IN THE COURT OF APPEAL (CIVIL DIVISION) **Appeal No. CA-2024-001933**

ON APPEAL FROM THE EMPLOYMENT APPEAL TRIBUNAL

THE HONOURABLE MR JUSTICE BOURNE [2024] EAT 119

BETWEEN

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

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'.

References in square brackets refer to the Core Bundle for permission to appeal.

References to the judgments below are given as follows:

ET Judgment, §00	=	*paragraphs in 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*
EAT Judgment, §00	=	*paragraphs in the judgment of the Employment Appeal Tribunal ('***EAT***') (Bourne J), 24 July 2024; [2024] EAT 119*

Introduction

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 concerns the ingredients for liability for causing or inducing unlawful direct discrimination. It is the first appeal to this court to consider those matters.

3. In this case, the Claimant is person C. She was a practising barrister and a member of Garden Court, which is person B. Garden Court was a member of Stonewall's 'Diversity Champions' scheme, under which Stonewall was a service provider to Garden Court within the meaning of EqA10, s29. Stonewall is person A.

4. The Claimant holds 'gender critical' beliefs, that sex is real and observable, and that gender is a subjective identity with no objective basis. She also believes that gender theory as espoused by Stonewall in its campaigning is sexist, homophobic and particularly damaging to lesbians. The Tribunal held that those beliefs are protected for the purposes of the protected characteristic of belief under EqA10, s10 (ET Judgment, §§279-280 & 290-3 **[157-158, 160-161]**). That conclusion has not been appealed.

5. The claim against Stonewall under EqA10, s111 arises because Stonewall made a complaint to Garden Court about the Claimant's expression of her beliefs in a number of 'tweets'. On the Tribunal's findings, that complaint was motivated by prejudice against the Claimant's beliefs, was made as a 'protest' to a perceived ally in the debate, and invited Garden Court to consider the complaint and *'do what is right'*. Garden Court investigated and partially upheld the complaint. In doing so, Garden Court directly discriminated against the Claimant because of its opposition to her belief, which was in part influenced by its association with Stonewall. None of the relevant tweets was in fact expressed in terms that justified upholding the complaint.

6. The Claimant's case, in short, is that:

   6.1. Those central facts are sufficient to establish liability against Stonewall for causing and/or inducing Garden Court's direct belief discrimination.

   6.2. The reasons the Tribunal gave for its conclusion to the contrary are wholly inadequate and focus on irrelevant matters.

6.3. The EAT's attempt to shore up the Tribunal's decision relies on a new test that is neither correct in law nor the test that was actually applied by the Tribunal or contended for by any party.

6.4. Ultimately, since the purpose of s111 is to contribute to the elimination of discrimination in the fields to which the EqA10 applies, *any* sensible interpretation must support liability in the circumstances of this case because Stonewall's actions themselves had all of the characteristics of direct discrimination: it acted because of the Claimant's beliefs and to her detriment in a way that in turn brought about Garden Court's discrimination. Reduced to their essentials, the circumstances are as follows:

(a) Because of A's prejudice against C's protected characteristic, A complained to B, whom he perceived as sharing his view of that characteristic, to 'protest' *about* that characteristic; and

(b) In response to that complaint B, who <u>does</u> share A's view of the characteristic and was further influenced by their association with A, directly discriminated against C by upholding the complaint.

<u>Relevant facts</u>

Parties and general background

7. At the material times, the Claimant was a practising barrister and a member of Garden Court (ET Judgment, §1 **[86]**).

8. Stonewall is a charity whose stated aim is to advance the rights of gay, lesbian, bisexual and trans people (ET Judgment, §54 **[98]**). 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 (ET Judgment, §§54-55 **[xx]**). It adopted slogans such as 'trans women are women' and campaigned for gender self-identification (ET Judgment, §§59, 290 **[99-100, 160]**).

9. The addition of transgender advocacy (in 2015, when Stonewall became an LGBT organisation) 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 (ET Judgment, §§59, 112 **[99-100, 112]**).

The Claimant's beliefs

10. The Claimant shared those concerns. She believes that sex is real and observable and gender (as proselytised by Stonewall) is a subjective identity: immeasurable, unobservable and with no objective basis. She came to the view that Stonewall's campaigning is sexist, homophobic and particularly damaging to women and lesbians, and has led to hostility and threats of violence (including rape and sexual violence) particularly against women and lesbians. Further details of her beliefs are set out in paragraph 279 of the ET Judgment **[157-158]**, all of which were found by the Tribunal to be part of her protected characteristic of belief under EqA10, s10 (for the full findings see ET Judgment, §§113, 279-280 & 289-293 **[112-113, 157-158, 160-161]**).

Garden Court's membership of Stonewall's Diversity Champions scheme

11. 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 various benefits (ET Judgment, §61 **[100]**). Stonewall was thus a service provider to Garden Court for the purposes of EqA10, s29 (Stonewall's Further Re-Amended Grounds of Resistance, §4 **[256]**).

Reaction to Claimant's tweet about the launch of LGB Alliance

12. During 2019 the Claimant sent various tweets expressing her beliefs (ET Judgment, §§114-118, 120-122, 126 **[113-114, 114, 115]**). In particular, on 22 October 2019, she sent a tweet announcing and supporting the launch of LGB Alliance, an organisation for lesbians, gay men and bisexuals founded on gender critical principles. This led to an avalanche of tweets in response, some of which were directed at Garden Court (ET Judgment, §§130-2 **[116-117]**).

13. 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 (ET Judgment, §§56, 133 **[99, 117]**).

14. 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'* (ET Judgment, §135 **[117-118]**). (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: ET Judgment, §§196, 135 **[134-135 117-118]**.)

15. 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: ET Judgment, §56 **[99]**), 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'* (ET Judgment, §137 **[118-119]**).

16. 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 (ET Judgment, §§132, 136, 138-140, 141-154, 174-6 **[116-117, 118, 119, 119-124, 128-129]**).

17. 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 (ET Judgment, §155 **[124]**). The Tribunal held that response tweet was an act of unlawful direct belief discrimination (ET Judgment, §§315-8 **[166-167]**).

Garden Court's initial investigation: no further action required

18. Another step which Garden Court took was, on 25 October 2019, to commence an investigation into 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 (ET Judgment, §177 **[129]**).

19. 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 (ET Judgment, §182 **[130]**). 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 (ET Judgment, §§186-8 **[131-132]**).

The Stonewall complaint

20. 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 (ET Judgment, §§189, 199, 371 **[132, 135-136, 183]**).

21. The complaint was addressed to the Garden Court Heads of Chambers and sent to them and the Claimant's clerks. A copy will be included in the Supplementary Bundle for permission to appeal and should be read in full **[2-3]**. Kirrin Medcalf began by stating that he was writing in his role as Head of Trans Inclusion at Stonewall *'to raise concerns regarding the barrister Allison Bailey and her association with yourselves'*. He took issue with a number of tweets and other public statements in which the Claimant had expressed her beliefs, describing them as *'transphobic'*. He said that for Garden Court *'to continue associating'* with the Claimant while she continued to express her beliefs in this way *'puts us in a difficult position with yourselves'*. He concluded: *'I trust that you will do what is right and*

stand in solidarity with trans people', and thanked Garden Court in advance for their *'time and consideration on this issue'*.

22. The Tribunal found that Kirrin Medcalf sent the complaint to Garden Court as *'an appeal to a perceived ally in a "them and us" debate'* in order to *'protest about [the Claimant's] views'* but *'without any specific aim in mind except perhaps a public denial of association with her views'* (ET Judgment, §§369, 372, 377 **[182, 183, 184]**). It was his view that objecting to gender self-identification *'was of itself transphobic'* and that feminists and lesbians who do so are *'transphobic because they "deny trans people's lived reality"'* (ET Judgment, §60 **[100]**).

Garden Court's response to the Stonewall complaint

23. On examination of the Stonewall complaint, Maya Sikand decided that it needed to be considered separately from the matters she had already reviewed (ET Judgment, §205 **[137]**). 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 further investigation (ET Judgment, §377 **[184]**).

24. 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 (ET Judgment, §206 **[137]**).

25. On 21 November 2019, the Claimant sent a detailed response to Ms Sikand (ET Judgment, §§209-220 **[138-141]**). It is not necessary to rehearse the details of the particular tweets in question or that response, given the Tribunal's un-appealed finding that in those tweets the Claimant was expressing her beliefs in a way that did not breach any of her professional duties and did not justify restricting her right so to express them under ECHR, Articles 9(2) and/or 10(2) (ET Judgment, §§295-8 & 327, final 8 lines **[161-162, 170]**).

26. Following receipt of the Claimant's response, Garden Court obtained advice from the Bar Council Ethics Committee, which was provided by Cathryn McGahey KC.

Stephanie Harrison KC conducted the correspondence with Ms McGahey, even though (as the Tribunal found) Ms Harrison *'had already demonstrated her opposition to the claimant's views about trans rights and about Stonewall, and had herself recognised that she should not be involved'* (ET Judgment, §327 **[169-170]**).

27. Ms McGahey provided some initial views, advising that whether the tweets in question breached any of the Claimant's professional duties would *'depend on whether the truth of them can be substantiated or, at least, whether they amount to legitimate comment on the underlying facts'* (ET Judgment, §223 **[142]**). However, Ms Harrison did not send Ms McGahey the Claimant's full and detailed written response to the complaint, which set out the basis on which she was commenting in the relevant tweets (ET Judgment, §§223-4 & 322-3 **[142, 167-168]**).

28. Ms McGahey therefore provided her more detailed advice without the benefit of the Claimant's full explanations. She advised that the 2 tweets in question were *'probably over the borderline of acceptable conduct'* (ET Judgment, §228 **[143-144]**).

29. 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 (ET Judgment, §§230-231 **[144]**).

30. 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 (ET Judgment, §§232 **[144]**).

The Tribunal's finding of direct discrimination in relation to the outcome of the Stonewall complaint

31. The Tribunal held that Garden Court's decision as to the outcome of the Stonewall complaint constituted unlawful direct belief discrimination (ET Judgment, §§327-8 **[169-170]**). In doing so, the Tribunal drew an inference that the main participants in that decision were influenced by dislike of the Claimant's beliefs and by Garden

Court's membership of Stonewall's Diversity Champions scheme. Those inferences are explained in the latter half of paragraph 327 of the ET Judgment **[169-170]**. In summary:

31.1. In respect of Ms Harrison, the Tribunal noted her prior opposition to the Claimant's beliefs and concluded that it was *'hard not to infer that her own view on gender critical feminism as hostility to trans rights played a part in this decision'*.

31.2. In respect of Ms Sikand, the Tribunal noted that, although she had initially been neutral, she had shown hostility to other tweets that the Claimant had made about Stonewall and *'seems to have been influenced by Garden Court being a Diversity Champion, though Kirrin Medcalf's complaint made no mention of this. From this we can infer that her disapproval of the Claimant's beliefs about Stonewall informed her sense that there must be <u>some</u> breach of the core duties here'* (emphasis in original).

31.3. In respect of Ms Khan and another of the Heads of Chambers, Leslie Thomas KC, the Tribunal found that they had *'shown little patience'* for the Claimant in response to an earlier expression of her beliefs and that Mr Thomas had expressed a peremptory view that a number of the Claimant's tweets must breach her professional duties, although they were tweets that in the event Ms Sikand concluded did not even require investigation. The Tribunal drew a contrast between the response to the Claimant and the more favourable approach to a complaint about another member of chambers' tweets on a different controversial topic, which in that case the Tribunal found showed *'greater recognition of the legitimate expression of views on a controversial topic'*.

32. Overall, the Tribunal concluded that *'the claimant's gender critical belief, and in particular her belief about Stonewall's promotion of gender self-identity encouraging and being complicit in hostility to gender critical feminists, significantly influenced the finding that her two tweets were "likely" to breach core duties'* (ET Judgment, §328 **[170]**).

The ET's decision on the s111 claim

33. 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 ET Judgment **[182-184]**. (There is no appeal against the Tribunal's dismissal of the s111 claim in respect of other matters that were relied on at first instance.)

34. After summarising the complaint at paragraph 367, paragraphs 368-372 are primarily concerned with findings about Kirrin Medcalf's subjective intentions. The Tribunal does not spell out what relevance it thought those intentions had to Stonewall's liability under s111. At paragraph 368, the Tribunal rejects Kirrin Medcalf's own evidence about his intentions, in which he had sought to assert that he was only concerned about the safety of trans visitors to Garden Court, as *'implausible'*. At paragraphs 369-372 (and also at 377), the Tribunal makes the findings (already noted at paragraphs 20 and 22 above) that Kirrin Medcalf sent the complaint, in response to Shan Knaan's prompting, as a 'protest' about the Claimant's beliefs to a perceived ally, without any specific action in mind, except perhaps a public denial of association with the Claimant's views.

35. Paragraphs 373-376 then deal with the claim for inducing direct discrimination under s111(3). Their primary focus is on whether Kirrin Medcalf knew about and sought to exploit Garden Court's membership of Stonewall's Diversity Champion's scheme by suggesting a threat to that relationship, and/or whether the individuals at Garden Court who considered the complaint perceived some such threat.

36. Paragraph 377 contains the full extent of the Tribunal's reasons for rejecting the claim for causing direct discrimination under s111(2):

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

37. The first sentence deals with 'but for' causation and finds that to be established. The final question and reply deal with attempting to cause discrimination. Therefore, the

sum total of the Tribunal's reasons for dismissing the claim for causing direct discrimination under s111(2) is in fact contained in the middle sentence: that Kirrin Medcalf's complaint was *'the occasion'* of Maya Sikand's report and *'no more'*.

38. It is, therefore, entirely opaque what test of causation the Tribunal thought it was applying. But that sentence certainly indicates that the Tribunal thought it was not sufficient to establish liability that there was (a) a complaint by Stonewall to 'protest' to a perceived ally about the Claimant's beliefs and her (legitimate) expression of them (b) which caused Garden Court (in a 'but for' sense) to directly discriminate by upholding that complaint because of the Claimant's beliefs. The Tribunal does not spell out what it thought was missing but, read in the context of its discussion of the s111 claim up to this point, it must be either some additional ingredient to do with Kirrin Medcalf's subjective intentions, or something to do with Garden Court's conduct which the Tribunal thought broke the chain of causation.

The judgment of the EAT

39. In respect of the claim for causing a contravention under s111(2), the EAT held that there is no requirement that person A intended that person B should discriminate in the way that he did, or that it must have been reasonably foreseeable that person B would discriminate in that way. It held that the test is whether, in addition to 'but for' causation, it is *'fair or reasonable or just'* to find person A liable for causing person B's contravention, and that this test does not have a fixed content but depends on the facts (EAT Judgment, §123 **[71]**).

40. The EAT held that, pursuant to that test, the Tribunal was *'entitled'* to find that Stonewall was not liable for causing Garden Court's direct discrimination (EAT Judgment, §131 **[72]**). The EAT relied on essentially 3 matters in support of that conclusion:

    40.1. Kirrin Medcalf's subjective intentions, in particular that he intended the complaint as *'no more than a protest'*, in relation to which the EAT placed reliance on its view that in making such a 'protest' Kirrin Medcalf was expressing beliefs that are also protected under EqA10, s10 (EAT Judgment, §§127-8 & 132 **[72, 72-73]**);

40.2. The EAT's view that it was *'not particularly likely'* that in responding to the complaint Garden Court would unlawfully discriminate against the Claimant (EAT Judgment, §129 **[72]**); and

40.3. The EAT's view that *'responsibility for determining the complaint in a discriminatory way lay only with [Garden Court]'* (EAT Judgment, §131 **[72]**).

41. In respect of the claim for inducing a contravention under s111(3), the EAT held that 'induce' is broadly synonymous with 'persuade' and that person A must intend that person B should carry out an act or omission which contains all of the elements of the basic contravention in question (EAT Judgment, §§105-6 **[68]**). It held that Kirrin Medcalf's complaint fell short of an *'inducement… to inflict the detriment on the grounds of her protected belief rather than because of an allegedly objectionable manifestation of her belief'* (EAT Judgment, §141 **[74]**).

Interpretation of s111

42. 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.

General considerations

43. As with all questions of statutory construction, the proper interpretation of 'causing' or 'inducing' a basic contravention under subsections (2) and (3) depends on an objective assessment of the meaning of the words used, considered within their statutory context and having regard to the legislative purpose (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).

44. 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. Although there were similar provisions in the predecessor legislation, they differed both as between each-other and from s111 in how the unlawful conduct was defined and as to their scope of application and enforcement: some did not apply in the employment sphere and enforcement was by way of action by the Commission, not individual cause of action. Section 111 is therefore a new provision in the EqA10 that 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).

45. The purpose of s111 is clear: to contribute to the over-arching objective of the EqA10 to eliminate the *'very great evil'* of discrimination (and other forms of prohibited conduct) in the spheres to which that Act applies. That is the purpose of

extending liability beyond the immediate discriminator, in circumstances where all of the relationships between the parties are within the spheres covered by the Act. That being the purpose, s111 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).

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

46.1. 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.

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

46.3. 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 instruction, causation and inducement, is intended.

46.4. Fourth, the scope of injury to which liability may attach is expressly and intentionally broad: pursuant to subsections (5) and (6)(a) read together, the liability of A is not limited to injury caused by the basic contravention committed by B; indeed, it does not matter whether B actually commits 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.

47. Finally as to the legislative context, in discrimination law generally conscious motive or intention is neither necessary nor relevant (Nagarajan v London Regional Transport [1999] CR 877, HL, 884G-886F *per* Lord Nicholls). In the EqA10, Parliament has in general carefully articulated the mental component (if any) of each cause of action and, where it intended to specify a need for specific knowledge or intention, it has done so explicitly: see e.g. s112(1), where there is an express requirement, for breach of that provision, that a person *'knowingly'* helps another to commit a basic contravention.

The ingredients of causing a basic contravention under s111(2)

48. The starting point is the language of s111(2). The EAT was right to hold that the term 'cause' does not imply any requirement for conscious motive or intention and is apt to cover unintended consequences.

49. The EAT was also right to note that identifying the ingredients of legal causation, in addition to 'but for' causation, depends on an analysis of the nature, purpose and scope of the obligation in question and 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).

50. However, the EAT was wrong to treat that analysis itself as, in effect, constituting the additional ingredient, rather than supplying the basis for determining what the additional ingredients are. The EAT's approach results in an open-ended test: asking what is *'fair or reasonable or just'* with no clear criteria attached, so that the ingredients will vary from case to case. That does not provide a sufficiently certain basis for ascertaining liability.

51. The correct analysis is that, since the purpose of s111(2) is to contribute to eliminating discrimination in the spheres to which the EqA10 applies, the necessary ingredients, in addition to 'but for' causation, should reflect the ingredients of the underlying causes of action. Thus, in the case of causing indirect discrimination contrary to s19, it will be sufficient if person A causes (in a 'but for' sense) person B to apply a provision criterion or practice ('PCP') that places person C and persons

sharing the relevant protected characteristic at a particular disadvantage and that cannot be justified as a proportionate means of achieving a legitimate aim. No further ingredient is required because the underlying cause of action is similarly not dependent on any intention, knowledge, foreseeability, or other such ingredient. Therefore, the legislative purpose of contributing to the elimination of this form of discrimination would not be met if some additional element were required, over and above causing (in a 'but for' sense) the application of a PCP that satisfies the other (objective) criteria for liability under s19.

52. By contrast, direct discrimination under EqA10, s13 requires that the immediate discriminator act 'because of' the protected characteristic, in the sense that his mental processes are materially influenced (consciously or subconsciously) by that characteristic, but a conscious motive or intention to discriminate is not necessary (Nagarajan, 884E-886F *per* Lord Nicholls). It would not, therefore, be consistent with the purpose of eliminating discrimination of that kind to make person A liable for causing direct discrimination when his own mental processes were not materially influenced by the protected characteristic. The actions of person A would not, in those circumstances, have the relevant characteristics of the 'evil' of discrimination of the kind in question, so A 'ought' not to be held liable.

53. Conversely, it would be equally inconsistent with the purpose of eliminating direct discrimination to require *more* than that person A acts because of the protected characteristic in a way that causes person B (in a 'but for' sense) to directly discriminate against person C. By definition, if those ingredients are present, person A will have acted, in a context to which the EqA10 applies, in a way that has all the characteristics of the 'evil' of direct discrimination that it is the purpose of the legislation to eliminate: person A will have acted because of a protected characteristic in a way that has caused detriment to person C. Those are precisely the sort of circumstances in which person A 'ought to be held liable' because they are precisely the kind of 'discriminatory' conduct that the EqA10 is intended to eliminate. Just as in relation to direct discrimination itself, it should not matter what person A's conscious motives or intentions were.

54. Moreover, liability cannot sensibly depend on person A being 'responsible' for the discriminatory mental processes of person B, or on whether person A's actions

brought about the specific discriminatory mental processes of person B. In the first place, the very concept of causing direct discrimination by person B is predicated on there being an intervening unlawful act of person B involving discriminatory mental processes for which person B is independently responsible (and liable). Therefore, that cannot itself negate the liability of person A.

55. Further, if it were a requirement that person A's actions must have brought about person B's specific discriminatory mental processes, that would negate liability in circumstances where that would obviously be contrary to the legislative purpose. For example, consider a situation in which A and B independently share a prejudice against C's protected characteristic. If, because of that prejudice, A makes a false allegation against C which, because of B's independent prejudice, B then upholds as a basis for dismissing C, A will not have brought about B's independent prejudice or B's independent mental processes. Indeed, B's thinking and actions may have differed from what A intended or envisaged in other respects: B may have relied on a different ostensible rationale for upholding the allegation from that envisaged by A, or A may have intended or envisaged some lesser sanction. But the fact will remain that A has done *precisely the sort of thing* that s111 (and the EqA10 generally) is intended to eliminate – that is, A will have acted, because of C's protected characteristic, in a way that is detrimental to C. To then make A's liability contingent on some (unclear) concept of 'responsibility' for B's mental processes, or on the precise relationship between A's conduct and B's mental process, would be contrary to the purpose of s111 and wrong in principle – not to mention the practical difficulty of requiring, in each case, an enquiry into the precise genesis of B's discriminatory mental processes, and the practical opportunities that would afford for culpable respondents to avoid liability.

56. This conclusion is supported by analogy with the approach of the EAT in Bullimore. In that case, a former employer gave the claimant a poor reference, which included gratuitously referring to the fact that she had brought employment tribunal proceedings for sex discrimination, as a result of which the prospective employer withdrew the offer of employment. The EAT (Underhill J) rejected arguments that the intervening unlawful act of the prospective employer was not foreseeable and/or broke the chain of causation. It held (§21, with emphasis added):

> 'Standing back from the tribunal's particular reasoning, it seems to us that as a matter of policy and fairness the respondents ought plainly to be liable here. When an employer (or ex-employer) gives, **for an illegitimate reason**, an adverse reference which leads to a prospective future employer deciding not to make, or to withdraw, a job offer to a candidate it 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.'

57. So, in a claim for causing direct discrimination under s111(2), where person A acts, **for an illegitimate reason** (i.e. because of C's protected characteristic), in a way that causes person B to directly discriminate against C, that is the very kind of conduct for which A ought to be liable as a matter of policy and fairness. Person B's intervening independent unlawful conduct cannot be regarded as breaking the chain of causation or otherwise negating A's liability.

58. For all of those reasons, on proper interpretation of EqA10, s111(2), the ingredients for liability for causing direct discrimination contrary to s13 are that (a) person A acted because of the relevant protected characteristic; and (b) but for person A's actions, person B would not have committed the relevant act of direct discrimination against person C (whether or not person A intended person B's actions or brought about the particular discriminatory mental processes of person B).

The ingredients of inducing a basic contravention under s111(3)

59. The starting point is again the language of s111(3). The EAT was right that the term 'induce' is broadly synonymous with 'persuade', which may or may not involve *'an element of carrot or stick'* (EAT Judgment, §105 **[68]**). See also the EHRC *Code of Practice on Employment (2011)*, which makes clear, an 'inducement' under s111(3) does not require any threat or offer: simple persuasion is sufficient; and see to similar effect in respect of predecessor legislation CRE v The Imperial Society of Teachers of Dancing [1983] IRLR 315, EAT, §8 *per* Neill J.

60. The EAT was also right that the term connotes an intention to bring about some action (EAT Judgment §106 **[68]**). However, the EAT was wrong to conclude that there must be an exact correspondence between the intended action and the actual outcome. 'Induce' is in that sense wider than 'instruct' under subsection 111(1), which connotes a greater degree of specificity in the intended result. The possibility

that an inducee might not do exactly what an inducer intended is inherent in the less precise nature of an 'inducement', and does not necessarily mean it is inapt to describe the inducee as having been 'induced' to act. For example, it would be perfectly natural to say that person A 'induced' person B to impose a disciplinary sanction on person C in circumstances where B made a complaint about C intending no more than that A should consider the complaint and decide for himself what action to take, or even where A intended a different outcome from the one B decided upon. Since s111 should be given a broad interpretation where possible, and it is perfectly natural to describe an action as having been 'induced' if it is of a kind intended by the inducer, even if not precisely what he intended, that is the interpretation that the term should be given in s111(3).

61. In addition, essentially the same considerations addressed above in relation to 'causing' a basic contravention also apply in relation to the further ingredients for liability under s111(3) – that is, they should mirror the ingredients of the underlying cause of action. So, in the case of inducing direct discrimination, person A must act because of the relevant protected characteristic, but does not need to intend or bring about person B's specific discriminatory mental processes.

62. Therefore, on a proper interpretation of s111(3), the ingredients for liability are that (a) person A acted because of the protected characteristic; (b) with the intention of persuading person B to take some action of a particular kind; (c) person B was persuaded to take action of that kind (whether or not precisely what person A intended); and (d) in taking that action, person B directly discriminated against person C (whether or not person A intended or brought about the specific discriminatory mental processes of person B).

Submissions as to the specific grounds of appeal

Ground 1: failure to apply the correct test for causing a basic contravention

63. Both the Tribunal and EAT failed to apply the correct test for liability for causing a basic contravention under EqA10, s111(2), as set out at paragraph 58 above:

    63.1. The Tribunal did not properly articulate what test it thought it was applying, but it is clear that it did not consider it sufficient that (a) Kirrin

Medcalf (writing as Stonewall's Head of Trans Inclusion) complained because of the Claimant's protected characteristic and that, (b) but for that complaint, Garden Court would not have discriminated against the Claimant by upholding that (or any) complaint. To the extent that it is possible to infer what other matter(s) the Tribunal may have had in mind, the only real candidates are either its finding that Kirrin Medcalf did not have any particular outcome in mind, or that it considered for some (unexplained) reason that Garden Court's direct discrimination broke the chain of causation. For the reasons set out at paragraphs 53-57 above, those are neither necessary nor relevant considerations.

63.2. The test adopted by the EAT – i.e. whether, in addition to 'but for' causation, it is *'fair or reasonable or just'* to hold person A liable – is not the correct test for the reasons given at paragraphs 49-57 above. Moreover, in its application of that test, two of the matters on which the EAT placed emphasis were Kirrin Medcalf's subjective intentions and whether he was 'responsible' for Garden Court's specific discriminatory mental processes. The first of these effectively imported by the back door a requirement for intention, which the EAT itself had (rightly) held is not an ingredient for 'causing' a basic contravention under s111(2). The second is contrary to the premise of s111(2) that there will necessarily be an intervening unlawful act for which person B is 'responsible'. For the reasons set out at paragraphs 51-55 above, both are neither necessary nor relevant considerations.

64. Applying the correct test as set out at paragraph 58 above, it is clear that it is satisfied. As the EAT rightly held (EAT Judgment, §126 **[71]**), on the Tribunals' findings (summarised at paragraphs 22 above) there is no doubt that in making his complaint Kirrin Medcalf was significantly influenced by the Claimant's beliefs – indeed he was making a 'protest' *about* those beliefs and her (legitimate) expression of them. The Tribunal expressly found that 'but for' causation was established (ET Judgment, §377 **[184]**).

Ground 2: perverse failure to uphold the claim for causing a basic contravention

65. Further, even if the test for causing direct discrimination articulated by the EAT applied, a more searching scrutiny of the conduct of Kirrin Medcalf (on behalf of

Stonewall) was required than was applied by either the Tribunal or the EAT. The matters on which they relied could not be decisive (see again paragraphs 55-59 above). To describe the complaint as *'just a protest'* or just the *'occasion'* for Garden Court's discrimination says nothing about Kirrin Medcalf's culpability or whether it was *'fair or reasonable or just'* to hold Stonewall liable under s111. On the basis of the Tribunal's primary findings of fact, the only proper conclusion, even applying the test adopted by the EAT – or indeed any conceivable test – is that Stonewall 'ought to be liable' for causing Garden Court to discriminate in response to Kirrin Medcalf's complaint:

65.1. Kirrin Medcalf made the complaint to Garden Court as a perceived ally, to 'protest' about the Claimant's beliefs and her legitimate manifestation / expression of them. He did so because of a misplaced prejudice that gender critical beliefs are inherently transphobic, when they are not (see 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).

65.2. In the complaint, Kirrin Medcalf explicitly objected to Garden Court's continued association with the Claimant, said that Stonewall trusted that Garden Court would *'do what is right'*, and invited Garden Court's consideration of the issue. Whatever outcome he may or may not have intended, therefore, he was certainly inviting Garden Court to consider his complaint and do *something* likely to be detrimental to the Claimant.

65.3. Kirrin Medcalf was prompted to make the complaint by statements made by Shaan Knan which explicitly indicated that Garden Court were considering taking action against the Claimant because of her expressions of her belief. Again, therefore, whatever outcome he may or may not have intended, at the time he made the complaint Kirrin Medcalf understood that action against the Claimant was a possible outcome.

65.4. The reason why Garden Court's decision to uphold the complaint amounted to unlawful direct belief discrimination contrary to EqA10, s13 was because the decision-makers were also influenced by opposition to the Claimant's beliefs, in part prompted by Garden Court's association with, and

support for, Stonewall and its position. Thus, even on the EAT's approach, Stonewall was 'responsible' for Garden Court's discriminatory mental processes because they were influenced, in their discriminatory decision to (partly) uphold the complaint, by their association with Stonewall. At the very least, this was a situation like that considered at paragraph 55 above, in which Stonewall and Garden Court both acted on a shared prejudice.

66. On those facts, whatever test for liability applies, it must be met. Kirrin Medcalf did not act innocently without any conception that his actions could lead to discrimination by Garden Court. He acted as a result of prejudice against the Claimant's beliefs, which he (rightly) perceived was shared by Garden Court, in direct response to explicit encouragement to support disciplinary action against the Claimant and made his complaint in terms which explicitly called for (unspecified) action by Garden Court. On any view, that conduct had all the hallmarks of the 'evil' of discrimination that the EqA10 is intended to eliminate. These are precisely the kind of circumstances in which person A 'ought to be held liable'.

Ground 3: EAT's reliance on irrelevant matters that had not been argued

67. The EAT further erred in placing reliance on its own conclusions that:

    67.1. It was *'not particularly likely'* that Garden Court would discriminate in responding to Stonewall's complaint (EAT Judgment §129 **[72]**) – The EAT itself concluded that foreseeability is not an ingredient of liability under s111(2) (EAT Judgment, §123 **[71]**). Moreover, this was not a finding made by the Tribunal, was not argued on behalf of Stonewall, and was not open to the EAT. On the contrary, given that Kirrin Medcalf was responding to a message which explicitly referred to the possibility of action against the Claimant by Garden Court, the only proper conclusion is that such action was eminently foreseeable. Further, there was abundant evidence before the Tribunal of communications by Garden Court members (including to Stonewall) indicating that they shared Kirrin Medcalf's prejudice against the Claimant's beliefs, as well as evidence of the wider tendency (recognised in Miller) for people in many fields wrongly to stigmatise statements of gender critical belief as 'transphobic'. The EAT's conclusion is not sustainable, or a matter for it.

67.2. Stonewall's complaint was itself a legitimate manifestation / expression of beliefs that are protected under EqA10, ss4 and 10 (EAT Judgment, §132 **[72-73]**) – Kirrin Medcalf's complaint was not a personal contribution to the general debate: it was a *complaint* in his capacity as Head of Trans Inclusion at an influential organisation to the Claimant's chambers, within the context of relationships to which the EqA10 applies. It is no defence to unlawful conduct under the EqA10 to say that it is expressing a belief that is itself protected: restricting Kirrin Medcalf's ability to advance his beliefs in *that particular context* and *in that particular way* is necessarily justified under ECHR, Articles 9(2) and/or 10(2). The point relied on by the EAT is therefore wrong in law. Moreover, it is not a point relied on by the Tribunal or advanced on behalf of Stonewall. It was not a point open to the EAT.

Ground 4: failure to remit the issue of liability for causing a basic contravention

68. On any view, the test identified by the EAT was not the test applied by the Tribunal: it is not a test articulated by the Tribunal or implicit in the Tribunal's reasons. Nor is it a test that was advanced by any party, either before the Tribunal or the EAT.

69. Therefore, even if (contrary to Grounds 1 and 2) (a) the EAT has now identified the correct test, and (b) the claim was not bound to succeed even applying that test, nevertheless the EAT was only entitled to uphold the claim if applying the new test it had identified cannot have affected the result (Jafri v Lincoln College [2014] ICR 920, CA, §21 *per* Laws LJ). Even if (contrary to the Claimant's case) the matters relied on in respect of Ground 2 above are insufficient to show that it was perverse not to uphold the claim under s111, they are certainly sufficient to show that the Tribunal did not *have* to find that it was not *'fair or reasonable or just'* to hold Stonewall liable in the circumstances. If that is the correct test, that is an assessment for the Tribunal to make, and the EAT ought to have remitted the matter.

Ground 5: failure to apply the correct test for inducing a basic contravention

70. Both the Tribunal and EAT also failed to apply the correct test for inducing a basic contravention under EqA10, s111(3), as set out at paragraph 62 above. In particular, having regard to the summaries of their respective reasons at paragraphs 34-35 and 41 above:

70.1. Both treated intention to induce the *particular* outcome as a necessary ingredient, when it is not.

70.2. Both took into account whether there was an *actual or perceived* threat, which is irrelevant.

70.3. Further, in the case of the EAT, at paragraph 141 of its Judgment **[74]** it held that, if there was any inducement, it was *'because of an allegedly objectionable manifestation of [the Claimant's] belief'* not the belief itself. That distinction is wrong in law and contrary to the findings of the Tribunal, and was not open to the EAT. It is wrong in law because expressions/ manifestations of a protected belief must be treated as inseparable from the protected characteristic of belief unless restricting them can be justified under ECHR Articles 9(2) and/or 10(2) (Page v NHS Trust Development Authority [2021] ICR 941, CA, §§68-74 *per* Underhill LJ; Higgs v Farmor's School [2023] IRLR 708, EAT, §§32-41 & 57 *per* Eady J). Therefore, no distinction can be drawn between the belief and a particular manifestation on the basis that it is *'allegedly objectionable'*: that question must actually be determined, and that is a matter for the Tribunal (Higgs, §§90-91 *per* Eady J). In this case, the Tribunal had in fact addressed the question and found that the relevant manifestations did not justify restricting them under Articles 9(2) and/or 10(2) (ET Judgment, §§295-8 & 327, final 8 lines **[161-162, 170]**). That finding has not been appealed. Therefore, the distinction that the EAT sought to draw was not open to it, and was not in any event a matter for it.

71. Applying the correct test (set out at paragraph 62 above) to the Tribunal's findings of primary fact, Kirrin Medcalf made the complaint because of the Claimant's beliefs and/or their (legitimate) expression / manifestation. He plainly intended that it should be considered (because he said so explicitly in the complaint) and that *some* action should be taken in response that was likely to be detrimental to the Claimant, even if only *'a public denial of association with [the Claimant's] views'* (ET Judgment §369 **[182]**). That any such public denial of association was likely to be detrimental is apparent from findings which show the degree of public opprobrium that the Claimant was already under and the distress she experienced at the idea that her chambers might publish anything implying that she was

transphobic or lacked GCC's commitment to promoting equality (see e.g. ET Judgment, §§155, 160, 304-9, 392 **[124, 125, 163-164, 187]**). Garden Court were in fact persuaded by the complaint to consider and (partly) uphold it: that is action of the *kind* intended by Kirrin Medcalf even if he did not intend the particular outcome. In doing so, Garden Court directly discriminated against the Claimant. Applying the test at paragraph 62 above, that is sufficient to establish liability under s111(3).

72. Alternatively, Kirrin Medcalf *attempted* to induce Garden Court to directly discriminate against the Claimant by taking detrimental action against her because of her beliefs and/or their legitimate expression / manifestation, in the form of investigating the complaint and publicly dissociating themselves from her beliefs. Pursuant to EqA10, s111(6)(a) it expressly does not matter that the particular basic contravention intended by Kirrin Medcalf did not occur; Stonewall is nevertheless liable under s111(5)(b) for the actual detriment suffered by the Claimant as a result. Therefore, on this basis, Stonewall is liable in any event.

Conclusion

73. For the reasons set out above, the Claimant asks for permission to appeal and will invite this Court to uphold the appeal and to substitute a finding that her claim under s111 against Stonewall in respect of Kirrin Medcalf's complaint succeeds, alternatively that that claim should be remitted to the same employment tribunal.

BEN COOPER KC

30 August 2024

IN THE COURT OF APPEAL (CIVIL DIVISION)

Appeal No.

BETWEEN

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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