



EMPLOYMENT TRIBUNALS

Claimant: Miss Hannah McCann

Respondent: Ministry of Defence

Heard at: Bristol (in public, by CVP)

On: 17 December 2025

Before: Employment Judge C H O'Rourke

Appearances

For the Claimant: In person

For the Respondent: Mr R Moretto - counsel

RESERVED PRELIMINARY HEARING JUDGMENT

The Respondent is not vicariously liable under s.109 of the Equality Act 2010, for the alleged acts of the trainer, Mr Pearson, as set out in paragraphs 2.1.2 to 2.1.4 of the list of issues.

REASONS

Background and Issues

1. The Claimant was a pilot under training at the Royal Naval Air Station (RNAS) Yeovilton. She failed her Final Aptitude Test on 4 May 2023, resulting in her being unable to pass to the next stage of pilot training and she eventually left service with the Royal Navy.
2. Her pilot training was provided by Babcock International Group plc ('Babcock'), under contract with the Respondent, the MOD, in the person of, for some of the time, in the period February to May 2023, one of their employees, a Mr Pearson.

3. As a consequence, she brought a claim of sex discrimination, which is listed for final hearing from 18 to 29 May 2026. In that claim, she alleges acts of direct sex discrimination and harassment against Mr Pearson.
4. The Respondent applied on 13 May 2025, for strike out of the complaints against Mr Pearson on the basis that, he not being an employee or agent of the Respondent, it could not be held vicariously liable for any alleged discriminatory acts of Mr Pearson and accordingly that issue was listed for determination by today's preliminary hearing.

The Law

5. The Equality Act 2010 (as of February to May 2023)

- a. s.39(2) of the EA 2010 provides:

39 Employees and applicants ...

(2) An employer (A) must not discriminate against an employee of A's (B)—

(a) as to B's terms of employment;

(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;

(c) by dismissing B;

(d) by subjecting B to any other detriment.

(so, in this claim, directing that the MOD, as the Claimant's employer, must not discriminate against her)

- b. s.40 provides:

40 Employees and applicants: harassment

(1) An employer (A) must not, in relation to employment by A, harass a person (B)—

(a) who is an employee of A's;...

(again, in this claim, stating that the MOD must not harass the Claimant)

- c. s.109 provides that:

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.

...

(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.

(the relevant section upon which both parties rely)

d. Section 83(3) provides that:

(3) This Part applies to service in the armed forces as it applies to employment by a private person; and for that purpose—
(a) references to terms of employment, or to a contract of employment, are to be read as including references to terms of service;
(b) references to associated employers are to be ignored.

(simply confirming that for the purposes of the Act, armed forces personnel are 'employees')

6. With effect 26 October 2024 (so, postdating the events in question) a new s.40A was introduced into the Act, stating that:

40A Employer duty to prevent sexual harassment of employees

(1) An employer (A) must take reasonable steps to prevent sexual harassment of employees of A in the course of their employment.

7. Relevant Authorities. I was referred to the following authorities by both parties:

- a. **Yearwood v Commissioner of the Metropolitan Police [2004] ICR 1660 EAT**, a case in which applicant police officers brought claims of discrimination related to acts by investigating or supervising officers, appointed by the relevant chief constable/commissioner. The Court held that such officers were not agents. In respect of consideration of the law on agency, it held (at paragraphs 35-40):

Agency

35. Submissions were made to us on the nature of agency which we found very helpful. There was substantial reference to Bowstead and Reynolds on Agency by Mr Mead, none of which was the subject of criticism in reply on behalf of the Applicants. We therefore take the definition to be as follows:

“(1) Agency is the fiduciary relationship which exists between two persons, one of whom expressly or impliedly consents that the other should act on his behalf so as to affect his relations with third parties, and the other of whom similarly consents so to act or so acts. (My emphasis, and subsequently) The one on whose behalf the act or acts are to be done is called the principal. The

one who is to act is called the agent. Any person other than the principal and the agent may be referred to as a third party.

(2) In respect of the acts which the principal expressly or impliedly consents that the agent shall so do on the principal's behalf, the agent is said to have authority to act; and this authority constitutes a power to affect the principal's legal relations with third parties.

(3) Where the agent's authority results from a manifestation of consent that he should represent or act for the principal expressly or impliedly made by the principal to the agent himself, the authority is called actual authority, express or implied. But the agent may also have authority resulting from such a manifestation made by the principal to a third party; such authority is called apparent authority.

36. The authors recognise that there are limits on the above definition, for they say as follows (at 1–003):

“The word “agency”, to a common lawyer, refers in general to a branch of the law under which one person, the agent, may directly affect the legal relations of another person, the principal, as regards yet other persons, called third parties, by acts which the agent is said to have the principal's authority to perform on his behalf and which when done are in some respects treated as the principal's acts.”

37. The justification for the agent's power is a unilateral manifestation by the principal of his or her willingness to have their legal position changed by the actions of an agent. The result of this manifestation is that the agent has the power to affect the principal's legal relations. The authors also deal with the meaning of “agent” in the abstract, for they say as follows (at 1–022) “And where the term agent is used in a statute or formal document, it has been said that it may be presumed that the word is used in this, its proper legal connotation, unless there are strong contrary indications.”

38. An important incident of the relationship is that an agent may be appointed to do any act on behalf of the principal, which the principal might do himself or herself: paragraph 2–017. A phenomenon of the common law of agency is that when the agent acts on behalf of a disclosed principal, the agent is not liable to the third party, nor can the third party sue the agent upon it. Yet in the field of discrimination, both are liable by statute.

39. It is next appropriate to consider the application of those principles to the two statutes. In our judgment, the use of the term “principal” and “agent” in these statutes connotes the description of the agency relationship described above. The only change from the common law position is, as we have indicated, that both the principal and the agent

are liable in discrimination. Otherwise we see no justification for a departure from the established and well understood context in which the term “agent” is used. It is a far more reliable proposition than the unspecific recruitment of ordinary language asserted on behalf of the applicants. We are attempting to apply a statute which invokes a legal context in which the actors are instantly recognisable as principal and agent, and in which their relationship to each other and to the third parties are defined by long established doctrine. By invoking those terms, there is no need for a lengthy exposition of what Parliament intended to achieve. On the contrary, if a more general expression were used, it would require a more general definition to be given.

40. Support for our approach to this can, we think, be found in the specific reference to the imposition of liability on both the agent and the principal, a departure from common law agency principles. No other departure from those principles is expressed in the statutes, and so we do not consider such departure to be justified. Where the Acts say “agent” in the text and “principal” in the headings, they mean agency, as we have set out from our understanding above.

- b. **MOD v Kemeh [2014] ICR 625 EWCA**, a case involving a contract worker for the MOD (employed by Serco), who worked as a butcher on an army base and was accused of racially abusing a soldier (Private Kemah). The Court took into account the authority of **Yearwood** (and also the authority of **Woodland v Swimming Teachers Association/Essex County Council [2013] UKSC 66**, as relied upon by the Claimant, below). It agreed that the question of whether there was an agency relationship was to be determined by applying the common law doctrine of agency, not some broader concept. In commenting (paragraph 16) on the ET’s judgment, it stated that it appeared to:

“rest on the premise that, if a contractor is carrying out functions for the benefit of an employer which that employer would otherwise need to do for himself, then he can be said to be acting on the employer’s behalf, thereby creating an agency relationship. It would seem to be a further stage in the tribunal’s analysis that all staff provided by the contractor, even though employed directly by the contractor, would at the same time be agents of the employer for which he would be liable as principal. Moreover, the liability of the employer would be greater than for his own employees, since the employer acting in his capacity as principal would not have the benefit of the defence conferred by subsection (3).”

- c. The Court rejected the Appellant’s suggestion that:

“the following would constitute a satisfactory definition of the agency relationship in a case such as this. It is a relationship, other than an employment relationship, (1) where the agent is subject to a degree of direction from the principal; (2) where there is a degree of integration with the principal’s employees; and (3) where there is a degree of proximity between the agent and principal. On this analysis, the concept

would include those regularly working with the principal's employees, but it would exclude contractors who are engaged to carry out a specific task, such as electricians or plumbers called to deal with a particular emergency." (akin, I comment, therefore to the legal test for employment status, such as 'control' and 'integration').

d. Elias LJ said as follows:

38. I am not sure how significant are the differences between the two concepts of agency advanced by the parties in the Yearwood case. The concept of agency at common law is not one which can be readily encapsulated in a simple definition. As the editors of Bowstead & Reynolds point out, "no-one has the correct use of this or any term". Moreover, Judge Peter Clark appears to have had reservations about the requirement, considered to be an essential part of the definition by the appeal tribunal in the Yearwood case, that an agent must have power to affect the principal's legal relations with third parties. In fact the authors of Bowstead & Reynolds (see para 1–04) recognise that someone might quite properly be described as an agent even where this feature is missing. An example is someone who merely introduces or canvasses custom on behalf of the principal without in fact having the power to bind the principal contractually. An estate agent is a typical example. This is not, therefore, an essential element in a common law definition of agency.

39. Even in the so-called "general concept of agency" advanced in the Yearwood case, it would be necessary to show that a person (the agent) is acting on behalf of another (the principal) and with that principal's authority. Once it is recognised that the legal concept does not necessarily involve an obligation to affect the legal relations with third parties, I doubt whether the concepts are materially different.

40. But ultimately it is not necessary for the purposes of appeal to resolve that question. Whatever the precise scope of the legal concept of agency, and whatever difficulties there may be of applying it in marginal cases, I am satisfied that no question of agency arises in this case. In my view, it cannot be appropriate to describe as an agent someone who is employed by a contractor simply on the grounds that he or she performs work for the benefit of a third party employer. She is no more acting on behalf of the employer than his own employees are, and they would not typically be treated as agents. (That is not, of course, to say that employees can never be agents; they might well be, depending on the obligations cast on them, such as where a senior manager is authorised to contract with third parties. He will be an employee but will also act as an agent when exercising the authority to deal with third parties.)

41. In my judgment, Ms Ausher's contract with Sodexo is the source of any authority she has to make decisions relating to the butcher's department in the mess. It may be, as Ms Romney asserts, that ultimately the MoD would have the right to veto her presence, at least for

good reason. But that limited degree of control comes nowhere near constituting an authorisation by the MoD to allow Ms Ausher to act on its behalf with respect to third parties. ...

43 I would respectfully agree that the fact that someone is employed by A would not automatically prevent him from being an agent of B, and I would not discount the possibility that the two relationships can co-exist even in relation to the same transaction. But in my judgment there would, particularly in the latter case, need to be very cogent evidence to show that the duties which an employee was obliged to do as the employee of A were also being performed as an agent of B. It is in general difficult to see why B would either want or need to enter into the agency relationship. That is so whichever concept of agency is employed. There is a complete lack of such cogent evidence here.

44. In my judgment, therefore, the argument of Ms Romney is unsustainable. Indeed, unlike the appellants in the Yearwood case, who at least asserted a concept of agency which recognised the need for the agent to be authorised to act on behalf of the principal, she relies on the concept of an agency relationship involving three criteria or characteristics which does not focus on the concept of authority as such at all. In my view, these criteria fail to reflect the statutory language. Her concept has the merit of sustaining her case, but I see no conceivable warrant in the language of the section for adopting it. Ms Ausher may be said in a general sense to be working for the benefit of the MoD, but she is not acting on its behalf. She is not, as it were, standing in the shoes of the MoD in relation to independent third parties.

e. Lewison LJ said at paragraph 70:

70. Under section 32(2) Parliament has chosen to attribute liability by reference to well established legal concepts. It must, therefore, be taken to have intended those legal concepts to be interpreted in accordance with ordinary legal parlance. This was the conclusion of the Employment Appeal Tribunal in *Yearwood v Comr of Police of the Metropolis* [2004] ICR 1660. I agree with it and the many cases that have followed it in the Employment Appeal Tribunal. There is, however, in my judgment one error in the reasoning. At para 38 the appeal tribunal said that it was a “phenomenon of the common law of agency . . . that when the agent acts on behalf of a disclosed principal, the agent is not liable to the third party, nor can the third party sue the agent on it”. If that observation is restricted to liability in contract, it may well be correct. But in that event, it is irrelevant to the question whether the imposition by section 32(2) of liability for a statutory tort was intended to mirror the common law. But, if it was intended as a more general proposition encompassing an agent’s liability in tort, then it is wrong. However, if there is an error, then correction of that error strengthens rather than weakens the argument that section 32(2) uses its terminology in the same way as that terminology would be understood in the common law of agency.

- f. Finally, the Court recorded that:

'Per curiam. The result is that, because of the different sets of rules relating to contract workers and employees, the claimant falls in a gap in the statutory protection. Section 7 confers rights on contract workers to bring a claim against the employer for whose ultimate benefit they provide services, but the Act does not impose liabilities on that person for the acts of the contract worker. Parliament may wish to consider this lacuna, although if it provides a remedy, it will have to decide whether it is the immediate employer rather than the end user of the services who should bear the legal responsibility.'

(s.40A was, effectively, Parliament's response to that 'lacuna', rendering employers personally (as opposed to vicariously) liable for acts of harassment of their employees by third parties, which they had not taken reasonable steps to prevent.)

- g. **Woodland**. In closing submissions, the Claimant referred to this case (detailed above). The case concerned the liability, in the tort of negligence, of a school/local education authority to its pupils, beyond its vicarious liability for its employees' actions and specifically whether a school owed a non-delegable duty of care for the actions of non-employees interacting with pupils during the school day. In the circumstances of this case a pupil undergoing a swimming class suffered serious injury while under the supervision of employees of a contractor of the local authority. The Court concluded that there was such a non-delegable duty of care in that case. Lord Sumption said as follows:
- h. 4. *The issue on this appeal is, however, nothing to do with vicarious liability, except in the sense that it only arises because there is none. On the footing that the local authority was not vicariously liable for the negligence of Mrs Stopford, Ms Burlinson or Ms Maxwell, the question is what was the scope of the authority's duty to pupils in its care....*
- i. Lord Sumption set out the characteristics (in the Common Law of tort, as distinct from statutory law) of the cases likely to impose a non-delegable duty:

(1) The claimant is a patient or a child, or for some other reason is especially vulnerable or dependent on the protection of the defendant against the risk of injury. Other examples are likely to be prisoners and residents in care homes.

(2) There is an antecedent relationship between the claimant and the defendant, independent of the negligent act or omission itself,

(i) which places the claimant in the actual custody, charge or care of the defendant, and

(ii) from which it is possible to impute to the defendant the assumption of a positive duty to protect the claimant from harm, and not just a duty to refrain from conduct which will foreseeably damage the claimant. It is

characteristic of such relationships that they involve an element of control over the claimant, which varies in intensity from one situation to another, but is clearly very substantial in the case of schoolchildren.

(3) The claimant has no control over how the defendant chooses to perform those obligations, i.e. whether personally or through employees or through third parties.

(4) The defendant has delegated to a third party some function which is an integral part of the positive duty which he has assumed towards the claimant; and the third party is exercising, for the purpose of the function thus delegated to him, the defendant's custody or care of the claimant and the element of control that goes with it.

(5) The third party has been negligent not in some collateral respect but in the performance of the very function assumed by the defendant and delegated by the defendant to him.

8. Subsequent to the Hearing, on considering the authorities in this matter, I referred myself to the case of **Handa v The Station Hotel (Newcastle) Ltd [2025] EAT 62**. As that authority had not been before either me or the parties at the Hearing, I invited the parties to provide further submissions in respect of it, which they have done. I will consider its relevance, or otherwise, below.

The Facts

9. I heard evidence from Ms Fiona Oaklands, an MOD employee and from Ms Helen Cotton, a Babcock employee. The Claimant did not give evidence.
10. I was provided with a hearing bundle, witness statements and both parties provided skeleton arguments.
11. The essential facts in this case, relevant to the issue I need to decide upon, are not really in dispute. They are:
- a. The Claimant was an employee of the Respondent.
 - b. Mr Pearson was an employee of Babcock, subject to his contract of employment with that Company [225].
 - c. The Respondent had no direct contractual relationship with Mr Pearson, their relationship being with Babcock [contract 159], who they had engaged to provide flying training, using Babcock's aircraft and trainers and who committed to carrying out a set number of 'sorties'. There was no requirement that any named trainer be provided, just that the services of a properly qualified trainer be supplied. Ms Cotton said that if the Respondent had a concern about the service being provided by Babcock, or of Mr Pearson personally, they could first take it up 'at a local level' with the Babcock manager on site (to whom Mr Pearson

reported), but if not resolved, it could be escalated up the management chain.

- d. Mr Pearson was based at RNAS Yeovilton, where, for the period February to May 2023, he instructed the Claimant on the flying of light aircraft, to standards set by the Respondent. On occasion, he would assume the role of 'senior pilot/flight commander' on the Station, a duty shared with RN personnel, with the responsibility for flights taking place from the Station.
 - e. The Final Aptitude Test that the Claimant failed on 4 May 2023 was conducted by her RN commanding officer, Lieutenant Commander Clinton. (It is the Claimant's case, however that that decision was reached '*because of a knowledge gap attributable to discrimination/harassment she received at the hands of the trainer (Mr Pearson)*'. She described it in submissions as being akin to a '*driving instructor failing to instruct a learner on the use of indicators*'.) Ms Oaklands stated that the selection, grading or withdrawal of a pilot from training was a decision for the Respondent, not Babcock.
 - f. Ms Cotton accepted that in exceptional circumstances Babcock personnel could conduct the above test but stated that that was not Mr Pearson's role [job profile 277].
12. The Claimant contended that Mr Pearson was carrying out a 'core military function', indistinguishable from those carried out by military colleagues and was part of the 'Whole Force' (which included contractors), to which the Respondent's Joint Service Publication (JSP) 822 referred to, in respect of 'care and welfare in training' [362].

Closing Submissions

13. Mr Moretto, in addition to his skeleton argument, made (in summary), the following submissions:
- a. The Respondent can only be liable for the acts of Mr Pearson, if he was, subject to s.109, an 'agent' of theirs. It is relevant to note that the statutory defence open to employers, in sub-section (4) only applies to acts of their employees, not their agents which would mean, therefore, if the Claimant's case is correct that the MOD has a wider liability for the actions of Mr Pearson, than it has for its employees, which cannot have been Parliament's intention in drafting this legislation.
 - b. This is the reason, therefore that the authorities referred to have taken a strict approach to the nature of 'agency'. The Court of Appeal in **Kemeh** recognised a possible lacuna in the then statutory law, which was for Parliament to address, which they did, in s.40A of the Act, but the Claimant is 'stuck' with the law applicable at the time of these incidents. So, therefore, her only route can be to establish an agency relationship/agreement between the MOD and Mr Pearson.

- c. **Yearwood** indicates that 'agency' requires a 'fiduciary' relationship, going beyond, therefore, what would be required from an employee. There must also be an express or implied agreement between the principal and agent, to which, importantly, Mr Pearson would also have to agree. The case suggests that such relationships would be 'instantly recognisable', such as a solicitor signing a document on behalf of a client.
- d. **Kemeh** rejected arguments that the Claimant now, in turn, seeks to bring, such as to the extent of 'control' exercised by the MOD over Mr Pearson and his 'integration' into the RNAS, as connoting agency. The Court stated that such a test would be '*rewriting, rather than interpreting the statute.*' So, the Tribunal must apply the Common Law test for determining whether or not an agency relationship exists and accordingly the finding in **Yearwood** is binding on this Tribunal.
- e. It is accepted in this respect that there is some 'blurring' of this test, with **Kemeh** indicating that it might not be necessary for an agent to legally bind the principal. But in any event, the authority indicates that it not necessary to determine that question, as no question of agency arose in that case (with reference to paragraph 40, as quoted above).
- f. While it is not impossible for a contractor's employee to be an agent 'very cogent evidence' would be required to support such a conclusion, but none such exists in this case, and it is noted that the Claimant chose not to give evidence. There would have to be a fiduciary duty, to which duty both the MOD agreed, and Mr Pearson had agreed to act on their behalf, either expressly or impliedly, effectively entering into a contract with the Respondent, for which there is no evidence. This is not a case of 'actors instantly recognisable' as principal and agent.
- g. All such terms and conditions are covered by the respective contracts between the MOD and Babcock and Babcock and Mr Pearson.
- h. Mr Pearson only carried out the role allocated to him and the 'sortie reports' filed by him on the Claimant's performance are exactly what would be expected of an instructor [348]. How the 'level' is decided for each task it set out in written procedures [309] which, not dissimilar to training for a driving test, allows for some results to be below the required level, provided the majority are over the level. So, at page 350, for example, the Claimant would have 'passed', but Mr Pearson was not testing her but training her.
- i. While the Claimant seeks to argue that Mr Pearson was carrying out a 'core military function', it is not accepted that learning to fly a light civilian aircraft is such a 'function', any more than, in the **Kemeh** case, is feeding armed forces personnel. The two can't be distinguished.
- j. The Claimant also seeks to rely on the contents of JSP 822, as to the duty of care owed to trainees, but this simply imposes a duty on military

commanders to ensure that all those under their command, which can include civilian contractors, comply. There is no evidence that Mr Pearson was even aware of this document.

- k. In rebuttal of the Claimant's reliance on **Woodland** (raised only in her closing submissions), the case relates to negligence at Common Law, effectively in respect of persons *in loco parentis* for children or vulnerable persons. It is wrong to attempt to interpret the Equality Act through Common Law. It is not a question of being 'fair' to the Claimant but correctly interpreting the application of statute (s.109) to the circumstances of the Claimant's case.

Claimant's Submissions

14. The Claimant, in addition to her skeleton argument made the following submissions:

- a. The circumstances in her claim should be factually distinguished from those in **Kemeh**, as, in her case, Mr Pearson exercised a 'gatekeeping' function in the decision as to whether or not she would pass her training, whereas, in **Kemeh**, the contractor had no control or authority over Private Kemeh. He was providing a 'core military function', whereas, in **Kemeh**, the contractor was providing simply an ancillary service. This is analogous to the 'core function' principles in **Yearwood** '*where a chief officer was held liable for discrimination by officers carrying out disciplinary functions, as that was a core function of the service*'. (In fact, in **Yearwood**, the chief officer was held to be vicariously liable for the actions of a civilian manager who dealt with personnel matters. In the Merseyside Force, police officers were engaged by the chief officer and civilian support staff by the Police Authority, but all were effectively under the command and instruction of the chief officer, as '*With a civilian workforce of this size, it is to be expected that the chief constable will give instructions to his managers in a range of different situations. For example, when he asks his (civilian) secretary to book a train ticket to London, he or she would act on the chief constable's behalf, notwithstanding that the formal contract of employment is with the Merseyside Police Authority.*' (paragraph 97)).
- b. Mr Pearson's role was that of a critical precursor to her final test and he was delegated this military function by the Respondent, with (with at least implied) authority over her, while being operationally integrated into the RNAS. His grading authority, assessment criteria, and reporting duties were imposed directly by the MoD's chain of command (Senior Pilot, Commanding Officer), not by Babcock.
- c. Even if the Common Law test for agency is not met, the JSP imposes a duty on the 'whole force', including civilian contractors, to exercise a duty of care for trainees, meaning that the MOD had a non-delegable statutory duty of care to her (reliant on **Woodland**). This broader interpretation should be applied to s.109.

- d. Mr Pearson was acting with the authority of the principal, the MOD, who are vicariously liable for his acts of discrimination.
- e. Were it not for his acts of direct discrimination and harassment, she would still be serving in the Royal Navy, but his 'gatekeeping' role prevented her from doing so.
- f. The consequences of Mr Pearson's actions were devastating for the Claimant, both in terms of her planned military career and her emotional wellbeing. She considers that since leaving the Royal Navy she has been the subject of a campaign of victimisation by an unknown person, who has made false allegations about her abilities to potential employers.

Conclusions

15. I consider the following factors of relevance in my decision:

- a. Both **Yearwood** and **Kemeh** indicate that 'agent/agency' must be interpreted in accordance with Common Law principles and that there is no scope for any broader interpretation.
- b. A possible *lacuna* in the statute in relation to contractors was identified in **Kemeh**, in that contractors were protected from discrimination by the Act but were not liable for any acts of discrimination on their part. After that decision Parliament introduced s.40A into the Act, which does not vary or expand the concept or scope of 'agency' in s.109, but merely imposes a duty on employers to take reasonable steps to prevent sexual harassment of their employees, during their employment. That is not the same as making employers vicariously liable for the actions of third parties who may sexually harass their employees. If Parliament had intended otherwise then no doubt s.109 would have been widened accordingly, to include 'contractors' and possibly others. It is not in dispute that the Claimant cannot rely on s.40A, as it was not in force at the time of the alleged discriminatory acts.
- c. I see no grounds for distinguishing the facts in **Kemeh** from that of this case before me. Even if relevant (which I doubt it is) the concept of 'core military function' is undefined and I see no distinction between catering for military personnel and teaching them to fly a civilian light aircraft. It might even be argued that feeding an armed force ('*an army marches on its stomach*') is more 'core' than conducting an initial stage of flight training for a small number of individuals. Mr Pearson's 'integration' into the Respondent's organisation and the 'control' they exercised over how he fulfilled his role are concepts specifically rejected in **Kemeh**, as implying 'agency'.
- d. The Claimant's reliance on **Woodland** is misplaced. The Judgment specifically states that it has nothing to do vicarious liability (and by inference, agency) but is concerned with the imposition of a non-

delegable duty of care on those effectively (as Mr Moretto stated), in *loco parentis* of children or vulnerable persons, which, in this case, would be the MOD. Putting aside the category of cases likely to impose such a duty, which clearly do not apply to the Claimant, there is no scope for 'reading across' this Common Law duty in negligence into statute, specifically, in this case, s.109. The JSP has no legal authority (beyond the internal command structure of the Services) and simply imposes on commanders (and by implication the MOD) a duty to ensure that all under their command (including contractors) exercise a duty of care towards trainees. Similar to **Woodland**, it has no bearing on agency or vicarious liability.

- e. In my view, **Handa** does seek to expand the definition of 'agency' in the employment law context. It concerns the engagement by the employer of Mr Handa of two external HR consultants to, respectively, investigate disciplinary charges against him and then to conduct disciplinary proceedings, following which the employer dismissed him. Mr Handa asserted that the consultants were acting as agents of the employer. At a preliminary hearing, an employment tribunal struck out the claims, as having no reasonable prospects of success, there being no agency relationship in place. The EAT concluded that the tribunal had erred in reaching that conclusion. As the summary of the Judgment states:

'Observations are made by the EAT on the approach to be taken to the application of the common law concept of agency to whistleblowing and discrimination claims in the employment tribunal.'

Those observations included the following (my emphasis):

'65. My conclusions on this point are as follows. First, while Mr Cordrey fairly submitted that the general authorities on the concept of agency, and the commentary in Bowstead, indicate that the power to affect the putative principal's legal relations with third parties is one of the hallmarks of agency, so that it would be unusual and atypical for an agency relationship to exist without it, as he was bound to acknowledge, those authorities do not hold that it is an essential requirement in every type of case.

66. Secondly, and importantly, while the authorities indicate that the provisions of the legislation relating to discrimination and whistleblowing have adopted the common law concept of agency, nevertheless that concept falls to be applied by employment tribunals in the particular and peculiar context of an employment relationship, and its dynamic nature, and keeping in mind the underlying purpose of the legislation. The fact that, in other commercial contexts, it would be unusual for a person who cannot alter the putative principal's "hard" legal relationship with a third party to be treated as an agent, should not necessarily be taken as casting light on how the concept of agency might or might not apply in the context of a claim arising from an employment relationship.

67. *The reasoning in McGlennon and Yearwood and Weeks did not turn on the provisions deeming police officers to be employees, but on whether the impugned conduct occurred during the course of activities that related to the relationship and could have been carried out by the deemed employer. Further, the significant point in McGlennon was that decisions about deployment and posting formed part of the management of the relationship; and the Husain/Robinson complaint in Yearwood was about what allegedly occurred during the course of a disciplinary hearing. Liability did not in either case depend on the contractual terms, or the status of the contract, having changed.*

68. *In summary, within the context of an employment relationship, where the complaint relates to the conduct of someone acting on behalf of an external provider, the material issue is whether the services that they are contracted to provide relate to a significant aspect of the employment relationship, rather than some other aspect of the employer's business or activities. Taking that approach, someone who incidentally comes into contact with employees in the course of providing a contracted service to their employer, which is itself unrelated to an employment relationship, is unlikely to be regarded as an agent for these purposes (the situation in Kemah). But I do not see why a person who is retained to carry out an employment-related procedure, such as a grievance or disciplinary investigation, could not be regarded as the employer's agent in the course of carrying out those functions.'*

In that context, I see no reason why Mr Pearson could not be regarded as carrying out 'an employment-related procedure', i.e. training the Claimant to fly a light aircraft, as a necessary step of her progressing her career.

- f. As stated above, both parties made further submissions as to the relevance or otherwise of **Handa**. The Claimant, however, despite being invited to comment only on the implications of that case, sought to expand her submissions to include other matters. Briefly, either such submissions are simply a repetition of submissions she had already made or were irrelevant. An example of the latter is the Claimant's provision of an email to her from the First Sea Lord. Her assertion that the contents of that email are an 'admission of responsibility', is an entirely wilful misinterpretation on her part. Equally, the inclusion of extracts from a Defence Select Committee do not assist in any way in my considerations as to whether or not an agency relationship existed in her case.

Judgment

16. I find that The Respondent is not vicariously liable under s.109 of the Equality Act 2010, for the alleged acts of the trainer, Mr Pearson, as set out in paragraphs 2.1.2 to 2.1.4 of the list of issues and I do for the following reasons:

- a. The authorities cited in paragraph 15 a to d, above, indicate that in the circumstances of this claim, an agency relationship cannot be established, because:
 - i. There is no scope for wider interpretation beyond that of the Common Law.
 - ii. Parliament considered whether there was a *lacuna* in the statute, following **Kemeh**, but did not broaden the definition of 'agency'. Also, it cannot have been Parliament's intention in drafting this legislation to provide a statutory defence to employers, in sub-section (4), but which only applies to acts of their employees, not their agents and which would mean, therefore, if the Claimant's case is correct that the MOD has a wider liability for the actions of Mr Pearson, than it has for its employees.
 - iii. **Kemeh** rejects arguments as to the concepts of 'integration' with, and 'control' by, an employer of a third party, as relied upon by the Claimant.
- b. The Claimant is correct, I consider, in stating that she was *'in a "legal vacuum" where the MoD could effectively legalise (more properly, evade) discrimination by simply replacing service instructors with contractors'*. It appears that **Handa** seeks to redress that balance, but I concur with Mr Moretto's further submissions in this respect, namely that:
 - i. **Handa** does not address the issue of an alleged agent being the employee of a subcontractor, as opposed to being the subcontractor himself, and therefore there being no direct agreement between the principal and agent (as required by **Kemeh**), as these were not the circumstances in that case, the consultants being the direct subcontractors.
 - ii. **Handa**'s reference to the case of **UBS AG (London Branch) v Kommunale Wasserwerke Leipzig GmbH [2017] EWCA Civ 1567** included the guidance that *"the absence of any of these main characteristics (fiduciary duty/control by the principal/authority to effect relationships) must nonetheless be a significant pointer away from the characterisation of a particular relationship as one of agency, even though there might be rare exceptions"*.

- iii. The purpose of the hearing in **Handa** was to determine whether or not the tribunal below had erred in striking out the claim as having no reasonable prospect of success, not whether or not an agency relationship existed. Justifying strike out requires the surmounting of a high bar, which, in this case, the EAT did not consider had been reached. The EAT's 'observations' on the wider issue of agency run contrary to the Court of Appeal case of **Kemeh**, which is binding authority on this Tribunal.

C H O'Rourke

19 January 2026

Sent to the parties on
02 February 2026