

# Trans rights charity did not cause or induce chambers to discriminate against one of its barristers

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[Bailey v \(1\) Stonewall Equality Ltd \(2\) Garden Court Chambers & Ors \[2024\] EAT 119](#)

## Background

1. Mrs Bailey ('the Claimant') was a barrister and tenant at Garden Court Chambers ('GCC'). The Claimant believes that a woman is defined by her sex and not by her gender. The Claimant's gender critical views also include the belief that the charity Stonewall wants to replace sex with gender identity and that this erodes the rights of women, lesbians, and those of same-sex orientation. The Employment Tribunal found these were protected beliefs under the Equality Act 2010 [289 – 293 ET Judgment].
2. When GCC became a Stonewall Diversity Champion in December 2018, the Claimant complained to her colleagues at GCC. In the second half of 2019, the Claimant then put out a series of tweets in opposition to trans rights campaigns. On 22 October 2019, the Claimant announced on Twitter the launch of the LGB Alliance, the purpose of which was to resist 'gender extremism.'
3. GCC received a series of complaints regarding these tweets and on 24 October 2019, GCC put out a tweet saying that they were investigating concerns about the Claimant's tweets in line with the BSB and their own complaints policies. The ET found that GCC had directly discriminated against the Claimant and that this tweet amounted to a detriment.
4. On 25 October 2019, a member of GCC was asked to investigate the complaints raised against the Claimant under the GCC complaints procedure. On 31 October 2019, Kirrin

Medcalf, Stonewall's Head of Trans Inclusion, sent a further complaint to GCC complaining about 11 tweets made by the Claimant.

5. On 11 December 2019, a final investigation report was drafted which found that it was likely that the Claimant's conduct breached the BSB Core Duties. Based on this report, the Claimant was asked to delete two of her tweets. The ET upheld that this was a further detriment.
6. The Claimant brought her claim in the ET against three Respondents, Stonewall, Garden Court Chambers Ltd, the service company that owns the premises and employs the administrative staff, and the tenants of Garden Court Chambers. The Claimant's claim against Stonewall, specifically that Stonewall had instructed or induced discrimination by GCC in breach of section 111 Equality Act 2010, was dismissed by the ET. This was the subject of the Claimant's appeal to the Employment Appeal Tribunal.
7. The Claimant appealed to the EAT on two grounds:
  - a. The facts found by the ET were consistent only with a ruling that Stonewall did cause discrimination contrary to section 111 of the Equality Act 2010.
  - b. The facts found by the ET were consistent only with a ruling that Stonewall induced discrimination contrary to section 111 of the Equality Act 2010.

### **The Employment Tribunal's approach to section 111 Equality Act 2010**

8. The ET held that when considering s.111, where the basic contraventions themselves require a mental element, the Tribunal must find that Stonewall's reason for its instruction, inducement, causing, or attempts to induce or cause conduct that would amount to that contravention were significantly influenced by the Claimant's protected characteristic [360 Employment Tribunal Judgment] (emphasis added).
9. The ET stated that there must be evidence of actual instruction, causation, inducement or an attempt to cause or induce. It will not be sufficient for the Claimant to establish that certain persons were in a position to do those things.
10. The ET then made factual findings about Kirrin Medcalf's conduct in making the complaint to GCC on 31 October 2019. The ET found that the complaint was written

without a specific aim in mind except perhaps a public denial of association with the Claimant's views.

11. It was set out that in a 'but for' sense Kirrin Medcalf had caused the detriment to the Claimant. Kirrin Medcalf's complaint led to further investigation which led to the final report and to the request that the Claimant delete two of her tweets. However, the ET held that while Kirrin Medcalf's complaint was the occasion of the report it was not the cause.
12. The ET found that Kirrin Medcalf did not have in his mind that any formal action would be taken by Chambers against the Claimant when making his complaint. Further, the ET declined to conclude that Kirrin Medcalf would have been aware that GCC were Stonewall Diversity Champions. The ET found that there were no words in the complaint which intended to make GCC fear losing their Diversity Champion status. Based on these factual findings, the ET concluded that the complaint raised by Stonewall did not cause and was not an inducement to discriminate against the Claimant.

## **The Employment Appeal Tribunal**

13. Under the first ground of appeal, the Claimant argued that the ET had incorrectly applied s.111(2) by:
  - a. applying the wrong test for causation and remoteness;
  - b. wrongfully focusing on Kirrin Medcalf's subjective intentions;
  - c. importing a requirement that Kirrin Medcalf must have intended the specific contravention of the Equality Act that was committed by GCC.
14. Under the second ground of appeal, the Claimant argued that the ET had erred by treating a subjective intention on Kirrin Medcalf's part to use GCC's Diversity Champion status as leverage or a subjective perception on GCC's part of a threat by Kirrin Medcalf to use it as leverage as a condition for liability under section 111(3).

### **s.111(1) 'instruct'**

15. Section 111(1), requires that Person A must not "instruct" Person B to do in relation to Person C anything that contravenes the relevant provisions. The EAT held that "*the*

*question of person A's mental state is subsumed into the nature of the prohibited act."* Essentially, Person A must know what it is they are instructing Person B to do, otherwise they are not giving an instruction [101].

16. Therefore, while it was not necessary for Kirrin Medcalf to know that his instruction to GCC was unlawful, to breach s.111(1) his act must contain all the elements of whichever statutory torts Person B will commit by following his instruction.
17. In this case, for the Claimant to succeed under s.111(1) it would have to be shown that Kirrin Medcalf instructed GCC to treat the Claimant less favourably than they treat others because of her protected belief.

### **s.111(2) 'cause'**

18. The EAT held that there was no fixed mental element imported into s.111(2). However, to satisfy s.111(2) it will not be enough that Person A caused Person B to commit a particular act or omission. The Claimant must establish that Person A caused Person B to commit the act or omission because of a protected characteristic [115].
19. The EAT further held that causation under s.111(2) does not depend on a test of reasonable foreseeability [109 – 112].
20. Instead, the EAT applied the approach taken to causation in *Kuwait Airways Corp v Iraqi Airways Co* (Nos 4 and 5) [2002] 2 WLR 1353 HL [69] which sets out a twofold inquiry of:
  - (1) whether the wrongful conduct causally contributed to the loss on a "but for" basis and,
  - (2) what is the extent of the loss for which the defendant ought to be held liable.
21. A claimant must therefore show that Person A's conduct causally contributed to Person B's commission of the prohibited act on a 'but for' basis and that it would be fair or reasonable or just to hold Person A liable. Foreseeability of the outcome will likely be relevant to whether it is fair or reasonable or just to hold Person A liable, but it will not be determinative.

### s.111(3) 'induce'

22. The EAT held that the word "induce" in s.111(3) is broadly synonymous with the word "persuade." Persuasion can happen verbally or by a carrot and stick approach [105]
23. The EAT considered that, as with instructing under s.111(1), Person A must know what they are inducing Person B to do, otherwise they are not making an inducement. Therefore, Person A must have intentionally induced Person B to carry out an act or omission which contains all the elements of the statutory tort that is a basic contravention, including any mental element [106].

### **The EAT's findings**

24. Based on the above statements of the law, the EAT dismissed both grounds 1 and 2 of the Claimant's appeal.
25. On ground 1, the EAT held that Kirrin Medcalf's intention when making the complaint was relevant to the question of whether it was fair or reasonable or just to regard Stonewall as having caused the basic contravention [127].
26. Based on the ET's factual findings that the complaint was not understood or intended as a threat to discontinue Stonewall's relationship with GCC if GCC did not expel the Claimant it was therefore not fair or reasonable or just to find Stonewall liable for causing the basic contravention [128].
27. The EAT further held that even if reasonable foreseeability had been the correct approach to causation, it was not reasonably foreseeable that Kirrin Medcalf's complaint would have caused the discrimination. Kirrin Medcalf could not have known that the complaint would not be weighed impartially and decided in a lawful manner by GCC [129 – 130].
28. On ground 2, the EAT held that Person A must intend to induce Person B to do something which contains all the elements of the basic contravention. Kirin Medcalf's intentions were therefore a necessary area of enquiry for the ET and there had been no misdirection on the law when the ET considered his intentions [137].

## Comment

29. This is the first reported judgment that directly deals with what it means to cause or induce discrimination under s.111 Equality Act 2010. This judgment provides helpful guidance, particularly on the mental element required under s.111 and what is required to establish causation under s.111(2).
30. Although not a subject of the appeal, the EAT provided some helpful commentary on the mental element required for 'instruction' under s.111. Of particular significance was the EAT's reminder that to be liable under s.111(1), Person A need not know that their instructions are unlawful, it is only necessary that the mental elements of the basic contravention are satisfied. Therefore, in the case of indirect discrimination, Person A would only have to instruct Person B to apply a PCP which contravenes section 19 Equality Act 2010. There would be no additional requirement for Person A to know or intend for the PCP to contravene s.19. This statement of the law serves as a reminder that, while in some instances the mental element under s.111 will be difficult to establish, there is scope to bring claims under s.111.
31. The approach taken to causation under s.111(2) is an interesting one. The EAT was clear that it is necessary to identify the extent or nature of the causing which Parliament intended to outlaw in section 111(2). The Tribunal referred to the approach taken in *Essa v Laing Ltd* [2004] IRLR 313, where a majority of the Court of Appeal, when deciding what compensation should be awarded against an employer who was liable under section 56 of the Race Relations Act 1976, declined to apply the "reasonably foreseeable" test and instead took the approach set out in *Kuwait Airways Corp v Iraqi Airways Co & Anor* [2002] UKHL 19.
32. However, as was noted at paragraph 108 of the judgment, both *Essa* and *Kuwait Airways Corp* are cases that deal with the causation of loss and what should be recoverable once a tort is committed. In the case of s.111(2), the causing is itself the tort. It is not clear that the approach taken to causation in *Kuwait Airways Corp* should be imported into the question of liability. It will therefore be interesting to see whether this approach to s.111(2) is subject to further appeal.

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