instructed by Lyons Davidson) for the **Respondent**

Hearing date: 9 April 2024

- -

JUDGMENT

SUMMARY

DISABILITY DISCRIMINATION, VICTIMISATION, HARASSMENT

The claimant brought claims for disability discrimination under the Equality Act 2010 (EqA) against her employer, the School, and two named individual respondents, who were also employees of the School. The employer did not run any defence under s.109(4) of the EqA. The employment tribunal (ET) found that the School, the first respondent, was liable under s.109 for two acts of disability discrimination done by the second and third individual respondents. It dismissed separate claims against the individual respondents brought under s.110 EqA, saying that their acts were misguided attempts to address a complex situation. There were three grounds of appeal.

Held:
(1) The conditions for liability on the part of individual employees or agents are set out in section 110 of the EqA. A contravention of that section arises if A is an employee, A does a discriminatory act in the course of his or her employment, that act amounts to a contravention of the EqA by the employer and none of the express exceptions in s.110 applies. Properly construed in light of its history, context and purpose, s.110 confers no discretion on an ET not to find a contravention of that section if the conditions for individual liability under it are met. Accordingly, the ET erred here and the EAT substituted a finding of a contravention of s.110 by the individual respondents in respect of their acts for which the School was liable.

(2) The ET failed to deal with one of the complaints of victimisation contrary to s.27 EqA in its written reasons, but the subsequent reasons provided to the EAT adequately explained why it had not upheld that particular complaint.

(3) The ET did not act perversely in failing to find that an email sent to the claimant was an act of harassment contrary to s.26 EqA.

Michael Ford KC, Deputy Judge of the High Court

Introduction

1. This is the appeal of Miss C. Baldwin, who was the claimant before the employment tribunal (the "ET"), against a judgment and reasons of the ET sent to the parties on 2 January 2021. Miss Baldwin brought various claims under the Equality Act (the "EqA") against her former employer, Cleves School (the first respondent), as well as against two named individual respondents (the second and third respondents). The ET upheld one complaint of direct disability discrimination, contrary to s.13 of the EqA, and a complaint of discrimination arising from disability, contrary to s.15 of the EqA, against the first respondent but dismissed the other claims.

2. I shall refer to the Appellant as the "Claimant", the first respondent to the tribunal proceedings as the "School" and the respondents before the ET as the "Respondents".

3. The Claimant was represented by Ms Step-Marsden and the Respondents by Ms Crew, neither of whom appeared before the ET. I am grateful to both for their clear written and oral submissions.

4. Permission was granted on six grounds in orders of HHJ Beard dated 28 October 2022 and 13 July 2023, but the grounds of appeal were subsequently condensed into amended grounds of appeal, reduced to four grounds. At the hearing, Ms Step-Marsden withdrew ground 4.

Background and the ET Decision

5. The Claimant was employed by the School as a newly qualified teacher ("NQT") from September 2014 until she resigned on 18 March 2015. It was conceded before the ET that she was disabled at the relevant time within the meaning of s.6 of the EqA: ET reasons §1.

6. After starting at the School, the Claimant was required to complete a formal NQT induction year, as recorded by the ET at §27. Her designated NQT mentor was Ms Miller, another teacher at the school and the Third Respondent: reasons §22. The Second Respondent was Mr Hodges, the head teacher at the school.

7. At the time the Claimant accepted her role, she had not completed her postgraduate certificate in education, abbreviated to PGCE, because as a result of ill health she had submitted some assessments late. Her PGCE tutor was Ms Sternstein. During the first term of her induction year, the Claimant had a number of absences.

8. The ET found two acts of discrimination proven. The first, which is relevant to grounds 1 and 2 of the appeal, arose from an email exchange between Ms Miller and Ms Sternstein. On 16 October 2014, after Ms Miller wrote to Ms Sternstein in connection with the Claimant's targets and development requirements, in an email of 19 October Ms Sternstein explained that the Claimant had been "very unwell" at the end of her course, causing delays in completing her CEPD, and provided information on when the CEPD would be completed: ET reasons, §36.

9. Ms Miller wrote a further email in response to Ms Sternstein on 24 October 2014. In particular, in the email, Ms Miller asked about the Claimant's ill health, as the ET explained at §38:

> "38. Ms Miller responded to Ms Sternstein's email on 24 October 2014, asking for "…further light on this matter … by confirming what was wrong with Cate, when she was unwell and also how many days she was absent …". She said she was copying in Mr Hodges, and said "I would also appreciate it if you kept

> this email correspondence between you and I" (305). Ms Sternstein cc'd her email in response to the claimant and declined to answer Ms Miller's questions, other than to say the claimant's final placement "was not supportive…"."

10. The ET considered that these questions were asked because the Respondents were suspicious whether the Claimant had significant health issues which had not been disclosed to the School. The email seen by the Claimant led to a discussion between her and Ms Miller, which it was common ground took place on 29 October 2014, about which the ET made findings at §40-41:

> "40. The claimant's case is that she immediately challenged Ms Miller about her questions to Ms Sternstein, saying that "she went behind my back", that Ms Miller's response was "this was information shared between two professionals" and the claimant was "unprofessional". While Ms Miller did not recollect all this conversation in her evidence, we accepted the claimant's account that there was a reference to professionalism, and that the claimant stated she considered this to be unprofessional conduct by Ms Miller, the claimant expressed her anger to Ms Miller.
>
> 41. We did not accept that Ms Miller stated she would "step back as a mentor" apart from classroom observation, and would only undertake "selected mentoring tasks..".."

The ET went on to decide in the above paragraph that in fact Ms Miller continued to undertake her mentoring role of the Claimant professionally after this conversation.

11. The second discrimination compliant the ET found proven, which is relevant to ground 1, concerned an NQT report on the Claimant completed by Mr Hodges at the end of the Claimant's first term. The ET cited some of comments in that report at §55 of its decision, including a comment that the Claimant had "not acted with integrity at all times". The ET found that there was no sufficient evidence to support this view and this matter had not been raised with the Claimant before: see §§64-65.

12. The Claimant was very unhappy with the NQT report and she objected to it at the time, including the comment that she lacked integrity, and eventually she resigned on 18 March 2015: see ET reasons §86.

13. The Claimant subsequently brought proceedings in the employment tribunal in a claim form received on 18 August 2015. She ticked the box in section 8 to indicate her claim was for disability discrimination and the pleaded claim, I was told, included a lengthy chronological account of events attached to the claim form together with particulars of claim, setting out in a table the dates of incidents, what happened, who carried out the acts and what type of discrimination was alleged.

14. The ET began hearing evidence on 2 March 2020. Mr Hodges was not able to give evidence at that hearing owing to ill health and, after hearing five days evidence in the period 2-6 March, the ET adjourned until 5-8 October 2020. At the resumed hearing, which took place via CVP, Mr Hodges gave evidence.

15. The ET's written reasons are structured as follows. First, the ET set out what it took to be the issues at §§1-8, setting out the allegations under various headings: direct disability discrimination, direct discrimination by perception, discrimination arising from disability, failure to comply with a duty to make reasonable adjustments, harassment and victimisation.

16. Next the ET set out the principal statutory provisions together with some of the key cases on them. It then explained the procedural history, including the reasons for the adjournment. At §§25-87 it made full and detailed factual findings, some of which I have referred to above. After summarising the submissions for both parties, its conclusions began at §118. Four of its conclusions are central to this appeal:

(1) The ET concluded that the request for information from the Claimant's PGCE tutor, Ms Sternstein, made by Ms Miller in the email of 24 October 2014, amounted to an act of direct discrimination by the School. The reason for this finding is set out in §125 of the reasons: the ET concluded "that the reason why this email was sent to Ms Sternstein was because of the claimant's perceived disability and this allegation is proven". That finding of direct discrimination us not challenged on this appeal.

(2) The ET dismissed all bar one of the complaints under s.15 EqA, of discrimination arising from disability. The single complaint it upheld was based on the comment in the term 1 NQT report that the Claimant was "lacking in integrity". The ET considered the comment was related to the Claimant's disability or perceived disability and the School could not show it was a proportionate means of achieving a legitimate aim for the purpose of s.15(1)(b): see reasons §§129-131.

(3) The ET dealt with the claim for victimisation, contrary to s.27 of the EqA, at §140 of its reasons. It had earlier set out the issues for the complaints based on s.27 EqA at §7, including whether the Claimant made a protected act, and the acceptance by the Respondents that she may have made such an act to her union. In its conclusions at §140 the ET decided that the Claimant made a protected act when allegations she made passed Ms Greenfield, an HR advisor engaged by the School, before a meeting on 18 December 2014. The ET said the Respondents were unaware of any earlier protected act. It decided that the Claimant was not subject to a detriment because of the protected act.

(4) Having found there were two acts of discrimination proven here for which the School was liable in its capacity as employer, the ET went on to reject any claim against the named individual respondents for the reasons it gave at §141:

> "We concluded that case as put was put against the school, respondent 1, that the claim was essentially one of vicarious liability for the acts of respondents 2 and 3. It was not suggested that respondent 1 could not be liable for the acts of another respondent. We did not consider that it was seriously put respondents 2 and 3 should be held individually liable for the acts of discrimination alleged. We concluded that the acts of respondents 2 and 3, whilst acknowledged in part to be misguided, and we found to be discriminatory, were anything other than attempts to address a complex situation with a NQT teacher. We considered that the main failing by individuals was not obtaining HR advice in time, while also noting there was a real desire to keep things as informal as possible as this was felt to be the best way to produce as [*sic*] successful outcome. Accordingly, we did not find respondents 2 and 3 liable for the acts of discrimination as found."

The Legal Framework

17. In the work sphere, governed by Part 5 of the EqA, a duty is placed on an "employer" not to discriminate against its employees in various ways: see s.39(2). The provision includes a duty not to discriminate against any of its employees by subjecting them to any detriment: see s.39(2)(d). The various forms of discrimination to which this provision applies are set out in ss 13-19, and include direct discrimination (s.13), indirect discrimination (s.19) and discrimination arising from a disability (s.15).

18. In addition, by s.39(4), an "employer" must not "victimise" one of its employees by, among other matters, subjecting the employee to any detriment. For this purpose victimisation is defined in s.27 EqA. It states:

> "**27 Victimisation**
> (1) A person (A) victimises another person (B) if A subjects B to a detriment because-
> (a) B does a protected act, or
> (b) A believes that B has done, or may do, a protected act.
>
> (2) Each of the following is a protected act-
> (a) bringing proceedings under this Act;
> (b) giving evidence or information in connection with proceedings under this Act;
> (c) doing any other thing for the purposes of or in connection with this Act;
> (d) making an allegation (whether or not express) that A or another person has contravened this Act.
>
> (3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.
>
> (4) This section applies only where the person subjected to a detriment is an individual.
>
> (5) The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule."

19. An "employer" is also under a duty not to "harass" one of its employees or a person who has applied for employment with it: see s.40. Harassment for this purpose is defined in s.26, and the relevant provisions for the purpose of this appeal are set out below:

> "(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.
>
> (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."

The relevant protected characteristics include disability: s.26(5).

20. The EqA then adopts a sophisticated and detailed system for attributing liability to employers and others. The two provisions central to this appeal are s.109 and s.110. The first concerns what acts are treated as done by an employer for the purpose of those provisions, such as s.39, which impose duties on it; the second provision places liability on employees or agents - what is usually referred to as personal liability. The sections state, so far as is material, as follows:

"**109 Liability of employers and principals**
(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.

(5) This section does not apply to offences under this Act (other than offences under Part 12 (disabled persons: transport)).

110 Liability of employees and agents
(1) A person (A) contravenes this section if-
(a) A is an employee or agent,
(b) A does something which, by virtue of section 109(1) or (2), is treated as having been done by A's employer or principal (as the case may be), and
(c) the doing of that thing by A amounts to a contravention of this Act by the employer or principal (as the case may be).

(2) It does not matter whether, in any proceedings, the employer is found not to have contravened this Act by virtue of section 109(4).

(3) A does not contravene this section if-
(a) A relies on a statement by the employer or principal that doing that thing is not a contravention of this Act, and
(b) it is reasonable for A to do so.

(4) A person (B) commits an offence if B knowingly or recklessly makes a statement mentioned in subsection (3)(a) which is false or misleading in a material respect.

> (5) A person guilty of an offence under subsection (4) is liable on summary conviction to a fine not exceeding level 5 on the standard scale.
>
> .....
>
> (6) Part 9 (enforcement) applies to a contravention of this section by A as if it were the contravention mentioned in subsection (1)(c)."

21. These sections replaced provisions found in the predecessor legislation, such as ss. 41-42 of the Sex Discrimination Act 1975 (SDA). The antecedent provisions were worded differently, even if both adopted a similar model, of treating acts done by an employee in the course of employment as being done by the employer and also imposing individual liability on the employee. In at least two respects liability under the EqA appears to be stricter. First, SDA s.41(3) included a similar but not identical defence for the employer to that in s109(4), framed in terms of doing "such steps as were reasonably practicable": the language of s.109(4) suggests the defence is narrower in scope. Second, the predecessor of s.110 EqA, s.42 of the SDA, included a requirement of "knowingly" aids, in order for personal liability to arise on the part of the employee or agent. Thus s.42(1) and (2) of the SDA stated:

> "(1) A person who knowingly aids another person to do an act made unlawful by this Act shall be treated for the purposes of this Act as himself doing an unlawful act of the like description.
>
> (2) For the purposes of subsection (1) an employee or agent for whose act the employer or principal is liable under section 41 (or would be so liable but for section 41(3)) shall be deemed to aid the doing of the act by the employer or principal"

There were similar provisions in the other predecessor legislation, such as ss. 32-33 of the Race Relations Act 1976.

22. Section 111 of the EqA deals with instructing, causing or inducing contraventions of the Act and s.112 concerns aiding contraventions (and does include a requirement of "knowingly"). These provisions also replicate and adjust provisions in the predecessor legislation, as the Explanatory Notes to the EqA explain.

The Grounds of Appeal

23. It is against that background that I consider the three grounds of appeal.

24. **Ground 1**. The first ground of appeal is that the ET erred in holding at §141 of its written reasons that the individual Respondents, the Second and Third Respondents, were not liable for the acts of discrimination and consequently dismissing the claims against them in its judgment. It is said that the ET failed to consider s.110 of the EqA and, if it had done so, it would have concluded that the two individual Respondents were liable for discrimination.

25. The two acts of discrimination to which s.110 potentially applied here were, first, the act of direct disability discrimination which the ET found proven in §125 of its reasons (the request for information from Ms Sternstein); and, second, the act of discrimination arising from disability which the ET found proven in §§129-131 of its reasons (the suggestion that the Claimant lacked integrity). The first was an act of the Third Respondent, for which the School was liable by virtue of s.109(1). The second was an act of the Second Respondent in the course of her employment, to which s.109(1)

again applied, so that the act was treated as done by the School. The School did not rely on the defence in s.109(4) with the consequence that these acts of the Second and Third Respondents were treated as done by the employer for the purpose of liability of the "employer" under s.36 EqA. It was on this basis that the ET upheld two of the claims against the School.

26. The ET did not expressly cite s.110 in the section where it set out the law and nor did it refer to any cases on that provision. I accept, however, that the ET had s.110 in mind when it came to consider liability of the individual Respondents at §141, as it was the obvious basis upon which personal liability could arise. The central issue is whether the ET correctly construed or applied it.

27. Statutory interpretation involves ascertaining the meaning which a reasonable legislature would be seeking to convey in the language it used, interpreted in its context and in light of its purpose. The modern approach is to give prominence to the purpose of the provision: see, for example, Lord Leggatt in **Uber v Aslam** [2021] ICR 657 at §70.

28. There are several points to make about the correct construction of s.110.

29. First, it does not expressly give a tribunal a discretion to find an employee or agent has not contravened s.110: it simply states that a person "contravenes" s.110 in the circumstances where s.110(1)(a)-(c) apply. The individual will not contravene the section if s.110(3) applies,[1] but in the sphere of employment there is no other defence or qualification to the contravention which arises under s.110(1). Nothing in the language suggests an employment tribunal has a discretion not to find a contravention in other circumstances: the section does not say a tribunal "may find" a person has contravened the section.

30. Second, I do not accept the argument, lightly pressed by Ms Crew, that a tribunal has an implicit discretion in s.110 to find an individual employee or agent has not contravened s.110 in circumstances where the employer itself is liable under s.109 - for example, because it has not pleaded, run or established the defence in s.109(4). If that were the intention or purpose of s.110, I consider that in the context of such a detailed code the provision would say so expressly. While s.110(2) says it "does not matter" if the employer is found not to have contravened the EqA because of succeeding in a defence under s.109(4), the provision does not state the converse, that if the employer *is* liable under s.109 then a tribunal may find an individual has *not* contravened s.110. As Ms Crew candidly conceded, nothing in the language, purpose or background to s.110 supports such an interpretation.

31. Third, the case law on the predecessor provisions suggests a contravention under s.110 can arise independently of s.109. Thus, in interpreting the similar provisions in the Disability Discrimination Act 1995, the EAT held that a claim could be made against individual employees for personal liability even in the absence of a claim against the employer: see, for example, **Barlow v Stone** [2012] IRLR 898. It was not suggested that a different approach should apply to ss.109 to 110 of the EqA. In that light, I do not accept the submission that s.110 is somehow "ancillary" to s.109, as Ms Crew characterised it. Both ss.109 and 110 are routes to findings of primary contraventions of the EqA, neither is subsidiary to the other, and they each fall to be applied in accordance with their own terminology.

32. Fourth, the history to s.110 counts against a narrow construction of the circumstances in which a contravention of that provision arises. For when the EqA was enacted, Parliament removed the requirement found in, e.g., s.42(1) SDA that personal liability would only arise where a person "knowingly" aided an unlawful act. This supports a legislative intention that s.110 should have a

[1] I ignore the intricate provisions on marriage in s.110(5A)-(5H), not relevant to employment.

broad, not narrow, reach.

33. Fifth, as Ms Crew accepted, nothing in the purpose of the EqA supports reading in a discretion to s.110 or a qualification that it only applies to what Ms Crew described as "ancillary" liability, where the employer is not found to be liable under s.109. The discrimination legislation was brought in to remedy a great social and individual wrong so that it has consistently been given a wide interpretation, including when it comes to interpreting the provisions leading to liability: see, for example, **Jones v Tower Boot Co Ltd** [1997] ICR 254 per Waite LJ at 262. In accordance with that purpose, in **Tower Boot** the Court of Appeal gave a wide interpretation to the phrase "course of employment" in s.32 of the Race Relations Act 1976, one of the predecessors of s.109. That approach, I consider, should apply equally to the EqA, the aim of which was to harmonise anti-discrimination law and to strengthen the law: see §10 of the Explanatory Notes to the EqA.

34. Sixth, the context of s.110 also counts against any implicit discretion in that provision. A tribunal has no discretion to find that an employer has not contravened the EqA so long as the conditions for liability on its part in s.109 arise. The only circumstances in which an employer will not be liable for discriminatory acts done by its employees in the course of their employment is if the employer succeeds in establishing the defence in s.109(4). By the same token, other provisions appearing in Part 8 of the EqA, such as s.111 (on instructing, causing and inducing contraventions) and s.112 (on aiding contraventions), lay down the conditions for contraventions without conferring any discretion on a tribunal not to find a person liable: instead, they refer to what a person "must" not do. The context indicates that exactly the same construction should apply to s.110.

35. Seventh, and although neither party addressed me on this, the provisions on enforcement point in the same direction. The enforcement provisions in Part 9 apply equally to claims against an employer, brought under s.39, and to claims of personal liability under s.109: see s.109(5). An employment tribunal has jurisdiction to determine a complaint about a contravention of Part 5: see s.120(1). Once it "finds there has been a contravention" of the provisions listed in s.120, a tribunal "may" make a declaration about the rights of the parties, order compensation or make an appropriate recommendation: see s.124(1). In practice, tribunals rarely make a formal declaration and almost invariably award compensation in order to provide an effective remedy for discrimination. But the discretion in s.124 only arises at the remedy stage, on the premise there has been a prior finding of a contravention, and there is no equivalent "may" in the provisions concerned with findings of contraventions, including s.110.

36. Eighth, there are practical reasons for not conferring a discretion on the tribunal to decline to find a contravention under s.110 in circumstances where the employer is liable, or concedes it is liable, under s.109. The employer may state that it will pay any award. But if the employer subsequently dissolves or goes into liquidation after the decision on liability before any compensation is in fact paid, the claimant may be left with no effective remedy for the wrong. That problem may not arise in the present case, where the School accepts it will be liable for any remedy; but it may well arise in other proceedings.

37. For all these reasons, I consider there is no discretion on the part of a tribunal to refuse to make a finding of a contravention of s.110 so long as the conditions for liability under that section are met. For this purpose, it is irrelevant whether or not the employer runs the s.109(4) defence, succeeds in that defence, fails in that defence, concedes it has no defence or is itself found to be liable under s.109.

38. I therefore turn to the ET's reasons at §141 for not finding a contravention on the part of the Second and Third Respondents. The ET said that the case was "essentially" one of vicarious liability and it was not suggested that the School was not liable for the acts of discrimination. But it is a pre-

condition of s.110 applying that the individual employee was acting in the course of employment, so that the employer is potentially liable: see s.110(1). If the ET meant that because the employer was not running the defence in s.109(4) and so was liable under s.109, this was a factor counting against liability on the part of the individual Respondents, I consider that was a legal error, for the reasons I have given: there is no discretion not to find a contravention of s.110(1) just because the employer is or is potentially liable under 109.

39. Second, the ET said it was not "seriously put" that the individual Respondents were liable. But there was no suggestion that the claims against them were withdrawn. Third, the ET held that the acts of the Second and Third Respondents were misguided attempts to address a complex situation, implying there was nothing deliberate about them. But s.110 no longer includes a requirement of "knowingly" aiding and it is well known that discrimination does not require intent. If the ET was suggesting that it had a discretion not to find a contravention because, e.g., the acts here were not deliberate, once more I consider that shows an error in construing s.110.

40. Implicit in the ET's findings that the School was liable for the two acts of discrimination it found proven was that the conditions in s.110(1) applied: the Second and Third Respondents were employees or agents of the School, the acts they did were treated as done by the School under s.109(1), and those acts were contraventions of the EqA. The ineluctable result, in my view, was a finding of a contravention of s.110 by the individual Respondents. Ms Crew said that findings of discrimination against named individual respondents may be harsh. That may be so, but I consider the legislation is clear in its meaning and effect when it comes to findings of contraventions under s.110.

41. Different issues may arise, of course, when it comes to deciding on remedies. Here, s.124 does give a tribunal a discretion, and where more than one respondent is potentially liable, the case law gives guidance on the circumstances in which it is appropriate to make "spilt awards" or joint and several awards: see, for example, **London Borough of Hackney v Sivanadan** [2013] ICR 672.

42. **Ground 2 as amended at the hearing**. This ground of appeal, as amended at the preliminary hearing, was that the ET made a material procedural irregularity because it used the wrong list of issues, with the consequence that it missed one of the protected acts relied on by the Claimant for the purpose of her claim of victimisation. The relevant protected act was said to be the Claimant speaking to Ms Miller on 29 October 2014 about the email Ms Miller had sent to Ms Sternstein. This matter, it was said, was set out in §14(f) of the correct list of issues.

43. At the hearing it became clear that this ground of appeal was based on a false premise. What appears to have happened is that the Tribunal had before it a Draft List of Issues running to some 12 pages (the "First List") which was in the bundle. It seems the parties then prepared another draft List of Issues (the "Second List") which was handed to the ET at the commencement of the liability hearing. It seems that this Second List was not couriered to the ET at the reconvened hearing and so it worked off the First List in its deliberations, as the employment judge ("EJ") explained in a letter to the parties dated 13 September 2021. However, the premise of the original ground of appeal was that the First List contained an allegation of the Claimant speaking to Ms Miller about the email but the Second List did not. But at the hearing I pointed out to the parties that *both* Lists contained exactly the *same* allegation of such a protected act.

44. Faced with this unforeseen difficulty undermining the existing ground, Ms Step-Marsden applied to amend this ground of appeal. The reformulated ground of appeal was as follows:

> "**Ground 2: The Judge erred in failing to address the protected act raised at paragraph 14f of the list of issues, being that the claimant did a**

> **protected act on 29 October 2014, by speaking to Sarah Miler regarding the email sent to Ms Sternstein behind her back.**
>
> At paragraph 7 of the judgment, the Judge outlines the List of Issues that he is working from, which does not include the claim that the Claimant did a protected act on 29 October 2014 by speaking to Sarah Miller regarding the email sent to Ms Sternstein behind her back. Thus, the judge failed to address whether this was a protected act.
>
> By letter dated 13 September, EJ Emery notified the parties that when the panel was deliberating, he did not have a copy of the full list of issues and 'attempted to make sense of these in the list of issues as set out in the judgment', which does not reference the protected act.
>
> The Judge further erred in reconsidering the Claimant's victimisation in his answers to the EAT questions after the liability judgment had been handed down."

45. The reformulated ground does not depend on which was the correct List of Issues: it is simply that the ET missed one of the protected acts which was on *both* Lists of Issues, though it referred to 14(f) of the First List (Ms Step-Marsden explained that the reference to "does not reference the protected act" was a reference to the written reasons not referring to it.).

46. The first question is whether I should grant permission to amend. Ms Step-Marsden argued that, while the amendment application was made at a late stage, both parties had proceeded on the same misapprehension; the reformulated issue had some overlap with the existing pleaded case, which the Respondents were ready to meet, and there would be prejudice to the Claimant if the matter were not considered. While Ms Crew resisted the application because it had been made so late, she accepted that her opposition to the reformulated ground was not in substance different from her arguments resisting the earlier ground: it all depended on whether the later answers given by the ET in response to a request made by the EAT under what is known as the **Burns/Bark** procedure, endorsed by the Court of Appeal in **Barke v SEETEC Business Technology Centre Ltd** [2005] ICR 1373, were sufficient.

47. Applying the guidance in **Khudados v Leggate** [2005] ICR 1013, I consider it is just to allow the amendment. The application was made as soon as the need for an amendment, to deal with the mistake in the previous ground 2, was realised; there is an explanation for the delay - namely, the mistake made by both parties to the appeal, for which Ms Step-Marsden apologised; the amendment did not cause any delay and was closely related to the previous grounds; there will be prejudice to the Claimant if the application is refused but none to the Respondents because Ms Crew is able to deal with the point; and on its face the amendment has a reasonable prospect of success.

48. So I turn to consider the ground of appeal. As to the background of this complaint:

(1) In the narrative account attached to the claim form, the Claimant referred to the conversation with Ms Miller on 29 October 2014, and said she had told Ms Miller she was "disappointed" about the way the email had been handled and had explained to Ms Miller that it was unprofessional to discuss her health behind her back; but the document did not specify what was the "protected act" (Ms Step-Marsden said it was an implicit allegation of harassment contrary to s.26 of the EqA; but the statements on their own are a long way from an implicit allegation of a breach of the EqA sufficient to fall within s.27(2)(d)). In the table in Particulars of Claim, which I was told formed part of the pleadings, the Claimant referred to the conversation with Ms Miller on 29

October in the list of acts said to constitute victimisation. Here, the Claimant again stated that she told Ms Miller on 29 October she was "disappointed" with her sending the email, but the allegation again did not further explain what was the protected act. The Particulars also said that Ms Miller told the Claimant on that day that she was stepping back as her mentor.

(2) Both Lists of Issues listed the conversation on 29 October 2014 as a protected act, in each case saying the Claimant "spoke to Ms Miller regarding the email she had sent to my PGCE mentor, Ms Sternstein, behind my back", and that as a result Ms Miller said she would step back as the Claimant's mentor. There was no further explanation of why this was said to be a protected act.

(3) It is not in dispute that the ET failed to deal with this alleged protected act in its written reasons. At §7.1, when it set out the issues, it said that one of the issues was whether the Claimant made a protected act for the purpose of a claim of victimisation, and referred to the Respondents accepting that the Claimant may have made a protected act to her union. In the law section, at §13, the ET rather confusingly said that the parties accepted the Claimant's grievance dated 11 November 2019 was a protected act (I assume this should say 2014 or it may be a mistake; but nothing turns on that for the purpose of the appeal). Finally, in the conclusions section at §140 the ET accepted that the Claimant made a protected act, when she made allegations which were passed to Ms Greenfield on 18 December 2014, stated that the Respondents were unaware of any earlier protected acts, but it did not specifically address whether there was a protected act on 29 October 2014: see 16(3) above.

49. The failure to address this matter in the conclusions was not the subject of a reconsideration application to the ET, even though there was an application to reconsider a different matter. However, the EJ (and one member; the other was not available) provided a response to questions from the EAT asking the ET to clarify or supplement its judgment: see response dated 6 January 2024 (the "Response to the EAT"). As regards the conversation which took place on 29 October 2014 about the email sent to Ms Sternstein, the Response stated:

> "30. The Tribunal concluded that the claimant raised issues with the 3rd respondent because of her contact with Ms Sternstein, she raised her concerns about medical confidentiality, and that she believed the 3rd respondent's actions amounted to unprofessional conduct.
>
> 31. We did not accept that these comments amounted to a protected act: there was no hint or suggestion that this comment related to a breach of the Equality Act. We accept that the act of contacting Ms Sternstein was an act which was connected to her disability, but the claimant was not suggesting that the emails to Ms Sternstein were in any sense connected to, or an act related to, the Equality Act.
>
> 32. We also concluded that the 3rd respondent did not step away from mentoring the claimant, who accepted in her evidence that the 3rd respondent had continued to mentor her thereafter."

50. It is clear that one of the permissible purposes of the EAT asking questions of an ET is to address the position where a point was overlooked in the reasons: see Dyson LJ in **Barke** at §42. I have hesitated on whether here the EJ and single member were reasoning on the point afresh rather than explaining a conclusion the ET did in fact reach at the time. Although parts of the Response to

the EAT could be read as the EJ and member impermissibly making fresh findings, ultimately I accept Ms Crew's submission that in the above paragraphs the EJ and member were explaining what the ET had decided at the time of its earlier reasons but had omitted to mention specifically in its written reasons or judgment. The additional reasons thus explained why the ET dismissed all the claims of victimisation, including in particular the allegation of victimisation relating to the conversation on 29 October 2014.

51. I am reinforced in that view because at §§40-41 of its original reasons, referred to at §10 above, the ET made findings about the conversation on 29 October 2014 and whether it resulted in Ms Miller stepping back as the Claimant's mentor, suggesting the ET was addressing the specific issue about victimisation on that date as set out in the pleadings and in the Lists of Issues. The additional reasons in the Response to the EAT are reflective of the ET's findings at §§40-41 of its reasons, including that the Claimant had said to Ms Miller that she considered her conduct to be unprofessional. I reject Ms Step-Marsden's argument that a reference to "unprofessional conduct" was sufficient to amount to an allegation of a breach of the EqA for the purpose of s.27 EqA: rather, the finding of such a comment is consistent with the ET having decided that no protected act taking place on 29 October 2014. Both the original ET reasons and the additional reasons also appear to reflect how the Claimant put her case in the pleadings and List of Issues on this point, which refer to the Claimant having told Ms Miller she had acted unprofessionally, but contain no sufficient explanation of any allegation being made to Ms Miller of a contravention of the EqA (see s.27(2)(d)).

52. For all these reasons, on balance, I consider that the additional answers given by the EJ in the Response to the EAT dispose of this ground of appeal. They adequately explain why no claim of victimisation was upheld as regards the conversation of 29 October 2024.

53. **Ground 3**. This ground is a perversity challenge based on Mr Hodge's email of 13 November 2014, about which the ET made findings at §§45-47. It is said that the only rational conclusion open to the ET, in light of the content of the email and the ET's findings about it, was that it amounted to harassment contrary to s.26 EqA.

54. The email itself, sent to the Claimant in reply to her email of 13 November 2014 to which the ET referred at §45, stated the following:

> "Thank you for the reply which is very helpful. It seems you had a very unfortunate experience while training and were very unlucky. I agree it must have been a difficult time.
>
> I certainly do not agree that Sarah [Ms Miller] has been unprofessional in her conduct and I'm surprised that you would describe her as such. Your tutor made a remark about your ill health and I asked Sarah to enquire what she was referring to. It was a remark which Sarah rightly wanted to clarify.
>
> I do in fact have a concern about how this has been handled but my concern is entirely about your tutor who has created an issue by not offering a speedy and simple reply. I will pursue that matter personally.
>
> I hope the procedure [a reference to a medical procedure] goes well and just let the office know if you need more recovery time".

55. The ET made findings about this email at §46-7:

> "46. The Tribunal considered these emails carefully. While this [*sic*] emails do not form part of the allegations within the claim, we noted that Mr Hodges was expressing concern about the claimant's absences and health during her PGCE year. We appreciated that Mr Hodges had at this stage genuine and serious concerns about the claimant's health and its potential impact on her NQT year, that he was genuinely seeking "clarity and understanding" to enable her to be supported as best as possible. He also had, we considered, genuine and reasonable questions to ask the claimant about her PGCE year and its potential impact on her NQT year, he also wished to know more about her current state of health, in part because of its potential impact on her classroom teaching. These were, we found, all reasonable issues for him to raise.
>
> 47. However, the Tribunal also concluded that Mr Hodges was doubling-down on Ms Miller's contact with Ms Sternstein, saying it was appropriate, and it was Ms Sternstein's conduct he was concerned about. We concluded that Ms Hodges [*sic*] response had the effect of causing the claimant serious concern. She was raising what she regarded as an attempt by Ms Miller to gain confidential medical information and was questioning why, she was raising concerns about Ms Miller's conduct. However these concerns were being peremptorily dismissed with no attempt made to address them, on an issue where she clearly considered Ms Miller to have acted unprofessionally and in breach of confidence. We concluded that this was an intransigent approach by Mr Hodges towards an NQT teacher. We concluded that there was as a result a failure to address the claimant's legitimate concerns. We wondered why HR advice was not taken before taking such a major step as contacting a tutor asking for medical information, one with implications for data protection, and medical and professional confidentiality. While Mr Hodges says he was asking questions on issues relating to the claimant with Babock on their regular visits to the school, it appears he did not do so in relation to this issue. Noting Mr Hodges concession that he could now understand the claimant's concerns about medical confidentiality, we concluded that if a slightly more reconciliatory approach had been taken, recognising the claimant's concerns but also addressing some of the issues that were of concern to the respondents, better relationships may have been maintained between the claimant and respondents."

56. I reject this ground of appeal for two reasons.

57. The first is that I am not persuaded that this matter was ever alleged as an act of harassment at all. So far as I can tell, the Claimant very briefly referred to this email in the narrative attached to her claim form. When I asked Ms Step-Marsden where the email was alleged to be an act of harassment, she directed me to the second List of Issues, in which there was a statement in Schedule A (said to include acts of discrimination and harassment) about the Claimant mentioning her "disappointment with the way that both Chris Hodges and Sarah Miller had gone behind my back to email my PGCE mentor". There was a similar statement, too, in the Particulars of Claim. But these statements were not an allegation that the email of 13 November 2014, which was not sent behind the Claimant's back, was an act of harassment at all; they were complaints about something else. It follows that, on the submissions I heard, the ET was correct to state at §46, to the extent it was considering the email of 13 November 2014, that this was not one of the allegations of harassment within the claim.

58. Second, and in any case, I do not consider this ground of appeal comes close to meeting the threshold for a perversity challenge. The principles on harassment are not in dispute, and the ET directed itself in accordance with the cases at §12 of its reasons, including **Pemberton v Inwood** [2018] ICR 1291. There, Underhill LJ reformulated his guidance in **Richmond Pharmacology v Dhaliwal** [2009] ICR 724, on the similar but not identical provisions in s.3A of the Race Relations Act 1976 Act. His reformulated guidance on s.26 of the EqA in §88 is as follows (footnotes omitted):

> "In order to decide whether any conduct falling within sub-paragraph (1)(a) has either of the proscribed effects under sub-paragraph (1)(b), a tribunal must consider both (by reason of subsection (4)(a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) and (by reason of subsection (4)(c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). It must also, of course, take into account all the other circumstances - subsection (4)(b). The relevance of the subjective question is that if the claimant does not perceive their dignity to have been violated, or an adverse environment created, then the conduct should not be found to have had that effect. The relevance of the objective question is that if it was not reasonable for the conduct to be regarded as violating the claimant's dignity or creating an adverse environment for him or her, then it should not be found to have done so."

59. It is far from clear to me that the email of 13 November was "related to" the Claimant's disability. But even assuming it was, and even accepting the ET's findings at §47 that the email caused the Claimant "serious concern", "peremptorily dismissed" the Claimant's concerns and amounted to an "intransigent approach", that is a long way from showing that the only possible conclusion was that the email had the purpose or effect of violating the Claimant's dignity, or of creating an "intimidating, hostile, degrading, humiliating or offensive environment for her" - or that it was reasonable for it to do so. Tribunals "must not cheapen the significance of the statutory words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment": per Elias LJ in **Land Registry v Grant** [2011] ICR 1390 at §47, to which the ET referred at §12(f). The ET had earlier found that Mr Hodges had genuine concerns about the Claimant's health and it was reasonable for him to raise issues about it: see §46. In that light, and in light of how the email was framed, it cannot be said that the only reasonable conclusion open to the ET was that the email constituted harassment. I do not consider this ground crosses the high threshold on a perversity challenge.

Conclusion

60. For all these reasons, I allow ground 1 of the appeal but dismiss the other grounds. It was not in dispute that the effect of my conclusion on ground 1 is that the only conclusions open to the ET were to find that there was a contravention of s.110 of the EqA (i) by the Third Respondent in respect of the act of disability discrimination which the ET found proven against the School at §125 of its judgment and (ii) by the Second Respondent in respect of the complaint of discrimination arising from disability which the ET found proven against the School at §§126-131 of its reasons. I therefore substitute findings to that effect. At the remedies stage, the ET will be guided by the case law where more than one respondent is potentially liable.