IN THE EMPLOYMENT APPEAL TRIBUNAL **Appeal No. EA-2022-001163-NLD**

BETWEEN

Ms ALLISON BAILEY

Appellant

and

(1) STONEWALL EQUALITY LTD

(2) GARDEN COURT CHAMBERS LTD

(3) RAJIV MENON KC AND STEPHANIE HARRISON KC sued on behalf of all members of Garden Court Chambers

Respondents

APPELLANT'S SKELETON ARGUMENT

References in square brackets are to pages in the EAT Hearing Bundle. References to the 'Judgment' and 'Reasons' are, respectively, to the Judgment and Reasons of the Central London Employment Tribunal (EJ Goodman, Mr Reuby and Ms Darmas) ('the Tribunal') sent to the parties on 27 July 2022.

The parties will be referred to using the same nomenclature as the Employment Tribunal in its Judgment and Reasons. Therefore, the Appellant will be referred to as 'the Claimant', the First Respondent will be referred to as 'Stonewall', and the Second and Third respondents will be referred to collectively as 'Garden Court'.

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Introduction and overview

1. Section 111 of the Equality Act 2010 ('EqA10') makes it unlawful for a person (A) to instruct, cause or induce (or attempt to instruct, cause or induce) another person (B) to contravene that Act in respect of a third person (C), where the relationship between A and B is one in which it would also be unlawful for A to engage in prohibited conduct against B.

2. This appeal is about the ingredients required to establish liability for causing or inducing a contravention pursuant to s111. In particular, it raises issues as to:

   2.1. the mental element required in order to establish such liability – that is, what is necessary as regards A's mental processes, including whether any specific intention is required; and

   2.2. the nature and degree of the required causal connection between the actions of A and the contravention in question.

3. As far as the Claimant's representatives are aware, this is the first case at EAT level (or above) to consider the ingredients of liability under s111 in that regard. Moreover, s111 is a unique statutory tort. Identifying the required ingredients therefore raises novel questions of construction about which there is little or no relevant authority, beyond general principles of statutory interpretation.

4. The specific factual backdrop to this case is the public debate, which has gained prominence in recent years, about the relationship between biological sex and gender identity[1], and the implications of that relationship for the treatment of

[1] 'Gender identity' has come to take on a meaning that is broader than gender reassignment. As the Tribunal records at Reasons §§43-48 **[14-15]**, UK law defined the difference between men and women on the basis of their observable birth sex. Case law and statute initially intervened to address the legal status of men and women who, from time to time, have felt profoundly uncomfortable with their bodies, and decided to live as the opposite sex, some of whom have undergone surgery, some not. Under the EqA10, the protected characteristic of 'gender reassignment' is defined as proposing to undergo, undergoing or having undergone a process (or part of one) for the purpose of reassigning the person's sex by changing physiological or other attributes of sex. Again, surgery is not necessary. More recently, 'gender identity' has taken on a broader meaning still, with some believing that everyone has an innate 'gender identity' that may or may not align with his or her biological sex. This has led to proposals for changes to the law, with some advocating for 'gender self-identity' (Reasons, §49 **[15]**).

different affected groups, including in particular women and girls, lesbians and gay men, and trans people.

5. In particular, the core events relevant to this appeal concern action taken in respect of the Claimant, a barrister, by Stonewall and by her chambers, Garden Court, following a 'Twitter storm' which erupted in October 2019 in response to various tweets by the Claimant in which she expressed 'gender critical'[2] beliefs, criticised Stonewall's campaigning, and supported the launch of LGB Alliance (an organisation for lesbian, gay and bisexual people founded on gender critical principles).

6. However, the EAT will not need to determine any issues specific to the debate about sex and gender or the Claimant's position in that debate because, insofar as there were such issues, they have been disposed of by findings and conclusions of the Tribunal against which there is no appeal or cross-appeal.

7. In particular, there is no appeal or cross-appeal against the following findings and conclusions of the Tribunal:

   7.1. The Claimant's beliefs – in summary, that sex is real and observable, that gender is a subjective identity with no objective basis, and that gender theory as espoused by Stonewall in its campaigning is sexist, homophobic and particularly damaging to lesbians – are a coherent set of beliefs, genuinely held by her, about a weighty and substantial aspect of human life that are worthy of respect in a democratic society, such that they amount to philosophical beliefs for the purposes of the protected characteristic of belief under EqA10, s10 (Reasons, §§279-280 & 290-293 **[75-6, 78-9]**).

   7.2. Garden Court unlawfully directly discriminated against the Claimant because of her beliefs by (amongst other things) partially upholding a complaint that had been made to Garden Court by Kirrin Medcalf, Stonewall's Head of Trans Inclusion, about the Claimant's expression of her beliefs on Twitter and elsewhere (Reasons, §§320-328 **[85-88]**).

[2] That is, critical of the notion that everyone has an innate 'gender' which is different from, and supersedes, his or her (biological) sex.

7.3. In the tweets which were the basis for Garden Court's decision to partially uphold that complaint, the way in which the Claimant expressed her beliefs was not such as to take them outside the protection of ECHR, Articles 9 and/or 10, or therefore outside the protection of EqA10, ss10 and/or 13 (as construed and applied to give effect to those Convention Rights, pursuant to section 3 of the Human Rights Act 1998 ('HRA')) (Reasons, §§295-8 & 327, final 8 lines **[79-80, 88]**).

8. The central issue in this appeal is whether the complaint by Kirrin Medcalf **[352-3]** caused or induced Garden Court's direct belief discrimination in partially upholding that complaint for the purposes of liability under EqA10, s111.

9. Within the framework of s111, therefore, Stonewall is person A and Garden Court is person B. It is common ground that they had a relevant relationship because Garden Court was a member of Stonewall's 'Diversity Champions' scheme, pursuant to which Stonewall provided services to Garden Court (Stonewall's Further Amended Grounds of Resistance, §§3-4 **[250]**; Reasons, §61 **[18]**). The Claimant is person C.

10. The Tribunal held that Kirrin Medcalf[3] made the complaint to Garden Court in order to *'protest about [the Claimant's] views'* (i.e. her beliefs) (Reasons, §369 **[100]**) and, but for that complaint, Garden Court would not have unlawfully discriminated against the Claimant by upholding any complaint against her (Reasons, §377 **[102]**).

11. It nevertheless dismissed the claim under s111, apparently on the grounds that:

11.1. Kirrin Medcalf did not have *'any specific aim in mind except perhaps a public denial of association with [the Claimant's] views'* (Reasons, §§369-372 **[100-101]**); and/or

11.2. Kirrin Medcalf did not use Garden Court's membership of the Diversity Champions scheme to induce any particular action (Reasons, §§373-6 **[101-2]**); and/or

[3] It is common ground that Kirrin Medcalf was at the material time an employee of Stonewall and that his actions are therefore to be treated as actions of Stonewall pursuant to EqA10, s109: see Issue 19 in Appendix 1 to the Judgment **[113]**.

11.3. the complaint was *'the occasion'* of Garden Court's discriminatory decision, not the cause (Reasons, §377 **[102]**).

12. The issue on appeal, therefore, is whether any of those grounds provide a proper basis in law for dismissing the s111 claim, or whether the relevant ingredients are in fact established by the Tribunal's primary factual findings. The first two of the grounds on which the Tribunal dismissed the claim go to the mental element of liability under s111. The third goes to the required causal link.

13. By way of overview, the Claimant's core submissions are as follows:

13.1. The mental element for liability under s111 mirrors the mental element for the basic contravention in question, together with any further element inherent in each of the different ways in which the tort may be committed (i.e. instructing, causing, inducing, or attempting any of those things). In the case of causing or inducing direct discrimination, this means that all that is required is that A takes action *because of* the relevant protected characteristic, which causes or induces B to directly discriminate against C.

13.2. As to the causal connection required for liability under s111, it is *at least* sufficient that B discriminates against C in a way that was a reasonably foreseeable consequence of A's actions. Certainly, the mere fact that B's discrimination is also the result of an independent decision by B, who may not follow precisely the same thought processes as A, cannot by itself be regarded as breaking the chain of causation or rendering B's discriminatory actions too remote because that is the very thing that, pursuant to s111, A has a responsibility to guard against. Indeed, an intervening act of discrimination by B is inherent in the very structure of liability under s111. There *may* be cases where B discriminates in a way that was so unexpected that it may be regarded as too remote, but that point does not need to be decided in this appeal because, on any view, for the recipient of a complaint about a person's expression of their beliefs to consider and uphold it in a way that amounts to direct discrimination because of those beliefs is obviously a foreseeable consequence of making that complaint.

13.3. Applying those tests, all of the ingredients for liability for causing and/or inducing direct belief discrimination under s111 are established by the findings summarised at paragraph 10 above: in making the complaint to *'protest about'* the Claimant's beliefs, Kirrin Medcalf acted because of those beliefs, in response to which Garden Court considered and (partially) upheld that complaint because of those beliefs in a way that was entirely foreseeable and amounted to direct belief discrimination.

13.4. None of the grounds on which the Tribunal dismissed the s111 claim (summarised at paragraph 11 above) provides a sound basis in law for doing so: neither intention to bring about a specific objective nor exploitation of the relationship between A and B is a necessary ingredient for liability under s111(2) or (3), nor is there any proper basis for finding that the complaint was the *'occasion'* but not a cause of the discrimination by Garden Court for the purposes of s111(2) (whatever that may mean, which is not in any event adequately explained by the Tribunal).

Relevant facts

14. The Tribunal's factual findings in respect of the Claimant's claims as a whole are very extensive. The following outline is limited to those which are either directly relevant to the issues in this appeal or provide narrative context.

15. At the material times, the Claimant was a barrister and a member of Garden Court (Reasons, §1 **[4]**).

16. Stonewall is a charity whose stated aim is to advance the rights of gay, lesbian, bisexual and trans people (Reasons, §54 **[16]**). From around 2015, it focused increasingly on transgender issues and transgender reform, setting up a 'Stonewall trans advisory group' ('STAG') to formulate a 5-year plan (Reasons, §§54-55 **[16]**). It adopted the slogans 'trans women are women', 'no debate' and campaigned for gender self-identification (Reasons, §§59, 217, 290 **[18, 58, 78]**).

17. This change in direction caused tension among some of Stonewall's traditional supporters: lesbians in particular felt threatened that males who identified as women would have access to same sex spaces, and alienated when told that they were

transphobic if they objected. Additionally, some lesbian and gay men regarded gender recognition reform as now advocated by Stonewall as incompatible with their rights (Reasons, §§59, 112 **[17-18, 30]**).

18. The Claimant fell into both categories. From around late 2017, she developed the belief that Stonewall's trans rights agenda was one of the most dangerous political and cultural movements in the West, which could destroy lesbian rights and women's rights and boundaries. She became concerned about Stonewall's influence, in that it purported to represent LGB people, without recognising the concerns of women, and lesbians in particular, about the trans rights agenda (Reasons, §113 **[30-31]**).

19. The Claimant's relevant beliefs and the Tribunal's findings and conclusions about them are set out in full in paragraphs 279-280 and 289-293 of the Judgment **[75-6, 78-9]**. Reference should be made to those findings and conclusions for the detail, if necessary. In summary, the following are all components of the Claimant's philosophical belief for the purposes of her protected characteristic of belief under EqA10, s10:

    19.1. Sex is real and observable. Gender (as proselytised by Stonewall) is a subjective identity: immeasurable, unobservable and with no objective basis.

    19.2. Stonewall's slogan 'trans women are women' seeks to conflate sex with gender identity.

    19.3. Stonewall's campaigning on this subject is binary, absolutist and evangelical, labelling anyone who disagrees as a bigot. Its campaigning is sexist and homophobic and has resulted in threats against women (including threats of violence and sexual violence) becoming commonplace, making Stonewall complicit in such threats.

    19.4. Gender theory as proselytised by Stonewall is severely detrimental to women, in particular because it seeks to deny women the ability to have female-only spaces such as in prisons, changing rooms, medical settings, rape and domestic violence refuges, and in sport.

19.5. Gender theory as proselytised by Stonewall is also particularly and severely detrimental and damaging to lesbians. It has sought to reclassify same-sex attraction as same-gender attraction, so that heterosexual men who identify as women are to be treated as lesbians. This has led to pressure on lesbians to have sex with male-bodied people or be labelled as bigoted. This is inherently homophobic because it denies the reality and legitimacy of same-sex attraction and invites opprobrium and threatening behaviour against people who do recognise that reality and legitimacy. Stonewall's position has left lesbians without the representation previously provided by Stonewall. Lesbians who disagree with Stonewall's lobbying on gender identity and trans rights find themselves cast as bigots and transphobes by the very charity founded to protect them from unlawful discrimination.

20. In November 2018, Garden Court became members of Stonewall's Diversity Champions scheme. That scheme had the declared aim of developing inclusive workplaces. In return for an annual fee of £2,500 (excluding VAT), members of the scheme receive a dedicated account manager to advise on best practice and conduct client meetings with stakeholder groups, free places at Stonewall best practice seminars, use of the Diversity Champions logo, copies of Stonewall research publications, discounted rates for Stonewall conferences, and networking opportunities with other member organisations (Reasons, §61 **[18]**). By providing those benefits in return for the annual fee under the terms of that scheme, it was common ground that Stonewall was a service provider providing a service to Garden Court for the purposes of EqA10, s29 (Stonewall's Further Re-Amended Grounds of Resistance, §4 **[250]**).

21. On 22 October 2019, the Claimant sent a tweet announcing and supporting the launch of LGB Alliance (an organisation for lesbians, gay men and bisexuals founded on gender critical principles), which led to an avalanche of tweets in response some of which were directed at Garden Court (Reasons, §§130-132 **[34-5]**).

22. On 23 October 2019, Kirrin Medcalf (Stonewall's Head of Trans Inclusion) attended a meeting at Garden Court of the 'Trans Organisation Network' ('TON'), a network run by the LGBT Consortium, an umbrella organisation of NGOs, which

included Stonewall. The meeting was organised by Shaan Knan, an employee of the LGBT Consortium and also a STAG member (Reasons, §§56, 133 **[17, 35]**).

23. At that meeting, Shaan Knan encouraged attendees to write to Garden Court's Heads of Chambers to express *'concern about Allison Bailey's (barrister) transphobic comments on twitter'* (Reasons, §135 **[35-6]**). (Shaan Knan told attendees that this encouragement came from Michelle Brewer, a barrister at Garden Court, although the Tribunal found he was mistaken about that: Reasons, §§196, 135 **[36, 96-7]**.)

24. On the evening of 24 October 2019, Shaan Knan also put a message on the 'STAG wall' (an internal Stonewall message board restricted to STAG members: Reasons, §56 **[17]**), stating that there would be *'a meeting on Monday [28 October] with the head of [Garden Court] to discuss if any formal action against Bailey should be taken'* and again encouraging *'the trans community to write messages of support (supporting action against Bailey) to the head of Garden Court Chambers'* (Reasons, §137 **[36-7]**).

25. Over the course of 22-25 October 2019, Garden Court received a number of tweets and messages via its website making various allegations against the Claimant and there were numerous internal communications about how to deal with them (Reasons, §§132, 136, 138-140, 141-154, 174-6 **[34-42, 46-7]**).

26. One action which Garden Court took was, on 24 October 2019, to tweet a response to some of those who had made allegations against the Claimant in tweets, stating (amongst other things) that it was investigating concerns about the Claimant's comments and that her views did not represent Garden Court's position (Reasons, §155 **[42]**). The Tribunal held that response tweet was an act of unlawful direct belief discrimination (Reasons, §§315-318 **[84-5]**), but that is not the act of discrimination that is relevant to this appeal.

27. Another step which Garden Court took was, on 25 October 2019, to commence an investigation into the Claimant's tweets identified in the complaints received via its website up to that point: Mia Hakl-Law (Garden Court's Human Resources Director) asked Maya Sikand (then a barrister at Garden Court) to investigate under Garden Court's complaints procedure (Reasons, §177 **[47]**).

28. On 29 October 2019, Maya Sikand was sent a copy of the complaints policy, the messages received via Garden Court's website, and the Claimant's tweets on the subject going back to the end of September 2019 (Reasons, §182 **[48]**). She proceeded to consider and draft an initial report, reaching the overall conclusion that there was nothing in the matters raised at that stage that required further action or investigation (Reasons, §§186-188 **[50]**).

29. However, on 31 October 2019, Kirrin Medcalf sent a complaint in his capacity as Stonewall's Head of Trans Inclusion. He was not aware of Garden Court's membership of the Diversity Champions scheme but had drafted the complaint on or around 28 October 2019 in response to Shaan Knan's encouragement at the TON meeting on 23 October 2019 and subsequent post on the STAG wall. He appears to have delayed sending it until he had discussed it with his supervisor (Reasons, §§189, 199, 371 **[50; 53-4, 99]**).

30. The complaint was addressed to the Garden Court Heads of Chambers and sent to them and the Claimant's clerks. It complained as follows **[352-3]** (bold type in original):

> 'I am contacting you within my role as Head of Trans Inclusion at Stonewall to raise concerns regarding the barrister Allison Bailey and her association with yourselves.
>
> Ms Bailey who goes by @bluskyeallison on twitter publicly states her association with Garden Court Chambers in her twitter bio. Via her twitter she has been making and retweeting multiple transphobic statements online, including:
>
> - Retweeting threats of violence: "I am a walking hate crime" [web link given]
> - Liking and writing posts calling trans women men:
>   - "because some men like performing femininity we are eliminating every safe space women have" [web link given]
>   - "I put the rights and safety of women before men who want to live as women" [web link given]
> - Writing tweets calling for trans people to lose their current legal rights:
>   - "Women & girls have suffered, and continue to suffer, at the hands of predatory & abusive men. It is offensive & unacceptable to suggest, much less legislate, for a system whereby *any* man can declare himself lawfully to be a woman." [web link given]

    - "tell the MoJ to stop sending men to women's prisons. Tell the NHS that no, men cannot self-ID onto women's wards." [web link given]
- Writing posts that misgender trans women by saying they have "male privilege" [web link given]
- Calling trans people and their campaign for equality "trans extremism" which is highly inflammatory language that encourages violent resistance [web link given]

As well as specifically targeting Stonewall and specific members of our staff:

- **Targeting a woman who works for us (our trans empowerment manager) and calling her a man** "Morgan Page, a male" [web link given]
- Calling our work on LGBT equality "gender extremism" [web link given]
- accusing Stonewall of "appalling levels of intimidation, fear & coercion" [web link given]
- spreading false information about Stonewall splitting (which is completely untrue) through retweeting these tweets: [web link given].

Ms Bailey has also chaired Woman's Pace meetings which is regarded by many LGBT rights and anti-violence organisations to be a hate group.

These actions and their link to Garden Court Chambers, threatens the positive relationship yourselves have built with the trans community through holding events, round tables and meetings for trans people on trans equality & rights. Ms Baileys actions are also in direct conflict with the fantastic work your barristers, such as Alex Sharpe, have done on GRA reform.

Garden Court barristers have always been allies to trans people and to Stonewall, which is something we are very proud of and grateful for. However, 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 members of 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 Stonewalls first priority.

I trust that you will do what is right and stand in solidarity with trans people.

Thank you in advance for your time and consideration on this issue.

Yours sincerely,

Kirrin Medcalf

Head of Trans Inclusion'

31. On examination of the Stonewall complaint, Maya Sikand decided that it needed to be considered separately from the matters she had already reviewed (Reasons, §205 **[55]**). The Tribunal therefore (unavoidably) found that, but for that complaint, Ms Sikand's report would have been limited to the original matters referred to her, which she would have dismissed without investigation (Reasons, §377 **[102]**).

32. Ms Sikand identified 2 tweets included in the Stonewall complaint which she considered *'may offend'* certain parts of the Bar Code of Conduct and/or BSB guidance on social media use. On 6 November 2019, she sent the whole complaint to the Claimant and asked for her response in relation to those particular matters (Reasons, §206 **[55]**).

33. The 2 tweets identified by Ms Sikand as requiring a response were (Reasons, §207 **[55-6]**):

    33.1. A tweet dated 22 September 2019 **[232]**:

    > 'Stonewall recently hired Morgan Page, a male bodied person who ran workshops with the sole aim of coaching heterosexual men who identify as lesbians on how they can coerce young lesbians into having sex with them. Page called "overcoming the cotton ceiling" and it is popular.'

    33.2. A tweet dated 27 October 2019, linking to an article in the *Sunday Times* about Garden Court's handling of the issues **[216]**:

    > 'On this issue I and many other women are grateful to @thetimes for fairly and accurately reporting on the appalling levels of intimidation, fear and coercion that are driving the @stonewalluk trans self-ID agenda.'

34. On 21 November 2019, the Claimant sent a detailed response to Ms Sikand (Reasons, §§209-220 **[56-9]**). Given the Tribunal's un-appealed findings and conclusions about the tweets in question and the reasons for both Kirrin Medcalf's complaint and Garden Court's decision to (partially) uphold it, it is not necessary

to rehearse the details of her response to the complaint. However, if necessary, reference should be made to the detailed findings at Reasons, §§209-220 **[56-9]**.

35. Following receipt of the Claimant's response, Ms Sikand (in consultation with others within Garden Court, including another senior member of chambers, Stephane Harrison KC) obtained advice from the Bar Council Ethics Committee, which was provided by Cathryn McGahey KC, although she was not provided with full details of the Claimant's written response to the complaint (Reasons, §§223-229 **[60-62]**).

36. On 11 December 2019, Ms Sikand shared a draft report with the Heads of Chambers and Ms Harrison. Following comments from Ms Harrison, she then amended and finalised her report, which she sent to the Claimant and the Heads of Chambers that day, concluding that the BSB would be likely to make findings that the 2 tweets in question breached the Bar Code of Conduct (Reasons, §§230-231 **[62]**).

37. On 15 December 2019, Judy Khan KC (one of the Heads of Chambers) informed the Claimant that the Heads of Chambers had accepted Ms Sikand's report and agreed with the conclusion. She asked that the Claimant delete the 2 tweets in question (Reasons, §§232 **[62]**). The Tribunal held that this outcome constituted unlawful direct belief discrimination (Reasons, §§327-8 **[87-8]**).

The decision of the Tribunal

38. The Tribunal upheld the Claimant's claims against Garden Court in respect of 2 of the detriments about which she complained, and dismissed her claims in respect of the remaining 3 detriments. Detriments 2 and 4, in respect of which the claim was upheld, were the response tweets sent on 24 October 2019 (detriment 2) and the outcome of the investigation into the Stonewall complaint (detriment 4) (Judgment, §§2 & 4 **[3]**).

39. As already noted, the following un-appealed conclusions of the Tribunal must be taken as established for the purposes of this appeal:

    39.1. The whole of the Claimant's beliefs (summarised at paragraph 19 above) constitute a coherent set of beliefs, genuinely held by her, about a weighty and

substantial aspect of human life that are worthy of respect in a democratic society, such that they amount to a philosophical belief for the purposes of the protected characteristic of belief under EqA10, s10 (Reasons, §§279-280 & 290-293 **[75-6, 78-9]**).

39.2. The way in which the Claimant expressed those beliefs in the 2 tweets which were the basis for Garden Court's decision to (partially) uphold the Stonewall complaint (see paragraph 33 above) was not such as to take them outside the protection of ECHR, Articles 9 and/or 10, or therefore outside the protection of EqA10, ss10 and/or 13 (as construed and applied to give effect to those Convention Rights, pursuant to section 3 of the Human Rights Act 1998 ('HRA')[4]) (Reasons, §§295-8 & 327, final 8 lines **[79-80, 88]**).

39.3. The outcome of the investigation constituted unlawful direct belief discrimination against the Claimant by Garden Court (Reasons, §§327-8 **[87-8]**).

39.4. But for the Stonewall complaint, Maya Sikand's report would have been limited to the original matters referred to her, which she would have dismissed without investigation – i.e. but for Stonewall's complaint the direct discrimination by Garden Court in respect of detriment 4 would not have occurred (Reasons, §188, 205, 377 **[50, 55, 102]**).

40. The Tribunal nevertheless rejected the Claimant's claim against Stonewall under EqA10, s111. Before the Tribunal, the Claimant relied on various different acts in

[4] It is now well-established that, to achieve an ECHR-consistent reading in accordance with HRA, s3, action taken because of an expression or manifestation of a belief that does not cross the line so as to justify such action for the purposes of ECHR, Art. 9(2) and/or 10(2) must be treated as done because of the protected characteristic of belief; whereas action taken because of an expression or manifestation that does justify such action will not be treated as done because of the protected characteristic: Page v NHS Trust Development Authority [2021] ICR 941, CA, §§68-74 *per* Underhill LJ; Higgs v Farmer's School [2023] IRLR 708, EAT, §82 *per* Eady J; Omooba v Michael Garrett Associates Ltd & another [2024] EAT 30, §92 *per* Eady J. Whether that is to be achieved by reading the definition of the protected characteristic of belief in EqA10, s10 so as to include manifestations that do not cross the line (cf Higgs, §32 referring to Bougnaoui v Micropole SA [2017] IRLR 447, CJEU, §30) or by reading s13 so as to treat actions done because of such manifestations as being 'because of' the protected characteristic (or a combination of the two) is a moot point that may receive further attention when Higgs reaches the Court of Appeal later this year. What is clear is that, by one route or another, the Tribunal's finding that the Claimant's expressions/manifestations of her belief did not cross any line so as to take them outside the protection of Art. 9 and/or 10 means that, whether action was taken because of general antipathy to her beliefs or because of those manifestations, it will in any event constitute action done because of the protected characteristic of belief.

respect of her s111 claim, including the complaint made by Kirrin Medcalf. This appeal concerns only the latter.

41. The Tribunal's reasons for rejecting the s111 claim in respect of Kirrin Medcalf's complaint are set out in paragraphs 367-377 of the Reasons **[100-102]**. They require some unpicking:

41.1. Paragraph 367 simply summarises the grounds expressed in the complaint itself.

41.2. Paragraphs 368-372 contain the Tribunal's discussion of, and findings about, Kirrin Medcalf's reasons for making the complaint:

(a) In paragraph 368, the Tribunal rejected Kirrin Medcalf's own evidence about that, in which he had sought to assert that he was concerned about the safety of staff if Stonewall were to continue working with Garden Court because of the potential for a hostile encounter if male trans identified staff (transwomen) were to use the female toilets at Garden Court, and that he had hoped to prompt a discussion about mitigating the risk. The Tribunal found that *'implausible'*.

(b) At paragraph 372, it also found, based on the timing, that Kirrin Medcalf was not (subjectively) seeking formal action by Garden Court against the Claimant. It did, however, accept at paragraph 368 (lines 1-4) that *'certainly one reading'* of the complaint was that the Claimant should be expelled if Stonewall was to continue its relationship with Garden Court.

(c) The Tribunal's central positive finding as to Kirrin Medcalf's reasons for making the complaint is at paragraph 369, repeated at paragraph 372: he wrote *'to protest about [the Claimant's] views… without any specific aim in mind except perhaps a public denial of association with her views'*. It is clear that the 'views' referred to here are the Claimant's beliefs and that Kirrin Medcalf's objection to those beliefs was his view that it is inherently 'transphobic' to oppose Stonewall's position on gender self-identification and not to accept that transwomen are women (see Reasons, §60 **[18]** and the complaint itself **[352-3]**).

(d) The significance of that finding as to Kirrin Medcalf's reasons for making the complaint is not clearly spelt out by the Tribunal in its subsequent reasoning in relation to the various forms of liability under EqA10, s111, but given the attention devoted to the point it must have regarded the finding as important to one or more of them.

41.3. In paragraphs 373-377, the Tribunal then addresses each of the potential forms of liability under EqA10, s111 – instructing, inducing, causing – in turn. It first finds that there was no 'instruction' in the complaint (§373, lines 5-6). The Claimant does not appeal that finding. This appeal relates to the subsequent conclusions on inducing and causing a contravention.

41.4. The remainder of paragraphs 373-376 all concern inducement:

(a) The Tribunal makes essentially 3 points:

(i) First, that there is no express reference in the complaint to the Diversity Champion scheme or possible brand damage brought about by Stonewall (§373).

(ii) Second, that Kirrin Medcalf was not aware that Garden Court was a Diversity Champion and so did not subjectively seek to use that relationship to bring about any particular action (§374). That Stonewall did not deliberately seek to use the Diversity Champion scheme as *'leverage'* in this way seems to be the '*finding'* that is referred to in §375.

(iii) Third, that concern about possible termination of that relationship or other brand damage brought about by Stonewall was not ultimately the *'basis for'* the decision by Garden Court to investigate and (partially) uphold the complaint, although the fact of that relationship *was* a material influence on (amongst others) Maya Sikand (§§373, 376). This refers back to the Tribunal's earlier finding that, in considering the complaint, Maya Sikand *'appears to have been influenced by Garden Court being a Diversity Champion, though Kirrin Medcalf's complaint made no mention of this'* and that this

was one of the facts which supported an inference of direct discrimination, namely that Ms Sikand's *'disapproval of the claimant's beliefs informed her sense that there must be* some *breach of the core duties here'* (Reasons §§327 **[87]**).

(b) The over-arching ground for the Tribunal's conclusion that there was no 'inducement' therefore appears to be that, in order to constitute an 'inducement' for these purposes, there would need to be either a subjective intention on the part of Kirrin Medcalf to use the Diversity Champions membership to threaten harm to Garden Court, or a subjective perception of such a threat on the part of Garden Court which prompted the relevant contravention. That conclusion is reinforced by the words in parenthesis in lines 7-9 of paragraph 373, which in context appear to summarise what the Tribunal thought would constitute an 'inducement' here: *'fear of losing Stonewall Diversity Champion status, more generally a breach of obligation to Stonewall, and some loss of brand association'*.

41.5. Paragraph 377 then deals with causing a basic contravention. The Tribunal first makes its positive finding of 'but for' causation. It then makes a bald assertion that nevertheless the complaint *'was the occasion of the [Sikand] report, no more'*. This one sentence is the sum total of the Tribunal's reasons for dismissing the claim of 'causing' a basic contravention and not further explained. But it can only mean one of two things:

(a) The first possibility is that the Tribunal considered that, although 'but for' causation was established, the discrimination by Garden Court in respect of the final outcome of their investigation was too remote – that the chain of causation was, in some (unexplained) way, broken.

(b) The second possibility is that the Tribunal considered that there was some (unidentified and unexplained) missing subjective element either on the part of Stonewall or Garden Court. Its reference, in the context of its further conclusion that there was no attempt to cause discrimination, to its finding that the complaint was *'no more than [a] protest with an appeal to a perceived ally in a "them and us" debate'* might suggest that it regarded

that finding as relevant to 'causing' a contravention more generally. Or it may have thought that there was some need for Garden Court's grounds for upholding the complaint to coincide with Stonewall's grounds for making it: that is a feature of its reasoning on inducement at s376.

42. In summary, therefore, whilst the Tribunal's reasoning is opaque and inadequate in a number of respects, doing the best possible the grounds on which the Tribunal relied (or may have relied) in dismissing the claim under EqA10, s111 in respect of Kirrin Medcalf's complaint are:

    42.1. The absence of a *'specific aim'* on the part of Kirrin Medcalf (*'except perhaps a public denial of association with [the Claimant's] views'*), which it may or may not have treated as relevant to both 'causing' and 'inducing' for the purposes of s111(2) and (3);

    42.2. The absence of a subjective intention on the part of Kirrin Medcalf to use the Diversity Champions relationship to threaten harm to Garden Court, and/or of a subjective perception of such a threat on the part of Garden Court leading to the discrimination in question, which is the central ground on which the Tribunal held there was no 'inducement' for the purposes of s111(3); and

    42.3. The conclusion that the complaint was *'the occasion of the [Sikand] report, no more'*, which may be a conclusion about remoteness or about the absence of some subjective element on the part of either Kirrin Medcalf or Garden Court or both, and which is the central ground on which the Tribunal held that Kirrin Medcalf's complaint did not 'cause' Garden Court's unlawful discrimination for the purposes of s111(2).

43. The central questions, therefore, are:

    43.1. Whether any of those matters can constitute proper grounds in law for rejecting the claim that Kirrin Medcalf's complaint 'caused' and/or 'induced' Garden Court's unlawful direct belief discrimination in (partially) upholding that complaint, for the purposes of EqA10, s111(2) and/or (3); and

43.2. If not, whether the necessary ingredients for liability under s111(2) and/or (3) are made out on the basis of the Tribunal's primary factual findings.

Interpretation of s111: general submissions

44. EqA10, s111 provides as follows:

> **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.

45. The issues in this appeal are questions of statutory construction as to (a) the mental element for liability under s111(2) and/or (3); and (b) the nature of the causal connection required under s111(2).

46. Those questions therefore depend on an objective assessment of the meaning of the words used, considered within their statutory context and having regard to the purpose of s111 (R (O) v Home Secretary [2023] AC 255, §§29-31 *per* Lord Hodge JSC; Uber BV & others v Aslam & others [2021] ICR 657, SC, §70 *per* Lord Leggatt JSC).

47. Section 111 creates a unique statutory tort, expressed in unique terms, with a unique structure and no ready analogy in other legislation or at common law. It therefore requires to be interpreted on its own terms, by reference to its own particular context and purpose, on the assumption that the particular terms in which it is framed have been chosen with precision (cf Kostal UK Ltd v Dunkley [2022] ICR 434, §30 *per* Lord Leggatt JSC; Kuzel v Roche Products Ltd [2008] ICR 799, CA, §48 *per* Mummery LJ).

48. The purpose of s111 is apparent from its face: within the context of relationships already covered by the EqA10, it is intended to extend the scope of prohibited conduct to actions by the party already prohibited from discriminating (or otherwise contravening the EqA10) within that relationship, where those actions involve instructing, causing or inducing the other party to discriminate against (or otherwise contravene the EqA10 in relation to) a third person, or where the actions amount to an attempt to do so. The underlying policy aim is clear: to contribute to the over-

arching objective of the EqA10 to eliminate the *'very great evil'*[5] of discrimination (and other forms of prohibited conduct) in the contexts to which that Act applies. In those contexts, it is just as objectionable to influence the other party to the relationship in a way that brings about the 'evil' of discrimination against a third party (or attempt to do so) as it is to discriminate against the other party him- or herself. It is also important that a person who suffers detriment as a result of such a conduct should have an adequate remedy against its originator, as she may not be able to recover in full against the intermediary (depending on the precise scope of any unlawful conduct on the part of the intermediary).

49. Before turning to the specific issues as to the required mental element and test for remoteness, one general point may therefore be made about the legislative context and purpose of s111. As an operative provision which contributes to the elimination of discrimination in the contexts to which the EqA10 applies, it should where possible be given a *'broad interpretation'* to maximise its effectiveness in that regard (Jones v Tower Boot Co Ltd [1997] ICR 254, 262B-G *per* Waite LJ).

50. Moreover, there are several features of s111 itself which reinforce the appropriateness of a broad interpretation:

    50.1. First, the principal forms of conduct which it prohibits – instructing, causing or inducing – are clearly broad, overlapping categories, not narrow or technical ones. For example, an instruction to discriminate which is carried out could also be said to 'cause' and 'induce' that discrimination. Whilst each form will of course carry its own particular requirements, the fact that Parliament included all three is an indication that it intended a broad coverage, with each form adding to the overlapping scope, rather than subtracting from it or narrowing it.

    50.2. Second, the fact that Parliament also extended the prohibited conduct under s111 to attempts to cause or induce discrimination and made clear that it does not matter whether the basic contravention actually occurs (subsections

[5] See Jones v Tower Boot Co Ltd [1997] ICR 254, CA, 262E *per* Waite LJ approving dicta of Templeman LJ in Savjani v Inland Revenue Commissioners [1981] QB 458.

(6)(a) and (8)) is another indication that the intended scope of the prohibition is wide.

50.3. Third the express provision that, for the purpose of the prohibition on inducing a basic contravention, the inducement may be direct or indirect (subsection (4)) is a further indication that a wide, rather than a narrow, understanding of the concepts of instruction, causation and inducement, is intended.

50.4. Fourth, the scope of injury to which liability may attach is expressly and intentionally broad: pursuant to subsections (5) and (6)(a), the liability of A is not limited to injury caused by the basic contravention committed by B; indeed, it does not matter if B does not actually commit the basic contravention. All that is required is that conduct by A which is caught by s111 results in detriment to B or C, and A will then be liable to either or both B or C for the full extent of such detriment.

51. With those general pointers to the need for a broad interpretation in mind, the following submissions address the specific issues of interpretation as to the mental element for both 'causing' and 'inducing' a contravention under s111(2)-(3), and the nature of the required causal connection for the purposes of 'causing' a contravention under s111(2).

The mental element for causing and/or inducing a contravention under s111(2)-(3)

52. The starting point is that, on their ordinary and natural meaning, each of the terms used for the various forms that breach of s111 may take carries an inherent indication of what (if any) mental element is required. Thus:

52.1. To 'instruct' inherently implies some specificity as to what should be done. An intention that the person instructed should act in a particular way will therefore be inherent in 'instructing' B to do something which is a basic contravention contrary to s111(1).

52.2. Similarly, trying (but failing) to carry a particular objective to fruition is inherent in the concept of an 'attempt'. Therefore, an intention to bring about

something that would have amounted to a basic contravention will be inherent in any liability for attempting to cause or induce such a contravention under s111(8).

52.3. Conversely, to 'cause' something does not imply any subjective intent or other state of mind at all: on its ordinary and natural meaning, to 'cause' something is simply to act in a way that, as a matter of objective causation, results in that thing occurring.

52.4. Similarly, to 'induce' something does not necessarily imply a specific intention to bring about that thing. The key feature of an 'inducement' (compared with purely objective causation) is that it implies an element of deliberate persuasion or influence, but it does not necessarily have the same specificity as an 'instruction'. For example, A might persuade or influence B to review C's pay, or investigate C's conduct, in a discriminatory way, without either specifying or intending a specific outcome. Thus, the natural meaning of 'induce' does imply an intention to bring about *some* action of a general identified kind, but not that it should necessarily take a particular form or lead to a specific consequence.

53. In addition, the Claimant accepts (as she did before the Tribunal and as is now common ground[6]) that, given the context of s111 within the EqA10 and its purpose of contributing to the elimination of discrimination (and other prohibited conduct under that Act), where the basic contravention in question has a mental element, that should be imported under s111 as a requirement in respect of A. That avoids the potential complexities that might arise from instead asking what A knew or intended as regards the mental processes of B: since, pursuant to subsection (6)(a), it does not matter whether B actually committed a basic contravention, the focus under s111 should be on A's mental processes, not B's. Further, if a requirement for the relevant mental element on the part of A were not implied then A might be made liable even though his actions were entirely untainted by anything discriminatory or improper. For example, A might otherwise be held liable for instructing, causing or inducing B to carry out a disciplinary investigation into C

[6] Paragraph 360 of the Reasons reflects C's position on this point **[98]**. That is now endorsed on behalf of Stonewall at paragraph 6 of its Respondent's Answer **[129]**.

for entirely legitimate and non-discriminatory reasons, which C then uses as a pretext for taking action for his own discriminatory reasons. That would be surprising and contrary to the central purpose of the EqA10 as an anti-discrimination statute.

54. On this basis, therefore, where the basic contravention in question does not itself have a mental component (e.g. indirect discrimination), no mental element will be required beyond what is inherent in the form relied on under s111. For example, if A instructs, causes or induces B to apply a policy which places C and people who share the relevant protected characteristic at a particular disadvantage and which cannot be justified, that will be sufficient for A to be liable for instructing, causing or inducing indirect discrimination. It will not be necessary to show that A knew or intended that applying the policy would amount to unlawful indirect discrimination.

55. Conversely, where the basic contravention in question does have a mental component, such as direct discrimination, then it will be necessary to establish that mental element in relation to A, in addition to any mental element inherent in the type of breach of s111 that is relied on. The mental element for direct discrimination is, of course, that the action in question is taken 'because of' the relevant protected characteristic. As is well-established, motive is irrelevant and the test is whether the protected characteristic had a significant (in the sense of more than trivial) influence on the action in question, whether consciously or subconsciously (Nagarajan v London Regional Transport [1999] CR 877, HL, 886E-F *per* Lord Nicholls). It will not, therefore, be necessary to show that A consciously knew or intended that B's actions would be discriminatory, only that he was materially influenced by the protected characteristic to act in a way that amounted to instructing, causing or inducing B to directly discriminate.

56. The final question, therefore, is whether there is any further mental element required above those identified above. In particular, is there anything in the legislative context or purpose which means that, notwithstanding the ordinary and natural meanings canvassed above, either 'causing' or 'inducing' a basic contravention should be construed as requiring either:

56.1. A specific intention to bring about the particular action which constituted the basic contravention; and/or

56.2. A specific intention to exploit the relevant relationship between A and B?

57. It is submitted that there is no basis whatsoever for importing any such requirements and to do so would be both contrary to the purpose of s111 and inconsistent with the legislative context:

57.1. In discrimination law generally, conscious subjective intention is not a requirement (Nagarajan, 884G-886F *per* Lord Nicholls). There is nothing in s111 or its context to indicate a different approach is required.

57.2. Indeed, where Parliament intended to specify a need for specific knowledge or intention in the EqA10, it did so: compare s112(1), where there is an express requirement, for breach of that provision, that a person *'knowingly'* helps another to commit a basic contravention. More generally, as an anti-discrimination statute the EqA10 does, of course, carefully articulate the mental component of each cause of action. If parliament had intended to make conscious intention to bring about a specific consequence a necessary ingredient of liability under s111, it could and would have said so expressly.

57.3. By contrast, since Parliament did not even consider it necessary for a basic contravention to actually occur in order for liability to arise under s111, it is difficult to see any rational or principled basis on which to imply a requirement that, where a basic contravention does occur, it must be one that A specifically intended.

57.4. To import such a requirement would be contrary to the purpose of s111 and the need for a broad reading (above) because it would unduly narrow its application and limit its effectiveness. It is inherent in the structure of liability under s111 that B is an independent active participant whose actions are not wholly under the control of A. Inevitably, in many (probably most) cases where, because of C's protected characteristic, A instructs, causes or induces B to act in a way that is detrimental to C, what B eventually does is unlikely to

be precisely what A had in mind. If that were sufficient to negate liability it would render s111 nugatory. The essential facts of the present case are a good illustration: if, because of a protected characteristic, A complains to one of its customers (B) about one of that customer's employees (C), causing B to directly discriminate by upholding the complaint and imposing a particular penalty on C, why should it matter that that penalty was different from the one that A had in mind, or that A did not have any particular penalty in mind? Why would it make all the difference whether A and B agreed about the appropriate action or penalty? That is not a rational or principled basis for determining liability having regard to the policy objectives of s111, which are engaged simply by the fact that, within the context of a relevant relationship, A acts because of C's protected characteristic in a way that causes or induces B to discriminate against C.

57.5. As to the suggestion that, in the case of 'inducing' a basic contravention under s111(3), specific exploitation of the relevant relationship between A and B is necessary, there is no basis whatsoever for implying such a requirement. Nothing in s111 expressly or implicitly suggests that it is a requirement. The only relevance of the relationship is to limit the operation of s111 to relationships that are already within the scope of the EqA10. There is nothing in s111(3) (or elsewhere) to suggest that exploitation of that relationship (either actual or perceived) is then a necessary ingredient for liability for 'inducing' a basic contravention. Indeed, as the EHRC *Code of Practice on Employment (2011)* makes clear, an 'inducement' under s111(3) does not require *any* threat or offer: simple persuasion is sufficient. *A fortiori*, therefore, there does not need to be any threat specifically based on exploitation of the relevant relationship.

57.6. It is implicitly accepted in Stonewall's Respondent's Answer that there is no requirement that B must intend the specific consequence or that B must exploit the relevant relationship and that it *would* be an error of law for the Tribunal to dismiss the claim under s111 on either of those grounds (§§9 & 11 **[129]**).

58. In summary, therefore, in respect of the two forms of breach of s111 that are in issue on this appeal:

58.1. In order to establish liability for 'causing' direct discrimination under s111(2), all that is required is for A to act, because of a protected characteristic, in a way that causes B to directly discriminate against C. A does not need to have any specific aim in mind when so acting, still less is it necessary for A to intend the particular action by B that eventuates.

58.2. In order to establish liability for 'inducing' direct discrimination under s111(3), all that is required is for A, because of a protected characteristic, to engage in conduct intended to persuade or influence B to take action of an identified kind in relation to C, and that B takes such action which amounts to direct discrimination against C. A does not need intend to any particular outcome, still less the specific one that eventuates. Nor is there any requirement for exploitation of the relationship between A and B (either intended by A or perceived by B).

Causation and remoteness for the purposes of s111(2)

59. Although causation is an ingredient of liability under s111(2), rather than a question of remedy, it is helpful to give some consideration to the authorities on causation of damage for the purposes of assessing loss because they provide some insight into how to approach the question of the nature of the causal link required. The following points in particular are relevant:

59.1. The question of what remoteness or other criteria should be applied to pure 'but for' consequences always requires analysis of the nature, purpose and scope of the obligation in question to determine, as a value judgment, the extent to which the defendant *'ought to be held liable'* (Kuwait Airways Corporation v Iraqi Airways Co [2002] 2 WLR 1353, HL, §§70-71 *per* Lord Nicholls; Essa v Lang Ltd [2004] IRLR 313, CA, §§22 & 34 *per* Pill LJ; Bullimore v Pothecary Witham Weld [2011] IRLR 18, EAT, §15 *per* Underhill J). This reinforces the need for a purposive approach.

59.2. Even in the context of general causation principles, there is no rule that the intervening act of a subsequent tortfeasor necessarily breaks the chain of causation. In particular, features which commonly lead to a conclusion that responsibility of the primary tortfeasor *'ought fairly to extend'* to the consequences of the acts of an intervening tortfeasor include (a) where the *'whole purpose'* of the duty in question is to protect against that sort of consequence; and (b) where the intervening act is *'the very kind of thing'* which was liable to happen as a result of breach (Bullimore, §§18-20 *per* Underhill J). In the context of s111, its 'whole purpose' is to prevent A doing things which cause B to discriminate.

59.3. More specifically, in an employment context, it has been held that *'policy and fairness'* require that, where a former employer victimised its former employee by giving her a bad reference which referred to her previous tribunal proceedings, the former employer should be liable for losses flowing from the prospective employer's withdrawal of the job offer, even though that was itself an independent act of victimisation: *'A negative or damaging reference… is liable to have precisely the result that occurred… '[I]t is hard to see why that consequence should be regarded as too remote to attract compensation from the original employer: so far from being remote it seems to us both close and direct'* (Bullimore, §§20-21 *per* Underhill J). Similarly, in the particular context of this case, a complaint to any organisation about one of its members' expressions of belief is 'liable to have precisely the result that' the complaint will be investigated and upheld in a way that amounts to direct belief discrimination. That is not a remote consequence, but a close and direct one.

60. In short, therefore, having regard to the purpose and structure of s111, it cannot possibly be said that the fact that the basic contravention involves some independent decision or act of B, which may not precisely replicate the mental processes or intentions of A, will necessarily break the chain of causation. Discrimination by B is the very thing that, pursuant to s111, A must not instruct, cause or induce. Indeed, an independent intervening act of discrimination by B is, in many cases, inherent in the very structure of liability under s111. Again, the fact that, pursuant to subsection

(6)(a), it is not essential that B actually commits a basic contravention and that, pursuant to subsection (5), liability extends to *any* detriment suffered by C (or B), not only those flowing from B's actions, are clear indicators that Parliament recognised that B would be a free agent who may not respond precisely as A intended, but that this should not negate liability.

61. There *may* be cases where B discriminates in a way that was so unexpected that it may be regarded as too remote, but whether reasonable foreseeability is strictly a necessary ingredient is (in light of Essa v Laing) not straightforward and the point does not need to be decided in this appeal because, on any view, for the recipient of a complaint about a person's expression of their beliefs to consider and uphold it in a way that amounts to direct discrimination because of those beliefs is obviously a foreseeable consequence of making that complaint. There is no requirement for any additional subjective element on the part of either A or B, and in particular no requirement that B's reasons for acting must coincide with A's.

62. Therefore, for the purposes of this appeal the Claimant is content to proceed on the basis that it is *at least* sufficient to establish the causal connection required for liability under s111 that B discriminates against C in a way that was a reasonably foreseeable consequence of A's actions.

Submissions on specific grounds of appeal

Ground 1: causing a contravention (s111(2))

63. In the first place, the Tribunal's reasoning at Reasons, §377 **[102]** is so sparse and lacking in explanation that it amounts to a failure to give adequate reasons (see paragraph 41.5 above).

64. But insofar as the grounds on which the Tribunal dismissed the claim that Kirrin Medcalf's complaint 'caused' unlawful discrimination can be discerned, they are not capable of providing a sound basis in law for dismissing that claim:

    64.1. For the reasons set out above, on proper interpretation of s111(2) the only mental element required was that Kirrin Medcalf made the complaint 'because of' the Claimant's belief. Therefore:

(a) Insofar, as the Tribunal dismissed the claim based on its finding that Kirrin Medcalf made the complaint as a *'protest about [the Claimant's] views'* without any specific aim in mind, the absence of a specific aim does not provide a sound basis in law for dismissing the claim.

(b) The finding that Kirrin Medcalf made the complaint as a *'protest about [the Claimant's] views'* is sufficient to meet the test that he made it 'because of' the Claimant's protected characteristic of belief. He was materially influenced by his own generalised stereotyping of the Claimant's beliefs as inherently 'transphobic': see paragraph 41.2(c) above. Such stereotyping of gender critical beliefs is itself a discriminatory mis-characterisation of those beliefs (see Forstater v CGD Europe [2022] CR 1, EAT, §§51, 99, 103 & 110-116 *per* Choudhury J; Miller v College of Policing & another [2020] All ER 31, Admin, §§241-250, 266-7 & 280 *per* Julian Knowles J; [2022] HRLR 6, CA, §§35-6, 69 & 70-76 *per* Dame Victoria Sharp P). In any event, the Claimant's expressions of her belief, about which Kirrin Medcalf was expressly complaining, did not cross any line so as to remove them from the protection of ECHR, Art 9 and/or 10, such that action because of them constitutes action because of the protected characteristic of belief (see paragraph 39.2 above).

64.2. Again for the reasons set out above, the causal connection required for liability under s111 is established *at least* on the basis that B discriminates against C in a way that was a reasonably foreseeable consequence of A's actions. Therefore:

(a) The mere assertion that Kirrin Medcalf's complaint was *'the occasion'* and not the cause of Garden Court's directly discriminatory decision to (partially) uphold that complaint, is not a sound basis for dismissing the claim under s111(2).

(b) On the basis of the Tribunal's primary findings, the only possible conclusion is that Garden Court's discrimination was not only reasonably foreseeable but was the 'very kind of thing' that was likely to happen as a result of such a complaint and was a close and direct consequence (see

paragraph 59.3 above). It is sufficient in that regard to note that, as a matter of unavoidable logic, even if the purpose is only to 'protest' about someone's beliefs (or the expression of them), to do so in the form of a complaint is, obviously and foreseeably, likely to result in an investigation of that complaint which could, obviously and foreseeably, result in its being upheld in a way that amounts to direct belief discrimination. But if more were needed, then it may be found in the fact that Kirrin Medcalf was obviously aware of the *possibility* of formal action against the Claimant (even if he did not specifically intend it) because he was writing in response to a prompt to complain for that purpose (see paragraphs 22-24 & 29 above and see Reasons, §372 **[101]**); the complaint itself does expressly anticipate that Garden Court will give it *'time and consideration'* that they will take *some* (unspecified) action (*'do what is right'*) **[353]**); and the Tribunal itself found that the complaint could *'certainly'* be read as demanding that action be taken to expel the Claimant from Chambers (Reasons, §368 **[100]**) and that Kirrin Medcalf '*perhaps'* intended a public denial of association with the Claimant's views (Reasons, §369 **[100]**) which would itself have required consideration of, and action upon, his complaint. Therefore, on the Tribunal's primary findings, Kirrin Medcalf *did* in fact intend *some* form of detrimental action by Garden Court because of the Claimant's beliefs, and certainly such action was a reasonably foreseeable consequence of his complaint.

65. In short, therefore, liability under s111(2) requires no more than that Kirrin Medcalf complained 'because of' the Claimant's beliefs, that but for his complaint Garden Court would not have discriminated in respect of detriment 4, and that the way in which they discriminated (by partially upholding the complaint and asking the Claimant to remove 2 tweets) was (at least) reasonably foreseeable. All of those ingredients are obviously and unavoidably satisfied on the basis of the Tribunal's primary factual findings. Therefore, not only did the Tribunal err in law in the basis on which it dismissed the claim, but the only possible conclusion is that the claim under s111(2) succeeds.

Ground 2: inducing a contravention (s111(3))

66. Insofar as the Tribunal relied, in respect of the inducement claim under s111(3), on its finding that Kirrin Medcalf complained as a 'protest' but with no specific aim (it is not clear whether it did), the same points as set out in paragraph 64.2 above apply.

67. The principal ground on which the Tribunal rejected the 'inducement' claim was that, in order to constitute an 'inducement' for these purposes, there would need to be either a subjective intention on the part of Kirrin Medcalf to use the Diversity Champions membership to threaten harm to Garden Court, or a subjective perception of such a threat on the part of Garden Court which prompted the relevant contravention (see paragraph 41.4 above). That is not a sound legal basis for dismissing the claim (see paragraph 57.5 above). In any event, on the Tribunal's findings, Garden Court *did* consider the complaint within the context of its Diversity Champion scheme membership and that membership *did* influence Maya Sikand's mental processes – not in the form of a perceived threat, but that is not necessary (see paragraph 41.4(a)(iii) above).

68. The Tribunal therefore erred in law in the basis on which it dismissed the inducement claim under s111(3). Again, on its positive findings that claim unavoidably succeeds. In making the complaint, Kirrin Medcalf acted 'because of' the Claimant's beliefs and sought to persuade or influence Garden Court to do *something* about the Claimant and her beliefs, which led to Garden Court directly discriminating against her: that is sufficient (see paragraphs 58.2 and 64.2(b) above).

Conclusion

69. For the reasons set out above, the EAT is invited to allow the appeal, substitute a finding that the Claimant's claim against Stonewall under EqA10, s111 succeeds, and remit the question of remedy for determination by the same Tribunal.

BEN COOPER KC

30 April 2024

10-11 Bedford Row
London
WC1R 4BU

IN THE EMPLOYMENT APPEAL TRIBUNAL

Appeal No. EA-2022-001163-NLD

BETWEEN

Ms ALLISON BAILEY

Appellant

and

(1) STONEWALL EQUALITY LTD

(2) GARDEN COURT CHAMBERS LTD

(3) RAJIV MENON KC AND STEPHANIE HARRISON KC sued on behalf of all members of Garden Court Chambers

Respondents

APPELLANT'S SKELETON ARGUMENT

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