Neutral Citation Number: [2024] EAT 119

Case No: EA-2022-001163-NLD

**EMPLOYMENT APPEAL TRIBUNAL**

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 24 July 2024

**Before** :

**THE HONOURABLE MR JUSTICE BOURNE**

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**Between :**

**ALLISON BAILEY** **Appellant**

**- and –**

**STONEWALL EQUALITY LIMITED** **First Respondent**

**GARDEN COURT CHAMBERS LIMITED** **Second Respondent**

**RAJIV MENON KC AND STEPHANIE HARRISON KC sued on behalf of all members of Garden Court Chambers** **Third Respondent**

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**Ben Cooper KC** (instructed by Doyle Clayton Solicitors) for the **Appellant**
**Ijeoma Omambala KC** (instructed by CMS Cameron McKenna Nabarro Olswang LLP) for the **First Respondent**
The Second and Third Respondents played no part in the Appeal

Hearing date: 14-15 May 2024

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# JUDGMENT

## SUMMARY


### Religion or Belief Discrimination

The Employment Tribunal did not err in rejecting the Claimant's claim that the First Respondent, through the acts of an employee, caused or induced a discriminatory act against her by the Second and Third Respondents contrary to section 111 of the Equality Act 2010. Its findings of fact did not compel it to allow the claim.

A claim for causing a "basic contravention" contrary to section 111(2) will not succeed unless (in the terminology of the section) person A actually caused the basic contravention. That means not merely that person A caused person B to commit a particular act or omission inflicting a detriment on person C, but that person B was caused by person A to commit the act or omission because of a protected characteristic of person C. Further, by analogy with the approach to loss in *Kuwait Airways Corp v Iraqi Airways Co (Nos 4 and 5)* [2002] 2 WLR 1353 HL, a claimant must show first that person A's conduct causally contributed to person B's commission of the basic contravention on a "but for" basis and, second, that the causal connection is such that, having regard to the statutory context and to all the facts of each case, making person A liable would be "fair or reasonable or just", those adjectives being interchangeable. Whilst a claim is more likely to succeed if what person A did was significantly influenced by person C's protected characteristic, there is no fixed mental element for an infringement of section 111(2). Foreseeability of the outcome will often be relevant in the application of the test, but liability does not depend on a test of reasonable foreseeability.

The word "induce" in section 111(3) is broadly synonymous with "persuade". In one case it could consist of pure verbal persuasion, and in another it could involve an element of carrot or stick. Person A must intentionally induce person B to carry out an act or omission which contains all the elements of the statutory tort that is a "basic contravention", including any mental element of the basic contravention.

In this case the alleged inducement or causative act was the making of a complaint against the Claimant and the basic contravention was the determining of the complaint in a discriminatory way. The Employment Tribunal found that the complaint was motivated by the Claimant's protected characteristic of belief. But it was made as a protest and "without any specific aim in mind except perhaps a public denial of association with her views". The Employment Tribunal found that it contained no element of threat. Those facts did not compel the conclusion that it was likely that, when determining the complaint, the Second and Third Respondents would be significantly influenced by the Claimant's protected belief. If, contrary to the EAT's judgment, liability depended on reasonable foreseeability, then that test was therefore not satisfied. On the Employment Tribunal's findings of fact, it was not bound to conclude that it was fair or reasonable or just to find the First Respondent liable. Although the complaint was a "but for" cause of the eventual outcome, responsibility for determining the complaint in a discriminatory way lay only with the Second and Third Respondents.

## THE HONOURABLE MR JUSTICE BOURNE

Introduction

1. Ms Bailey was the claimant and Stonewall Equality Ltd ("Stonewall") was the first respondent to proceedings in the Employment Tribunal ("the ET", EJ Goodman sitting with lay members) from which this appeal arises.

2. All references in this judgment to the facts of the case are to those found by the ET.

3. Ms Bailey, a barrister, was a member or "tenant" of Garden Court Chambers ("GCC"), practising in crime. She brought her claim against Stonewall and the second respondent, a service company which owns GCC's premises and employs its administrative staff, and the members of GCC (which is an unincorporated association) as third respondent.

4. Ms Bailey's claim succeeded against the second and third respondents, who have played no part in this appeal. In particular the ET found that they had directly discriminated against her because of the protected characteristic of belief, contrary to section 47 (read with sections 4, 10 and 13) of the Equality Act 2010 ("the 2010 Act").

5. Her claim against Stonewall was dismissed, and she now appeals against that order.

6. After a 23 day hearing, the ET gave a long and detailed judgment which determined numerous issues between the parties. The majority of those issues have not been re-opened in this appeal.

7. The appeal concerns Ms Bailey's claim that Stonewall, through the acts of an employee, caused or induced one of GCC's discriminatory acts against her contrary to section 111 of the 2010 Act. She contends that the facts as found by the ET were consistent only with a ruling that Stonewall did cause (ground 1) or induce (ground 2) the discrimination.

Statutory framework

8. By section 13(1) of the 2010 Act:

> "A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."

9. Protected characteristics are listed in section 4. They include gender reassignment, sex, sexual orientation and religion or belief.

10. "Belief" is defined by section 10(2) as "any religious or philosophical belief and a reference to belief includes a reference to a lack of belief".

11. Section 47(2), which is found in Part 5 of the 2010 Act, provides:

> "A barrister (A) must not discriminate against a person (B) who is a pupil or tenant—
> (a) as to the terms on which B is a pupil or tenant;
> (b) in the way A affords B access, or by not affording B access, to opportunities for

training or gaining experience or for receiving any other benefit, facility or service;
(c) by terminating the pupillage;
(d) by subjecting B to pressure to leave chambers;
(e) by subjecting B to any other detriment."

12. Section 57, also found in Part 5, provides:

"(2) A trade organisation (A) must not discriminate against a member (B)—
(a) in the way it affords B access, or by not affording B access, to opportunities for receiving a benefit, facility or service;
(b) by depriving B of membership;
(c) by varying the terms on which B is a member;
(d) by subjecting B to any other detriment."

13. The relevant parts of sections 111 and 112 provide:

**"111 Instructing, causing or inducing contraventions**

(1) A person (A) must not instruct another (B) to do in relation to a third person (C) anything which contravenes Part 3, 4, 5, 6 or 7 or section 108(1) or (2) or 112(1) (a basic contravention).

(2) A person (A) must not cause another (B) to do in relation to a third person (C) anything which is a basic contravention.

(3) A person (A) must not induce another (B) to do in relation to a third person (C) anything which is a basic contravention.

(4) For the purposes of subsection (3), inducement may be direct or indirect.

(5) Proceedings for a contravention of this section may be brought—
(a) by B, if B is subjected to a detriment as a result of A's conduct;
(b) by C, if C is subjected to a detriment as a result of A's conduct;
(c) by the Commission.

(6) For the purposes of subsection (5), it does not matter whether—
(a) the basic contravention occurs;
(b) any other proceedings are, or may be, brought in relation to A's conduct.

(7) This section does not apply unless the relationship between A and B is such that A is in a position to commit a basic contravention in relation to B.

(8) A reference in this section to causing or inducing a person to do something includes a reference to attempting to cause or induce the person to do it.

(9) For the purposes of Part 9 (enforcement), a contravention of this section is to be treated as relating—
(a) in a case within subsection (5)(a), to the Part of this Act which, because of the relationship between A and B, A is in a position to contravene in relation to B;
(b) in a case within subsection (5)(b), to the Part of this Act which, because of the relationship between B and C, B is in a position to contravene in relation to C.

**112 Aiding contraventions**

(1) A person (A) must not knowingly help another (B) to do anything which contravenes Part 3, 4, 5, 6 or 7 or section 108(1) or (2) or 111 (a basic contravention).

(2) It is not a contravention of subsection (1) if—
(a) A relies on a statement by B that the act for which the help is given does not contravene this Act, and
(b) it is reasonable for A to do so."

14. The statutory components of Ms Bailey's claim against Stonewall therefore consisted of five propositions:

(1) She held a belief which was protected under sections 4 and 10.

(2) Because she held that belief, GCC treated her less favourably than it treated or would treat others, and thereby discriminated against her under section 13.

(3) That discrimination by GCC and its other members contravened section 47 and/or section 57. In the language of section 111, that was a "basic contravention".

(4) Stonewall was in a relationship with GCC whereby it was in a position to commit a basic contravention in relation to GCC, pursuant to section 111(7).

(5) Stonewall caused GCC to commit the basic contravention against Ms Bailey, contrary to section 111(2), and/or induced GCC to do so, contrary to section 111(3).

15. The first four of those propositions were established by the ET's findings, as I shall explain. The issue on this appeal is whether the fifth was so established.

The ET's findings

16. In its Reasons at [38] the ET found that Garden Court has a particular focus on fighting inequality and protecting human rights. It has practice teams for crime, public law, and family. Some members focus on the rights of minorities, or the homeless, or victims of domestic abuse, gender-based violence and human trafficking, asylum and immigration, unlawful detention, inquests, and public enquiries. There are formal practice teams with budgets and strategy plans. There are also less formal groups which share expertise in areas of particular interest or developing law, including a Trans Rights Working Group.

17. Ms Bailey was attracted to GCC's diversity and its commitment to justice for some of the most disadvantaged in society. She became a tenant of GCC in November 2004.

18. As the ET found in its Reasons at [2]:

"She believes that a woman is defined by her sex. She disagrees with the beliefs of those who say that a woman is defined by her gender, which may differ from her sex, and is for the individual to identify. She also holds views, which she says amount to a

belief, about Stonewall's campaign on gender self-identity."

19. The ET identified a continuing public debate about possible reform of the Gender Recognition Act 2004. That Act enables a trans person to obtain a certificate that for all legal purposes they now had an acquired gender different from that recorded at birth. An applicant must show that they had, or had had, gender dysphoria, must provide two medical certificates containing details of the diagnosis and treatment, must have lived in the acquired gender for two years and must make a declaration that they intend to live in that gender for the rest of their life.

20. The ET added:

> "51. Opposition to proposed changes has focused on the need to preserve single sex spaces for natal women, and the single sex exemptions in the Equality Act. Some fear that self-identification of gender identity could facilitate abuse of women. Lesbians and gays are concerned that young people exploring their sexual identity may identify in another gender when they are only same-sex attracted, or even that same-sex orientation will be erased.
>
> 52. The debate on reform has been polarised, often uncompromising, and sometimes hostile and abusive. Men and women who oppose gender self-identity can be labelled transphobes. Transgender people are in turn accused of homophobia and misogyny. It is probably relevant to the uncompromising tone that the issue is not one of philosophy but of the practical consequences. Many transpeople live in fear of challenge, ridicule and threats. Transwomen are subjected to open abuse and sometimes violence - as gay men sometimes are, possibly by the same people, policing masculinity. They also fear unpleasant challenges from women if they try to use women's toilets and changing rooms. From the other side, the long and continuing history of male violence towards women can make women fearful and mistrustful of admitting people with male bodies to protected spaces where they are vulnerable, such as rape crisis centres, public toilets, changing rooms and refuges. Others fear losing the chance to correct historic disadvantage, for example, in collecting equal pay statistics. People who are same-sex attracted are concerned that younger people may find it hard to recognise they are gay or lesbian when it is suggested to them that their confused feelings mean they are in fact of another gender. Opponents talk of women, or gays or lesbians, being 'erased'."

21. It noted at [53] that both the belief that women are defined by sex, and the belief that gender is a matter of self-identity, are protected under the 2010 Act: see the decision of this Tribunal in *Forstater v CGD Europe Ltd* [2022] ICR 1.

22. The ET described Stonewall at [54] as "a large and widely respected charity with a mission to advance the rights of gay lesbian bisexual and trans people (LGBT)" which had campaigned from 1989 onwards. In 2015 it turned to transgender issues and gender recognition reform, setting up the Stonewall Trans Advisory Group (STAG). This was replaced by an expert panel in 2021, but at the time of the events relevant to this case, STAG operated as an interface between Stonewall and other trans groups.

23. The ET found:

> "57. In March 2017 Stonewall published A Vision for Change, setting out action to

> advance trans equality at work, at home, in school and in public. It has also researched the levels of discrimination and hate crime experienced by trans people. This survey recorded that 2 in 5 had suffered an unpleasant "incident" and 1 in 8 had been physically attacked by a colleague or customer at work. There is no breakdown of the sex or gender of the attackers, but the report includes a quote from a trans person surveyed about two women ejecting them from women's toilets.
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> 58. Stonewall also prepared detailed policies for employers to promote inclusion for trans people as well as gays and lesbians. Many organisations have signed up with its Diversity Champions Scheme, aimed to spread inclusion in workplaces. Other employers participate in its Workplace Equality Index, which ranks the top 100 participant organisations for inclusiveness.
>
> 59. This change in direction caused tension among some of Stonewall's traditional supporters. Lesbians in particular felt threatened that people with male bodies who identified as women would have access to same sex spaces, and alienated when told by some that they were transphobic if they objected. At the annual Pride march in London in July 2018 a group of lesbian protesters carried banners that 'transactivism erases lesbians', to which Stonewall responded that 'transwomen are women'. In October 2019 one of Stonewall's co-founders, Simon Fanshawe, considered setting up a breakaway group, because Stonewall had 'lost its way… they had confused legal and biological questions with social identity'. This was the LGB Alliance."

24. In November 2018, GCC signed up to Stonewall's "Diversity Champions" scheme. This was summarised by the ET at [61]:

> "In return for an annual fee of £2,500, Diversity Champions received a dedicated account manager to advise on best practice and conduct client meetings with Garden Court Chambers stakeholder groups, free places at Stonewall best practice seminars, use of the Stonewall Diversity Champions logo, free copies of Stonewall research publications, discounted rates for Stonewall conferences, and 'regular networking opportunities with the other 750 member organisations'. The declared aim of the scheme was to develop inclusive workplaces."

25. On 14 December 2018 a member of GCC emailed the other members to inform them that GCC was now a Diversity Champion. Ms Bailey sent a "reply all", objecting to this association with Stonewall going through "on the nod" because she and many others in the LGBT community "fully support trans rights but who do not support the trans-extremism that is currently being advocated by Stonewall and others in respect of the proposal for self-id under revised GRA". A number of other members made adverse comments about Ms Bailey's email, some privately and some more widely.

26. The ET recorded that in the second half of 2019 Ms Bailey posted a number of comments on related matters on the platform then known as Twitter. Of particular significance to this case is a tweet on 22 September which referred to Stonewall hiring "Morgan Page, a male bodied person who ran workshops with the sole aim of coaching heterosexual men identifying as lesbians on how they can coerce young lesbians into having sex with them".

27. Several members of GCC expressed concern about Ms Bailey's tweets. On 16 October 2019 one member, Michelle Brewer, made a request to GCC's Heads of Chambers, trans rights

working group and head of HR for guidance on members' use of social media. She "introduced herself as part of the chambers working group focusing on building their reputation as specialists in trans rights work" and stated that Ms Bailey's tweets, which she said included criticisms of GCC events on trans rights, were "incredibly alarming". The ET described this request as a complaint.

28. Between 18 and 28 October 2019, GCC received comments on its website objecting to Ms Bailey's tweets.

29. On 22 October 2019 Ms Bailey posted a tweet announcing the launch of LGB Alliance, an association based on gender critical principles which in fact was launched that evening at a private meeting in London.

30. This "generated a strong reaction on Twitter, some of which was specifically directed at Garden Court" [132] including some critical responses and some supportive responses.

31. At [133] the ET recorded that on 23 October 2019, GCC's premises were the venue for a meeting of TON (Trans Organisational Network). It was organised by Shaan Knan, who was employed by LGBT Consortium to run TON. The meeting was attended by representatives of various groups, including Kirrin Medcalf on behalf of Stonewall. At the meeting, Mr Knan encouraged those present to write to GCC to express concern about Ms Bailey's tweets, and he referred to a meeting (which was in fact a meeting of GCC's management committee) which would be taking place on 28 October.

32. At [136] the ET recorded that specific adverse comments were posted in enquiry forms on GCC's website late on 23 October.

33. On the evening of 24 October Shaan Knan put a message on STAG's wall and Facebook page, referring to a meeting on Monday 28 October "with the head of GC Chambers to discuss if any formal actions against Bailey should be taken" and asking people to write to GCC by Monday morning.

34. GCC received further complaints from sources inside and outside chambers. The ET recorded at [154] that Ms Bailey was informed on 24 October 2019 that chambers would need to investigate the complaints in accordance with its complaints procedure.

35. Later on 24 October 2019, GCC sent a tweet to those who had complained on Twitter, which was widely retweeted ("the response tweet"). It said:

> "We are investigating concerns raised about Allison Bailey's comments in line with our complaints/BSB policies. We take these concerns very seriously and will take all appropriate action. Her views are expressed in a personal capacity and do not represent a position adopted by Garden Court. Garden Court Chambers is proud of its long-standing commitment to promoting equality, fighting discrimination and defending human rights"

36. The sending of the response tweet was one of a number of detriments which, in her ET claim, Ms Bailey contended were inflicted on her by reason of her holding protected beliefs, and it was the first of two which were upheld by the ET in its finding that GCC discriminated

against her. It should be noted that the response tweet predated any relevant conduct by Stonewall.

37. As the ET recorded, there was then press coverage of the issue between Ms Bailey and GCC including an interview with Ms Bailey in the Sunday Times on 27 October 2019. There was continued discussion on social media.

38. On 25 October 2019, GCC's HR director asked a member of chambers, Maya Sikand, to investigate the complaints under the chambers complaints procedure.

39. In a draft report on 4 November 2019, Ms Sikand expressed the view that Ms Bailey's words were "deliberately provocative" but not transphobic and not in breach of the guidance of the Bar Standards Board ("BSB") or social media policy. As the ET put it at [188] she concluded that "there was nothing to investigate".

40. Then, under the heading "Stonewall's Complaint", the ET said:

> "189. While the report on the original reference was being drafted, Kirrin Medcalf of Stonewall had now sent his own complaint, dated 31 October, to Garden Court. The complaint seems to have been drafted on 28 October, when he posted on the STAG wall 'done' (referring to Shaan Knan's appeal there to send messages of support) with a comment, adding that he had found an earlier offensive tweet, probably the Morgan Page one.
>
> 190. Identifying himself as Head of Trans Inclusion at Stonewall, he complained of 11 tweets by the claimant, giving their links. Some of these went back to September, so before the launch tweet. He praised Garden Court's positive relationship with the trans community, but:
>
> > 'for Garden Court Chambers to continue associating with a barrister who is actively campaigning for a reduction in trans rights and equality, while also specifically targeting our staff with transphobic abuse on a public platform, puts us in a difficult position with yourselves: the safety of our staff and community will always be Stonewall's first priority'.
>
> The reference to Stonewall staff concerns … the tweet about Morgan Page on 22 September. He said this targeted a woman who worked for Stonewall, and called her – 'Morgan Page, a male'. He complained of Allison Bailey calling their campaign 'trans extremism', which encouraged violence. He also complained of the accusation that Stonewall engaged in 'appalling levels of intimidation, fear and coercion'."

41. The Stonewall complaint was sent to Maya Sikand with a string of new tweets about Stonewall which Ms Bailey had posted on 2 November. Ms Sikand decided that the Stonewall complaint should be considered separately, but was persuaded by Stephanie Harrison QC (a senior member who would soon become one of GCC's joint Heads of Chambers) to deal with everything in one report to avoid having more than one "media storm". Ms Sikand wrote to Ms Bailey, inviting her to comment on why two tweets included in the Stonewall complaint (one of which was the Morgan Page tweet) were not a breach of core duties in the BSB guidance. Ms Bailey sent a lengthy response on 21 November 2019.

42. Ms Harrison then sought advice from a member of the Bar Council's Ethics Committee, Cathryn McGahey QC, on whether the tweets as particularised in Stonewall's complaints had breached any Core Duty ("CD") under the BSB Code. Ms McGahey initially responded that this "may well depend on whether the truth of them can be substantiated or, at least, whether they amount to legitimate comment on the underlying facts" and asked whether GCC could "identify the material on which Allison was commenting". Ms Harrison did not provide Ms Bailey's response to the complaint to Ms McGahey, but simply asked: "On the premise that there is nothing sufficient to substantiate the allegation of coercion what is your view?"

43. On 3 December 2019 Ms McGahey responded with her advice. She concluded that if the Claimant could not substantiate the assertions made in the tweets under investigation, she "may be at risk of a finding of a breach of CD5 and/or CD3" and "I think, though, that the two tweets are nevertheless probably over the borderline of acceptable conduct, on the basis that Allison's views are sincerely held but that she has published allegations of criminal and/or disreputable conduct that she cannot substantiate".

44. Ms Sikand drafted a final report and showed it to the Heads of Chambers on 11 December 2019. It stated that there was a risk of a breach of the core duties. Ms Harrison, however, suggested that she should say that the tweets were "likely" to breach the BSB guidelines. That was how it was put in the final report. On 15 December 2019, GCC informed Ms Bailey that the Heads of Chambers accepted the report, and asked her to delete the two tweets, adding that chambers "do not intend to report you to the BSB, as we do not consider that this amounts to the type of serious misconduct which would require us to do so", but that Ms Bailey would be aware that others might report the matter.

45. That outcome of the complaint was the other detriment found by the ET to have been inflicted by GCC as an act of discrimination.

46. The ET ruled that Ms Bailey's beliefs about gender self-identity and about the pernicious effect of Stonewall's campaign promoting gender self-identity were protected under the 2010 Act, and that they were not manifested in such a way as to lose that protection (e.g. by seeking to destroy the rights of others), having regard to the requirements of ECHR Articles 9 and 10.

47. In her claim to the ET Ms Bailey alleged that she was subjected to a number of detriments because she had protested about the association with Stonewall. One of the alleged detriments was being denied work and therefore suffering a drop in income. The ET dismissed that claim, finding that there were innocent explanations for the fluctuation in her practice.

48. The terms of the response tweet which referred to an investigation, viewed in light of Ms Sikand's later opinion that there was nothing to investigate, was found to be a detriment inflicted by GCC because of Ms Bailey's protected views. As the ET put it at [315]:

> "Faced with a Twitter storm on gender self-identity, they picked sides. The Heads chose to prefer the view that the claimant was in the wrong and that her tweets should be investigated, because there was a lot of opposition to the views expressed in them. They knew it was about sex versus gender. Although in evidence all professed not to have a view in the sex versus gender debate, we concluded that they were opposed to her,

> perhaps because they had not appreciated the consequences of the transgender debate which the claimant was protesting about, perhaps because they were unused to the forceful tone of Twitter communication."

49. As the infliction of that detriment preceded Stonewall's complaint, it could not have been caused or induced by Stonewall contrary to section 111.

50. The ET then ruled that GCC also discriminated against Ms Bailey by inflicting the detriment of the outcome of the Stonewall complaint as above.

51. It is important to note some details of the ET's reasoning which led to that ruling.

52. At [321-322] the ET explained that the outcome was detrimental to Ms Bailey because of the "psychic cost" to her of being asked to take down the tweets and because she had a reasonable sense of grievance at being told she was likely to have breached BSB core duties when tweeting her views on a matter of public debate. That sense of grievance would arise from the finding that, in the Morgan Page tweet which referred to young lesbians being "coerced" into having sex with men (by the suggestion that they would be transphobic if they refused), she was "likely" to be seen to have made an allegation of criminal and/or disreputable conduct that she could not substantiate.

53. At [323] the ET explained that Ms Bailey could also be expected to resent the fact that GCC had not heeded the explanation which she had given for referring to Stonewall engaging in "intimidation".

54. At [324] the ET then posed the question of what part was played in the infliction of this detriment by Ms Bailey's gender critical belief, or by any tweet found to be a protected act. That question was essential for deciding the allegation that GCC had committed direct discrimination, and would also be essential for deciding whether Stonewall was in breach of section 111.

55. At [325-326] the ET records Ms Bailey's submission that deficiencies in the process adopted by GCC should lead to the inference that the outcome was influenced by prejudice on the part of GCC about her protected beliefs, and GCC's response that they had acted as much for her protection as for their own and that she had brought these events on herself.

56. The key paragraph is [327]. Here the ET found that GCC had outsourced, to Ms McGahey, its decision on whether Ms Bailey could support her assertions of coercion and intimidation and had done so "crucially, without supplying her with the claimant's response". Instead, Ms Harrison had told Ms McGahey that Ms Bailey did not have material to support her assertions. The ET concluded:

> "Ms Harrison had already demonstrated her opposition to the claimant's views about trans rights and about Stonewall, and had herself recognised that she should not be involved. It is hard not to infer that her own view on gender critical feminism as hostility to trans rights played a part in this decision. Maya Sikand, initially neutral, had shown hostility to the claimant's 2 November tweets about Stonewall (tweet 10), and seems to have been influenced by Garden Court being a Diversity Champion, though Kirrin Medcalf's complaint made no mention of this. From this we can infer that

> disapproval of the claimant's beliefs about Stonewall informed her sense that there must be some breach of the core duties here."

57. In the same paragraph the ET noted that the Heads of Chambers had earlier shown "little patience" about Ms Bailey's tweets. Their handling soon afterwards of a complaint against another member of GCC, relating to a different topic, had shown "greater recognition of legitimate expression of views on a controversial topic". The outcome of the complaint against Ms Bailey did not happen because she had manifested her beliefs in such an objectionable way as to lose the protection of ECHR Articles 9 and 10, or because of conduct of a kind that they would have been obliged to report. And, GCC "did not heed the claimant's explanations of intimidation and coercion, or consider whether or how this justified limitation on speech and manifestation of belief".

58. I interpret the ET as referring back to all of those contents of [327] when it made its finding of direct discrimination at [328]:

> "From these matters we conclude that the claimant's gender critical belief, and in particular her belief about Stonewall's promotion of gender self-identity encouraging and being complicit in hostility to gender critical feminists, significantly influenced the finding that her two tweets were 'likely' to breach core duties."

59. It was and, on this appeal, is necessary to decide whether Stonewall induced or caused the commission of the statutory tort described there.

60. Meanwhile, the ET then dealt with some other issues and dismissed some other parts of the claim against GCC.

61. I observe in passing that, dealing with an allegation against GCC of indirect discrimination, the ET found at [355] that Stonewall did not direct GCC's investigation process in any way:

> "Stonewall's complaint of 31 October was only a complaint. There is no evidence that Stonewall directed how that complaint was handled; they did not follow it up, or even ask the outcome.
> …
> Alleging that Stonewall directed the complaint process was a conspiracy theory."

62. The deficiencies in the investigation therefore were laid firmly at GCC's door. Stonewall was not blamed for them.

63. Finally, the claim against Stonewall was considered from [358] onwards. The ET set out section 111, identified the fact that Stonewall as a service provider to GCC could be the person referred to as "A" under the section, and noted that the claim was that Stonewall instructed or caused or induced contraventions or attempted to do so. It continued:

> "360. Of the mental element required, where the basic contraventions themselves require a mental element (as in direct discrimination and victimisation) then the tribunal must find that A's reason for its instruction, inducement, causing, or attempts to induce or cause conduct that would amount to a basic contravention were significantly influenced by the claimant's protected characteristic (here, belief), even if that was not

the motive, or was not the conscious reason."

64. Having noted correctly that the Claimant bore the burden of proof, the ET at [364] set out the various instances of conduct by Stonewall on which Ms Bailey relied and made findings about several of them at [365-366].

65. However, the conduct on which Ms Bailey still relies in this appeal is the making by Kirin Medcalf of Stonewall's complaint. The ET dealt with that at [367-377]. In particular it said:

> "367. We next address Kirrin Medcalf's complaint on behalf of Stonewall … As Head of Trans Inclusion he objected to the claimant on a number of grounds: (a) transgendering[1] in various of the claimant's tweets, including Morgan Page, a member of staff (b) attacks on trans people's rights to access to women's prisons and hospital wards (c) aligning Stonewall with extremism, intimidation and inflaming the debate (d) chairing meetings of Women's Place, a 'hate group'.
>
> 368. It is obscure what he wanted to achieve or Garden Court to do. The claimant sees the statement that continued association with her put them in a difficult position as a threat that she should be expelled if Stonewall was to continue its relationship with Garden Court. This is certainly one reading. Kirrin Medcalf said it was about the safety of staff if they were to continue working with Garden Court. This is not clear from his email, but is consistent with the protest about 'targeting our staff with transphobic abuse' on a public platform, and to 'the safety of our staff and community' being their priority Kirrin Medcalf explained that his staff safety as his purpose in writing the email in a little more detail. He is himself trans. Transwomen are apprehensive of being challenged in a hostile way by natal women if they use female toilets. They are often objects of violence. He did not say whether the violence came from women or men. He did attend a further meeting at Garden Court a month later, on prison policy, and decided that to mitigate the risk of challenge he would not arrive early, would attend with a cis-male colleague, and would not wear anything that associated him with Stonewall. But if mitigation of risk was his purpose in writing the complaint email, we considered it will have been wholly obscure to the recipients. Other than the final mention of safety, this concern could not be detected. Agreeing that he had not given any detail of his safety concern or what would mitigate any risk, he said in evidence that he had thought they would get back to him about it and they could have a discussion. To our minds however it was implausible that what he wanted was a discussion of arrangements for access to female toilets, or he would have said so.
>
> 369. Challenged on why he was not more specific about what he wanted, he said he had 'had his advocacy hat on', which we understand to mean that he was writing to protest about her views (stated to come from a member of Garden Court) and put the case for trangendered people. In other words, he wrote without any specific aim in mind except perhaps a public denial of association with her views.
>
> …

[1] This appears to be a clerical error and should read "misgendering" i.e. referring to a trans person in the wrong gender.

> 372. It is less likely he had in mind any formal action by chambers when he was too late for the meeting date advertised by Shaan Knan, though it is a possibility. The lack of any follow up to this complaint - it was not mentioned in the meeting with Garden Court about the scheme early in 2020 for example, even though they had had no response at all from Garden Court in two months – indicates that Kirrin Medcalf and Stonewall had not in fact been looking for any action. It was just a protest."

66. In paragraph [374] the ET made an important finding of fact, declining to conclude that Kirrin Medcalf "would have been aware that [GCC] were Diversity Champions". It noted that the complaint made no reference to GCC being a Diversity Champion, referring instead to voluntary services that GCC was providing to Stonewall e.g. by making their premises available for meetings. Under the Diversity Champion scheme a Ms Zainab Al-Farabi was GCC's account manager, and the ET found that she was shocked when she learned of the complaint because it should have gone through her. Mr Sanjay Sood-Smith, who was in overall charge of the Diversity Champion scheme, also had not known about the complaint.

67. That supported the ET's conclusion at [373] that the Stonewall complaint contained nothing in the nature of an instruction to GCC to discriminate against Ms Bailey because of her protected views, and nothing in the nature of an inducement, actual or attempted. There were no words which were intended to make GCC fear losing their Diversity Champion status, because Kirrin Medcalf was not aware of it. Any fear of a "loss of brand association" lay in the minds of GCC's managers and Heads of Chambers. Although Kirrin Medcalf was aware that "organisations liked to be associated with Stonewall 'because it made them look good'", the ET "did not consider that the terms of his letter, which did not mention the scheme, suggested brand damage, or amounted to inducement".

68. The ET then found at [376] that, in addition, GCC themselves did not see the complaint as an inducement:

> "At most, their reaction to an attack on Stonewall, seen as an ally, was to consider whether there were any grounds for finding the claimant in the wrong, and reaching for BSB social media guidance as the only candidate. That was Stephanie Harrison's response to [one of the claimant's tweets posted on 2 November], which Stonewall did not complain about. That did not come from Stonewall. Kirrin Medcalf did not know about Bar standards or barristers' duties."

69. Finally at [377] the ET decided the question of causation which is at the heart of this appeal:

> "377. As for causing, in the 'but for' sense it is true that if Kirrin Medcalf had not written, Maya Sikand's report would have been limited to the original batch referred, which she would have dismissed without investigation. The email was the occasion of the report, no more. Was the letter an attempt to cause discrimination against the claimant? We concluded that it was no more than protest, with an appeal to a perceived ally in a 'them and us' debate."

70. The ET then rejected some other allegations of detriment being induced or caused by the actions of other individuals on behalf of Stonewall.

71. At [390] the ET concluded that “the claim that Stonewall instructed, induced or caused, or attempted to induce or cause detriment to the claimant does not succeed”.

The Claimant’s submissions

72. Representing Ms Bailey, Ben Cooper KC submitted that any requirement in section 111 for a mental element must be discerned from the words used in each subsection. So in order to “instruct” a person contrary to section 111(1), it is inherent that person A must intend person B to act according to the instruction. When making an “attempt” contrary to section 111(8), person A must intend to achieve the thing that they are attempting to make happen.

73. In the case of section 111(3), Mr Cooper submitted that “induce” has less specificity than “instruct”, and implies an intention to persuade or influence the inducee to take “action of an identified kind” but not that it should result in any specific outcome or consequence. Nothing in the section, he submitted, suggests any requirement that there must be anything in the nature of exploitation of a specific relationship between A and B. A must engage in conduct intended to persuade or influence B to take action of an identified kind in relation to C, and to do so in a way which contravenes the 2010 Act.

74. In the case of section 111(2), Mr Cooper submitted that the wording does not necessarily imply any subjective intent or state of mind on the part of person A in order for them to “cause” a contravention of the Act.

75. Nevertheless, Mr Cooper submitted that it is necessary to import a mental element for person A which matches the necessary mental element for the contravention of the Act by person B. Otherwise a person who, for example, instigates a disciplinary process for entirely non-discriminatory reasons could be liable when person B, of their own volition, determines that process in a discriminatory way and for discriminatory reasons. However, he submitted, persons A and B do not have to share the same motivation. The required degree of coincidence is only that both A and B act “because of” the protected beliefs (or other protected characteristic).

76. Meanwhile, Mr Cooper submitted, to prove causation under section 111(2) it is “at least” sufficient to establish that B discriminates against C in a way which was a reasonably foreseeable consequence of A’s actions. However, he did not concede that reasonable foreseeability is a statutory requirement, though the point need not be decided on this appeal if it is apparent that that test would be satisfied in any event.

77. On the basis of that approach, Mr Cooper relied on four basic facts found by the ET which, he submitted, meant that the claim under section 111 was bound to succeed:

(1) Kirrin Medcalf on behalf of Stonewall (person A under the section) made a complaint to GCC (person B) about, and because of, the beliefs of Ms Bailey (person C) and/or her reasonable expression of them.

(2) In partly upholding that complaint, GCC directly discriminated against Ms Bailey because of her beliefs and the expression of them.

(3) GCC was influenced by the relationship between itself and Stonewall, which relationship brought Stonewall within the scope of section 111.

(4) But for the making of that complaint, GCC would not have discriminated against Ms Bailey in that way.

78. In his oral submissions Mr Cooper focused on some further factual details. He submitted that it is clear that Kirrin Medcalf made the Stonewall complaint in response to encouragement by others to support action against Ms Bailey. He added that, whatever Kirrin Medcalf's subjective intentions in drafting the complaint, it was reasonably foreseeable that GCC would interpret it as a threat to terminate the relationship between Stonewall and GCC unless GCC expelled Ms Bailey. It objected to Ms Bailey's "association with yourselves" and repeatedly labelled her views as transphobia and hate, meaning that continuing the association would damage the relationship. By the words "do what is right", Kirrin Medcalf clearly intended some action to be taken even if they did not specify it.

79. Cross-referring to his submission that the mental element required by section 111 is that person B must act "because of" person C's protected beliefs (or other protected characteristic), Mr Cooper submitted that that is clearly why Kirrin Medcalf made the complaint. It was intended to protest against her beliefs and her expression of them.

80. Those facts, Mr Cooper submitted, made it reasonably foreseeable that GCC would respond to the complaint by inflicting a detriment on Ms Bailey because of her protected beliefs.

81. Mr Cooper further submitted that (if it matters, which he says it does not) the ET also found that when GCC discriminated against Ms Bailey because of her protected beliefs, it was influenced by its membership of the Diversity Champion scheme. Despite the ET finding that GCC did not act because they were worried about Stonewall terminating their relationship, Mr Cooper submitted that GCC nevertheless perceived Stonewall as an ally and were therefore quick to look for something wrong in Ms Bailey's tweets.

82. Mr Cooper took me back through the ET's Reasons at [367-377]. His overarching submission is that the ET did not clearly say why it found that Stonewall did not cause the discriminatory action. It did not set out a legal test. Perhaps, by inference, the ET decided either that some supervening event broke the chain of causation, a conclusion which would not be supported by the evidence, or that section 111 requires some subjective mental element on the part of person A, a conclusion which would be wrong in law.

83. The ET's finding that Kirrin Medcalf made his complaint as a "protest" was, Mr Cooper submitted, sufficient to satisfy the test that he made it because of Ms Bailey's protected views.

84. Mr Cooper further submitted that the ET's finding that Kirrin Medcalf's complaint was merely the "occasion" for GCC's discriminatory action was not sufficient to dispose of the claim that the former caused the latter, and there was no valid conclusion that the latter was not reasonably foreseeable (if that was the right test in law).

85. So far as inducing is concerned, he submitted that the ET was wrong to require either a subjective intention on Kirrin Medcalf's part to use GCC's Diversity Champion status or a

subjective perception on GCC's part of a threat by him to use it to harm them. In any event, he further submitted that on the ET's findings, the scheme membership did influence Ms Sikand's treatment of the complaint.

The Respondent's submissions

86. Representing Stonewall, Ijeoma Omambala KC submitted that the ET directed itself correctly on the mental element required under section 111 and the test of causation. It did not wrongly import a requirement that Kirrin Medcalf intended that GCC should discriminate. It also directed itself correctly on the meaning of inducement. It made findings of fact which were supported by the evidence. This appeal, she submitted, is in reality an impermissible attempt to challenge the findings of fact.

87. In support of that submission, Ms Omambala emphasized that the ET rejected Ms Bailey's case on the facts in a number of significant areas, notably when it found that Kirrin Medcalf had acted independently in making his complaint and that Kirrin Medcalf was unaware of GCC's Diversity Champion status and did not try to exert influence via a threat of withdrawal of membership of the scheme and reputational harm. Those findings were central to the ET's conclusion that Stonewall did not either induce or cause GCC to discriminate.

88. Ms Omambala agreed that section 111(2) creates a unique statutory tort with its own definition. She submitted that the subsection does not require any mental element (unlike other provisions such as section 112), and that the word "cause" has its ordinary meaning of bringing about or making something happen. Therefore the ET was required to establish what Stonewall did – in this case the making of the complaint – and then to decide whether that act caused GCC to commit direct discrimination against Ms Bailey because of her protected belief or, to put it another way, to act tortiously against her. The relevant tortious conduct by GCC was, she submitted, the upholding of the complaint rather than its investigation. On the ET's findings, whilst Kirrin Medcalf's complaint started the process, Kirrin Medcalf did not bring about the prejudiced outcome, and a prejudiced or disciplinary outcome was not a reasonably foreseeable outcome of the complaint.

89. Similarly Ms Omambala submitted that the ET correctly considered whether the complaint was an inducement contrary to section 111(3), and that its finding that it was merely a protest was fatal to that limb of the claim.

The meaning of section 111

90. By her first ground of appeal Ms Bailey contends that the ET applied section 111(2) incorrectly by applying the wrong test for causation and remoteness and/or by wrongly focusing on Kirrin Medcalf's subjective intentions and/or by wrongly importing a requirement that Kirrin Medcalf must have intended the specific contravention of the Act which was committed by GCC.

91. I have not been shown any reported authority which sheds relevant light directly on the meaning of section 111(2).

92. I agree that section 111(2) creates a free-standing statutory tort. Its elements are to be found in the words of the section, construed in the context of the 2010 Act as a whole.

93. The basic principles of statutory construction are well known. The Court's duty is to arrive at the legal meaning of an enactment. This will usually correspond to the grammatical meaning but, as is recognised in *Bennion, Bailey and Norbury on Statutory Interpretation* (8th edition, p378), the two may differ. The task was summarised by Lord Reid in *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591 at 613:

> "We often say that we are looking for the intention of Parliament, but that is not quite accurate. We are seeking the meaning of the words which Parliament used. We are seeking not what Parliament meant but the true meaning of what they said."

94. There is no doubt about the purpose and context of the relevant provisions of the Equality Act 2010. The parties to the present case agree that the purpose of section 111, like the other related provisions of the 2010 Act, is to strive to eliminate the evil of discrimination on certain proscribed grounds in various sectors.

95. The Act reflects that purpose by prohibiting, along with direct discrimination on a proscribed ground, various acts and omissions of an indirect, collateral or inchoate nature including those identified in section 111. So in addition to direct discrimination, the Act also deals with indirect discrimination, victimisation, harassment, attempts and vicarious liability and the section 111 torts of instructing, causing and inducing. There is a clear statutory intention to outlaw conduct that is discriminatory on proscribed grounds, whatever the form in which Parliament has been able to anticipate it occurring.

96. Where there is any doubt about the meaning of the relevant provisions, they should therefore be given a construction which recognises the broad scope which Parliament intended the legislation to have. This has for many years been recognised in cases involving anti-discrimination legislation, such as *Jones v Tower Boot Co Ltd* [1997] ICR 254 CA (page 262D per Waite LJ).

97. The mental element or motivation which has to be shown in order to prove a contravention of the 2010 Act varies according to the type of act or omission concerned. To take three prominent examples:

    a. Direct discrimination under section 13 must be "because of a protected characteristic". See *Nagarajan v London Regional Transport* [1999] ICR 877 in which the House of Lords decided that a finding of direct discrimination "on racial grounds" under the 1976 Act did not require that the discriminator had a conscious discriminatory motive so long as, regardless of motive or intention, a significant cause of his decision to treat the claimant less favourably was that person's race.

    b. Indirect discrimination has no mental element. A respondent must merely apply a provision, criterion or practice ("PCP") of a kind which contravenes section 20.

    c. Harassment contrary to section 26 is defined at least in part by reference to the perception of the victim, being conduct which is "unwanted". It may have no mental

element if it has the proscribed effect on the victim, or it may have the mental element of being done for the "purpose" of having that effect.

98. Some sections identify a specific mental element. Section 112 is close to section 111 both in its location within the statute and in the broad nature of the conduct which it outlaws, though it differs by creating both civil and criminal liability. The civil provisions state:

> "(1) A person (A) must not knowingly help another (B) to do anything which contravenes Part 3, 4, 5, 6 or 7 or section 108(1) or (2) or 111 (a basic contravention). [emphasis added]
>
> (2) It is not a contravention of subsection (1) if—
> (a) A relies on a statement by B that the act for which the help is given does not contravene this Act, and
> (b) it is reasonable for A to do so."

99. Thus the civil provisions are closely focused on person A's mental state. Similarly the criminal provisions, outlawing the making of a false statement of a kind mentioned in subsection 2(a), refer to a *mens rea* of acting "knowingly or recklessly".

100. Section 111, by contrast, does not refer to any mental state. However, the mental state required by some of the subsections can be identified by common sense because it is obvious.

101. For example, section 111(1) requires that person A must not "instruct" person B to do in relation to person C anything which contravenes the relevant provisions. I agree with Mr Cooper that the question of person A's mental state is subsumed into the nature of the prohibited act. It is in the nature of an instruction that the instructor intends the instructee to do something specific. Person A need not be aware that the instructed act will be unlawful, but they must know what it is that they are instructing person B to do, and that act, as instructed, must contain all the elements of whichever of the statutory torts that person B will commit by following the instruction. So if, for example, the statutory tort is direct discrimination, then person A must instruct person B not merely to treat person C less favourably than he treats or would treat others, but must instruct person C to do so because of a protected characteristic. If, on the other hand, the statutory tort is indirect discrimination, then person A must simply instruct person B to apply a PCP which contravenes section 19. Since person B can be liable without knowing or intending that the PCP has that effect, so can person A.

102. Similarly, section 111(3) requires that person A must not "induce" person B to do in relation to person C anything which contravenes the relevant provisions. A similar analysis applies to the meaning of the word "induce".

103. In that regard, I have been referred to *Commission for Racial Equality v Imperial Society of Teachers of Dancing* [1983] IRLR 315 which concerned (inter alia) section 31 of the Race Relations Act 1976. Section 31(1) made it unlawful "to induce, or attempt to induce, a person to do any act which contravenes Part II or III" of that Act. There was no provision in the 1976 Act prohibiting the "causing" of a contravention. Proceedings under that Act could only be brought by the Commission. The claim arose because an employee of the Respondent had

contacted a school, asking for a school leaver to be put forward as a candidate for a job, and had said that she "would rather that the school did not send anyone coloured". The Commission succeeded on appeal under section 31. The EAT (Neill J) rejected a suggestion that "induce" connoted an element of "stick or carrot" and called for something going beyond a mere request, seeing "no reason to construe the word narrowly or in a restricted sense". He said:

> "There may be cases where inducement involves the offer of some benefit or the threat of some detriment, but in their ordinary meaning the words 'to induce' mean 'to persuade or to prevail upon or to bring about'. In our judgment the intimation by Mrs McBride that 'she would rather the school did not send anyone coloured' as 'that person would feel out of place as there were no other coloured employees' did constitute an attempt to induce Mrs Patterson not to send coloured applicants for interview."

104. The fact that the 1976 Act made no provision for a person who causes rather than induces a contravention leads me to be cautious about applying that interpretation to section 111 of the 2010 Act. "Cause" and "induce" are now contained in different subsections of section 111 and therefore must now have different meanings even if there is an overlap between them, and it seems to me that the phrase "to bring about" is a more natural equivalent of the former than the latter. As to the overlap, I doubt that a person could induce a contravention without also thereby causing it, but not every causative act can also be characterised as inducing.

105. In my judgment the word "induce" in section 111(3) is broadly synonymous with "persuade". In one case it could consist of pure verbal persuasion, and in another it could involve an element of carrot or stick.

106. As in the case of section 111(1), the question of mental state is answered by considering the nature of the prohibited act. In my judgment, it is in the nature of an inducement that the inducer intends the inducee to do what they are being induced to do. I am fortified in that conclusion by the fact that the section contains separate provisions applying to inducing and to causing, the latter word being more apt to cover an act which has unintended consequences. I conclude that Person A must intentionally induce person B to carry out an act or omission which contains all the elements of the statutory tort that is a basic contravention, including any mental element of the basic contravention.

107. I then turn to section 111(2) and the meaning of "cause".

108. Before considering discussions of causation in the law of tort, I acknowledge that the cases tend to deal with causation of loss i.e. the question of what losses should be recoverable once it is recognised that a tort has been committed. But in the case of section 111(2), the causing *is* the tort.

109. Nevertheless, I draw assistance from the principle, found in case law, that assessing the extent of a defendant's liability for a claimant's loss calls for a twofold inquiry as to (1) whether the wrongful conduct causally contributed to the loss on a "but for" basis and (2) what is the extent of the loss for which the defendant ought to be held liable: *Kuwait Airways Corp v Iraqi Airways Co (Nos 4 and 5)* [2002] 2 WLR 1353 HL per Lord Nicholls at [69].

110. Lord Nicholls explained:

> "70. The second inquiry, although this is not always openly acknowledged by the courts, involves a value judgment ("ought to be held liable"). Written large, the second inquiry concerns the extent of the loss for which the defendant ought fairly or reasonably or justly to be held liable (the epithets are interchangeable). To adapt the language of Jane Stapleton in her article "Unpacking 'Causation' " in Relating to Responsibility, ed Cane and Gardner (2001), p 168, the inquiry is whether the plaintiff's harm or loss should be within the scope of the defendant's liability, given the reasons why the law has recognised the cause of action in question. The law has to set a limit to the causally connected losses for which a defendant is to be held responsible. In the ordinary language of lawyers, losses outside the limit may bear one of several labels. They may be described as too remote because the wrongful conduct was not a substantial or proximate cause, or because the loss was the product of an intervening cause. The defendant's responsibility may be excluded because the plaintiff failed to mitigate his loss. Familiar principles, such as foreseeability, assist in promoting some consistency of general approach. These are guidelines, some more helpful than others, but they are never more than this.
>
> 71. In most cases, how far the responsibility of the defendant ought fairly to extend evokes an immediate intuitive response. This is informed common sense by another name. Usually, there is no difficulty in selecting, from the sequence of events leading to the plaintiff's loss, the happening which should be regarded as the cause of the loss for the purpose of allocating responsibility. In other cases, when the outcome of the second inquiry is not obvious, it is of crucial importance to identify the purpose of the relevant cause of action and the nature and scope of the defendant's obligation in the particular circumstances. What was the ambit of the defendant's duty? In respect of what risks or damage does the law seek to afford protection by means of the particular tort? … "

111. In my judgment, that reasoning is also logically applicable to establishing liability under section 111. The same broad principle applies because, in the present case, it is similarly necessary to identify the extent or the nature of the "causing" which Parliament decided to outlaw. This is to be done by having regard to the Parliamentary intention of rooting out and eradicating discrimination on proscribed grounds, and by applying common sense.

112. Did Parliament decide that a person should be taken to have caused only such consequences of their actions as are reasonably foreseeable? That requirement is applied when a Court determines the extent of liability for causing personal injury in tort. However, in *Essa v Laing Ltd* [2004] IRLR 313, a majority of the Court of Appeal, having referred to *Kuwait Airways*, declined to apply the "reasonably foreseeable" test and instead applied a test of "pure causation" when deciding what compensation should be awarded against an employer who was liable under section 56 of the Race Relations Act 1976 for race discrimination consisting of a racist insult by a foreman to an employee. An Employment Tribunal had found that whilst distress was foreseeable, it was not reasonably foreseeable that the claimant would suffer psychiatric harm which then prevented him obtaining further employment, giving rise to extended financial loss. Pill LJ held that in a case of "racial abuse in the face of the victim", a claimant should be able to recover damages "for the loss which arises naturally and directly from the wrong" [39]. Clarke LJ stated the slightly broader conclusion that "in order to be entitled to compensation for unlawful racial discrimination under s56 of the 1976 Act it is not necessary for the claimant who has been discriminated against to show that the particular type

of loss was reasonably foreseeable" [44]. In answering the second of the questions identified in *Kuwait Airways*, he noted at [62]:

> "The tort of racial discrimination is a unique tort. It cannot be committed by accident. The act or omission must be deliberate but I agree with Pill LJ that there is no need for an analysis of why the act or omission is committed. I also agree with him that in these circumstances there is no need to superimpose the requirement or pre-requisite of reasonable foreseeability in order to achieve the balance of interests which the law of tort requires."

113. Clarke LJ's reference to the mental element of discrimination reflects the seminal case of *Nagarajan v London Regional Transport* (see paragraph 97a above) in which the House of Lords decided that a finding of direct discrimination "on racial grounds" under the 1976 Act did not require that the discriminator had a conscious discriminatory motive so long as, regardless of motive or intention, the claimant's race was a significant cause of the discriminator's decision to treat him less favourably.

114. The starting point in the construction of section 111(2) is the words used. There is no express mental element, by contrast with section 112 which uses the word "knowingly". Nor does the subsection set out a test of reasonable foreseeability.

115. However, a claim under the subsection will not succeed unless person A actually caused the substantive contravention. That means not merely that person A caused person B to commit a particular act or omission, but that person A caused person B to commit the act or omission because of a protected characteristic.

116. Further, by analogy with the approach to loss in *Kuwait Airways*, a claimant must show first that person A's conduct causally contributed to person B's commission of the prohibited act on a "but for" basis and, second, that the causal connection is such that person A ought to be held liable. Borrowing Lord Nicholls' phrase, those last words mean that, having regard to the statutory context and to all the facts of each case, making person A liable would be "fair or reasonable or just", those adjectives being interchangeable.

117. In my judgment, that second hurdle may be cleared in different ways in different cases. If person A knows or intends that, as a result of their action, person B will commit an act which (whether or not person A knows it) will be a substantive contravention, that will plainly be sufficient, but that is not the threshold requirement. The threshold requirement is that it is fair or reasonable or just, on the facts of the case, to make person A liable for causing person B's substantive contravention of a relevant provision of the 2010 Act.

118. Applying what Lord Nicholls called "informed common sense", that test is more likely to be satisfied if, using the formulation applied by the ET and suggested in argument by Mr Cooper, it is found that what person A did was significantly influenced by person C's protected characteristic. It is also not easy to imagine an example in which person A will be liable without that being the case, but an example could arise. In my judgment, the right question to ask is the broader one of whether it is fair or reasonable or just to regard person A as having caused the substantive contravention.

119. The present type of case, where person A makes a complaint about person C and person B deals with the complaint in a way which infringes the 2010 Act, can be used to furnish illustrative examples of how the test may operate.

120. Take an example where person A makes a complaint to person B, an employer, alleging misconduct by persons C and D, where person C has a protected characteristic and person D does not. Person B upholds the complaint against person C and exonerates person D, treating them differently for no reason other than person C's protected characteristic. Will person A always be held to have caused person B's discriminatory conduct?

121. The answer is clearly no. The complaint may have been made in good faith and have been entirely unconnected with person C's protected characteristic. If that is so, it would not be fair or reasonable or just to hold person A liable for person B's discrimination. To borrow the language used by the ET in the present case, the complaint would have been the "occasion" for the discrimination but would not have been its "cause" for the purposes of section 111(2).

122. However, different facts will lead to a different result. If the misconduct was committed by persons C and D, but person A directed the complaint only against person C, and did so because of person C's protected characteristic, with the result that person B treated person C less favourably than person D, then (without more) it would seem entirely just to hold person A liable.

123. I therefore conclude, first, that section 111(2) does not import any fixed mental element and, second, that liability for causing a contravention does not depend on a test of reasonable foreseeability. Instead, once "but for" causation has been established, the question is whether, having regard to the statutory context and to all the facts, it is fair or reasonable or just to find person A liable for causing person B's contravention of the 2010 Act. No doubt foreseeability will often be a relevant area of enquiry, but all will depend on the facts.

Ground 1

124. In my judgment the ET did not err, as alleged under ground 1, by wrongly focusing on Kirrin Medcalf's subjective intentions and/or by wrongly importing a requirement that Kirrin Medcalf must have intended the specific basic contravention which occurred.

125. Instead, as I have said at [63] above, the ET asked itself whether Kirrin Medcalf's (or Stonewall's) reason for the act which is said to have caused or induced the basic contravention was significantly influenced by Ms Bailey's protected belief.

126. I have held that that is not the determinative question. However, the ET clearly did not reject the claim against Stonewall because of the answer to it. In fairness to Ms Bailey it should be noted that the ET, having set out the question, did not expressly state the answer to it. However, it found at [369] that Kirrin Medcalf's explanation for making the complaint was that "he was writing to protest about her views … and put the case for transgendered people" and that "he wrote without any specific aim in mind except perhaps a public denial of association with her views". It is clear that in making the complaint, Kirrin Medcalf was significantly influenced by Ms Bailey's protected belief, and therefore that issue was decided in her favour.

127. The ET's discussion of what Kirrin Medcalf wanted to achieve does not, in my judgment, reveal that it wrongly determined the case on the basis of Kirrin Medcalf's subjective intentions. It is true that a lack of intention to cause the basic contravention would not, by itself, prevent Stonewall from being liable. However, Kirrin Medcalf's subjective intentions were relevant to the question of whether it was fair or reasonable or just to regard Stonewall, by Kirrin Medcalf's agency, of having caused it.

128. Nor do I consider that the ET's findings of fact compelled it to uphold Ms Bailey's claim. It carried out a careful and detailed analysis of what Kirrin Medcalf and Stonewall did. It summarised the complaint (see [40] above) as being about 11 tweets and referring specifically to Ms Bailey "campaigning for a reduction in trans rights and equality" and "targeting our staff with transphobic abuse", including an allegation of misgendering, and objecting to criticisms which Ms Bailey had made of Stonewall's campaigning. In the passage at [368-376] it rejected the suggestion that the complaint was either intended or understood as a threat to discontinue Stonewall's relationship with GCC if GCC did not expel Ms Bailey. At [377] it concluded that the complaint was "no more than protest, with an appeal to a perceived ally in a 'them and us' debate".

129. In my judgment, it was not particularly likely that in responding to the complaint and identifying any breach of the BSB guidelines, GCC would be significantly influenced by the mere fact that Ms Bailey held particular beliefs i.e. her "gender critical belief and her belief about Stonewall's promotion of gender self-identity encouraging and being complicit in hostility to gender critical feminists" (see ET [328]). On the contrary, a barristers' chambers specialising in equality law could be expected to weigh such a complaint impartially and decide in a lawful manner whether Ms Bailey's expression of any views had contravened any guideline.

130. I have ruled that the right question was not whether the unlawful outcome was reasonably foreseeable but whether, in this statutory context, it is fair or reasonable or just to find Stonewall liable for causing it. But even if, contrary to my view, reasonable foreseeability is the correct test, then for the reasons I have set out, the ET was not bound to decide that issue in Ms Bailey's favour.

131. On the facts that it found, the ET was entitled to find that Stonewall was not liable for causing the basic contravention. The key point was that responsibility for determining the complaint <u>in a discriminatory way</u> lay only with GCC. For that reason, although Kirrin Medcalf's complaint was the "occasion" for it happening (and so could be regarded as causing it in a "but for" sense), and although there was a nexus between Ms Bailey's views and the making of the complaint, it would not be reasonable to hold Stonewall liable for that discriminatory outcome. That defeated the claim under section 111(2).

132. In arriving at that conclusion I bear in mind the context of the Equality Act 2010. I note that just as Ms Bailey's beliefs are protected under sections 4 and 10, the same is likely to be true of Kirrin Medcalf's beliefs (though the ET was not asked to decide that question). Just as she expressed her beliefs in the tweets about which he complained, Kirrin Medcalf expressed his beliefs in the complaint to GCC. If in doing so Kirrin Medcalf had sought to persuade GCC to do something contrary to the 2010 Act, then the torts of causing or inducing could have been

made out. But the ET found that that was not what Kirrin Medcalf did. Instead, Kirrin Medcalf just made a protest based on his beliefs. If those beliefs were protected under the 2010 Act, it would be surprising if a mere protest based on them were itself a contravention of the same Act.

133. Finally, it was contended in paragraph 6 of ground 1 that the ET was perverse in failing to conclude that the complaint caused (or was an attempt to cause) direct discrimination, given its finding that the complaint was made because of Ms Bailey's protected views and resulted (in a "but for" sense) in an investigation and/or in other consequential action which was to her detriment.

134. For the reasons I have explained, that conclusion does not follow. If person A acts because of person C's protected views and thereby causes them to suffer some detriment, that may be an infringement of provisions of the 2010 Act by person A, depending on the nature of their relationship with person C. But those facts by themselves do not necessarily correspond with the elements of the specific tort under section 111(2).

Ground 2

135. I repeat the observations about the meaning of section 111(3) at paragraphs 102-106 above.

136. I do not accept Mr Cooper's submission that the ET erred by treating as conditions for liability under section 111(3) either a subjective intention on Kirrin Medcalf's part to use GCC's Diversity Champion status as leverage or a subjective perception on GCC's part of a threat by Kirrin Medcalf to use it to harm them.

137. Given my conclusion that, to be liable, person A must intend to induce person B to do something which contains all the elements of the basic contravention, Kirrin Medcalf's intentions were plainly a necessary area of enquiry for the ET. That appears to be acknowledged by Mr Cooper in his submission that A's conduct must be intended to induce B to take action of an identified kind. The ET did not find that Kirrin Medcalf intended GCC to inflict a detriment on Ms Bailey because of her protected belief.

138. When determining the true meaning of the complaint, it was also relevant for the ET to consider GCC's perceptions of it (although an attempted inducement could occur even if it was not perceived as such). The ET found that any fear of brand damage was only in the minds of GCC's leaders and was not engendered by the complaint itself.

139. Having weighed all the relevant facts and reached those conclusions, the ET in my judgment was entitled to decide that Kirrin Medcalf neither induced a basic contravention nor attempted to do so.

140. Mr Cooper sought to argue, in effect, that those conclusions were perverse. I reject that submission. In my judgment the ET confronted those parts of the complaint which could have been interpreted as threatening, or as demanding the infliction of a detriment on Ms Bailey. It explained, by reference to the evidence, its conclusion that the complaint was neither intended nor understood as doing either of those things and that it was "just a protest". And, even if Ms Sikand's treatment of the complaint was influenced by GCC's Diversity Champion status, that

logically did not compel a finding that the complaint was an inducement in view of the ET's further finding that Kirrin Medcalf when making the complaint was unaware of that status.

141. From the facts found by the ET, and which in my judgment it was entitled to find, Ms Bailey also fell well short of showing that if Stonewall (by Kirrin Medcalf) either induced or attempted to induce GCC to inflict a detriment on her, the inducement was to inflict the detriment on grounds of her protected belief rather than because of an allegedly objectionable manifestation of her belief. Just as the ET found at [318] that Ms Bailey's protected belief, rather than the manifestation of it, was the reason for the response tweet, it also found at [328] that her belief significantly influenced the complaint outcome. But the complaint as summarised by the ET at [367] was focused on the manifestation of the belief rather than the belief itself. Although the protected belief significantly influenced the making of the complaint (see paragraph 126 above), there was nevertheless a lack of correspondence between the content of the complaint and its outcome. I therefore see no basis on which the ET was bound to construe the complaint as an inducement to discriminate on grounds of the belief.

Conclusion

142. For those reasons I perceive no error of law in the ET's decision and the appeal will therefore be dismissed.