Case No: CA-2024-001933

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM
EMPLOYMENT APPEAL TRIBUNAL
Mr Justice Bourne

NCN: [2025] EWCA Civ 1662

Date: 18.12.2025

Before :

LORD JUSTICE BEAN
(Vice President of the Court of Appeal (Civil Division))
LORD JUSTICE NEWEY
and
LADY JUSTICE WHIPPLE

- -

Between :

ALLISON BAILEY	**Appellant**
- and -	
STONEWALL EQUALITY LTD	**First Respondent**
- and –	
GARDEN COURT CHAMBERS	**Second Respondent**
- and –	
RAJIV MENON KC AND STEPHANIE HARRISON KC SUED AS REPRESENTATIVES OF ALL MEMBERS OF GARDEN COURT (EXCEPT THE APPELLANT)	**Third Respondent**

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Ben Cooper KC (instructed by **Doyle Clayton Solicitors**) for the Appellant
Ijeoma Omambala KC (instructed **by CMS Cameron McKenna Nabarro Olswang LLP**) for the Respondent

Hearing dates: 21 and 22 October 2025

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Approved Judgment

This judgment was handed down remotely at 10.30am on [18 December 2025] by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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LADY JUSTICE WHIPPLE

Lady Justice Whipple:

Introduction

1. Ms Bailey is a barrister. At the material time she was a tenant at Garden Court Chambers ("GCC"). She pursued a claim for discrimination in the Employment Tribunal ("ET") against GCC (naming the service company which owns the chambers premises and GCC's heads of chambers as respondents). She succeeded in that claim against GCC and was awarded damages. There was no appeal by GCC.

2. Ms Bailey also sued Stonewall Equality Ltd ("Stonewall") for discrimination arising out of the same events. The ET (Employment Judge Sarah Goodman sitting with Mr M Reuby and Ms Z Darmas) dismissed that claim in a reserved judgment dated 25 July 2022 (the "ET Decision"). The Employment Appeal Tribunal (Mr Justice Bourne) dismissed her first appeal in a reserved judgment dated 24 July 2024 ([2024] EAT 119, [2025] ICR 46) (the "EAT Decision"). Ms Bailey now pursues a second appeal against Stonewall with permission granted by Singh LJ.

3. The question raised in this appeal is whether the ET was wrong to dismiss Ms Bailey's claim against Stonewall for causing or inducing, or attempting to cause or induce, GCC to discriminate against her; and whether the EAT was therefore wrong to dismiss the first appeal. That question in turn depends on the construction and meaning of section 111(2) and (3) of the Equality Act 2010.

4. Mr Cooper KC has appeared for Ms Bailey throughout these proceedings. Ms Omambala KC has appeared for Stonewall throughout. I am grateful to both counsel, and their supporting legal teams, for their expert assistance.

The Equality Act 2010

5. Part 2 of the 2010 Act establishes certain key concepts. Within that Part, section 4 deals with protected characteristics, which include "belief", further defined by section 10(2) to mean any religious or philosophical belief.

6. Section 13 defines direct discrimination in the following terms:

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

7. Section 27 defines victimisation in the following terms:

> "(1) A person (A) victimises another person (B) if A subjects B to a detriment because—
>
> (a) B does a protected act, or
>
> (b) A believes that B has done, or may do, a protected act."

8. Part 5 of the 2010 Act concerns equality at work, one of the areas of application of the 2010 Act. Within that Part, section 47 applies to barristers and section 47(5) provides

that a barrister (A) must not victimise another person (B) who is a tenant by subjecting B to pressure to leave chambers or by subjecting B to any other detriment.

9. Part 8 addresses certain ancillary forms of prohibited conduct. Within that Part, section 111 provides as follows:

> "**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 a 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."

10. It has always been common ground that GCC and Stonewall were in a qualifying relationship for the purposes of section 111(7), because Stonewall provided services to GCC.

11. It is now also common ground, in light of the ET's findings against GCC, that GCC has committed two basic contraventions against Ms Bailey for the purposes of section 111(1) of the 2010 Act.

Facts

12. The ET dealt with a large number of issues relating to Ms Bailey's case against GCC as well as her ancillary case against Stonewall. Its decision ran to 117 pages (the "ET Decision"). The ET Decision was a thorough and careful piece of work for which the panel is to be commended. The issues are now considerably narrowed and for present purposes I can summarise the key facts shortly.

13. Ms Bailey believes that a woman is defined by her sex. She disagrees with the beliefs of those who say that a woman is defined by her gender, which may differ from her sex, and is for the individual to identify. The ET found that this belief, sometimes referred to as "gender critical", was protected under the Equality Act 2010, applying *Forstater v CGD Europe Ltd* [2022] ICR 1. There is no challenge to that finding.

14. Stonewall is a charity committed to advancing the rights of gay, lesbian, bisexual and trans people ("LGBT"). In 2015, it turned its attention to transgender issues and campaigned for gender recognition reform, setting up the Stonewall Trans Advisory Group ("STAG") as an interface between Stonewall and other trans groups. Stonewall campaigned for inclusion for trans people, as well as for gays, lesbians and bisexuals. It devised a Diversity Champions Scheme to promote inclusion for the groups it represented in workplaces.

15. Stonewall's support of trans rights, and in particular its support for self-identification under the Gender Recognition Act 2004, created tension with some of Stonewall's traditional supporters, including lesbians such as Ms Bailey, who felt threatened by people with male bodies who identified as women. Some women with gender critical beliefs campaigned for same sex spaces and felt alienated by the accusation that it was transphobic.

16. GCC signed up to Stonewall's Diversity Champions Scheme in November 2018. Ms Bailey objected to that in an email she sent to all members of GCC, saying that she supported trans rights but did not support the "trans-extremism that is currently being advocated by Stonewall". In the second half of 2019 Ms Bailey posted a number of comments on Twitter (now X) which reflected her gender critical views and her objection to Stonewall's trans agenda. On 22 October 2019, Ms Bailey announced the

launch of the LGB Alliance, a campaigning organisation for lesbian, gay and bisexual rights according to gender critical principles.

17. On 23 October 2019, GCC hosted a meeting of the Trans Organisational Network ("TON"). That meeting was attended by Kirrin Medcalf, head of trans inclusion at Stonewall. The meeting was hosted by Shaan Knan who ran TON. Shaan Knan encouraged those present to write to GCC to express concern about Ms Bailey's tweets. On 24 October 2019, Shaan Knan put a message on STAG's wall and Facebook page asking people to write to GCC to express their concerns.

18. GCC received a number of comments on its website objecting to Ms Bailey's tweets. GCC informed Ms Bailey on 24 October 2019 that there would be an investigation. On the same date, 24 October 2019, GCC tweeted a message to seven individuals who had complained on Twitter in the expectation that it would be retweeted widely. That message said that GCC was investigating Ms Bailey's comments, which were made in her personal capacity and did not represent the views of GCC. This became known as the "response tweet".

19. In a draft report dealing with Ms Bailey's tweets up to 24 October 2019, which draft was dated 4 November 2019, the investigator (Maya Sikand, then a member of GCC) concluded that the tweets she had considered were neither transphobic nor in breach of professional guidance.

20. On 27 October 2019, an interview with Ms Bailey appeared in the Sunday Times. Ms Bailey tweeted that article referring to "appalling levels of intimidation, fear and coercion that are driving the [Stonewall] trans self-ID agenda".

21. On 28 October 2019, Kirrin Medcalf posted "done" on the STAG wall. This appears to be a reference to his email to GCC on 31 October 2019 in which he complained about 11 tweets posted by Ms Bailey since September 2019; he said that Ms Bailey had been making and retweeting multiple "transphobic" statements online (he provided links to seven tweets or retweets by Ms Bailey); he said that she had been "specifically targeting" Stonewall and members of its staff (he provided four further links, including one to a comment dated 22 September 2019 about an employee of Stonewall called Morgan Page); he complained that Ms Bailey had chaired meetings of Woman's Place which he said was regarded by many LGBT rights organisations to be a hate group; he said that Ms Bailey's actions and their link to GCC threatened the positive relationship which GCC had built with the trans community. He ended his email in this way:

> "Garden Court barristers have always been allies to trans people and to Stonewall, which is something we are very proud 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."

This email from Kirrin Medcalf was referred to as the "Stonewall complaint".

22. On 4 November 2019, the Stonewall complaint was sent to Maya Sikand for investigation along with a number of tweets by Ms Bailey which had not so far been investigated. On 6 November 2019, Maya Sikand wrote to Ms Bailey asking for her to comment on two tweets, the first being the 22 September 2019 tweet about Stonewall's employee, Morgan Page, and the second being the 27 October 2019 tweet about the Sunday Times interview (these are the "two tweets"). Ms Bailey responded on 21 November 2019. GCC's co-head of Chambers (Stephanie Harrison QC) then sought advice from the Bar Council Ethics Committee (Catherine McGahey QC). GCC did not provide Catherine McGahey with a copy of Ms Bailey's response of 21 November 2019.

23. Catherine McGahey advised, on the basis of information before her, that if Ms Bailey could not substantiate the assertions made in her two tweets, she "may be at risk" of a finding of professional misconduct, but that what she had written was "probably … over the borderline of acceptable conduct" given that her posts represented her sincerely held views. Maya Sikand's draft final report adopted Catherine McGahey's language and concluded that there was a "risk of" breach of professional obligations. In response to a suggestion by Stephanie Harrison, Maya Sikand elevated the language of her report to conclude that the two tweets were "likely" to have breached professional obligations. Her report, containing that conclusion, was provided to GCC's Heads of Chambers.

24. In light of Maya Sikand's report, GCC asked Ms Bailey to take down the two tweets. Having considered that request, Ms Bailey declined to do so. In the event, no further action was taken against Ms Bailey by GCC.

The ET's Decision

Basic Contraventions by GCC

25. Ms Bailey sued GCC alleging discrimination (direct and indirect) and victimisation. The ET held that Ms Bailey's views about gender self-identity and the effect of Stonewall's campaign to promote self-identity were protected beliefs for the purposes of section 10(2) of the 2010 Act. The ET also held that the two tweets were protected acts for the purposes of section 27(1) of the 2010 Act. The ET found that Ms Bailey had made out her claim for direct discrimination against GCC in two ways, both of which were "basic contraventions" for the purposes of section 111(1) of the 2010 Act. The first basic contravention (or discriminatory act) consisted of GCC's response tweet on 24 October 2019 in which GCC announced an investigation against Ms Bailey. This was referred to as Detriment 2. The ET held that GCC had picked sides against Ms Bailey by instituting an investigation of her on account of her protected beliefs and by telling those who had complained about her that it had done so. Detriment 2 pre-dated the Stonewall complaint and is not material to this appeal, save as part of the background.

26. The second basic contravention (or discriminatory act) consisted of the outcome of the investigation. This was referred to as Detriment 4. The ET identified three problems

with the way GCC handled its investigation once it was reopened in November 2019 (paras 327-8 of the ET's Decision): (i) the fact that Catherine McGahey, who was asked for advice by GCC, was never sent Ms Bailey's response setting out her explanation of the two tweets, which was unfair to Ms Bailey; (ii) the interference by Stephanie Harrison in the process leading to the phrasing of Maya Sikand's final report in circumstances where Stephanie Harrison should not have been involved because she had already demonstrated opposition to Ms Bailey's views; and (iii) the disapproval by Maya Sikand and other senior members of GCC of Ms Bailey's beliefs which led them to conclude that she had or was likely to have breached her professional duties.

27. The ET held that Detriment 4 was established on the facts and the outcome of the investigation was a detriment to Ms Bailey. Further, that detriment was because of (in the sense of being significantly influenced) by Ms Bailey's protected beliefs (so as to amount to direct discrimination) as well as being materially influenced by the two tweets, which the ET had found to be protected acts (so as to amount to victimisation) (para 328).

28. The ET dismissed Ms Bailey's claim for indirect discrimination by GCC, holding that there was no provision, criterion or practice ("PCP" as defined in section 19 of the 2010 Act) established on the evidence. Ms Bailey had argued that there was a PCP in the form of GCC allowing Stonewall to direct the complaints process, but the ET rejected that submission holding that: "there was no evidence whatsoever that Stonewall directed [GCC]'s investigation process" and that her allegation that Stonewall directed the complaints process "was a conspiracy theory" (para 355 of the ET's Decision).

29. The ET awarded Ms Bailey damages of £22,000 against GCC by way of remedy for Detriments 2 and 4, including an award for aggravated damages.

The Case Against Stonewall

30. Ms Bailey's claim against Stonewall was pleaded in the further revised amended particulars of claim dated 28 September 2021. By para 2(d) she claimed that Stonewall had instructed, caused or induced GCC's unlawful conduct, contrary to section 111. She asserted that Stonewall's complaint "became the focus of [GCC's] investigation" (para 14) and that GCC's upholding of the Stonewall complaint amounted to a detriment against her (para 16). Ms Bailey's case was particularised at paras 17 and 18, as follows (emphasis added):

> "17. The Claimant's case is that:
>
> a. Individuals for whose actions [GCC] are liable **colluded** with [Stonewall] in the submission of the complaint against her and/or invited the submission of the complaint;
>
> b. The Claimant's protected acts were the reason for those actions and for the complaint; and
>
> c. [GCC] (acting through members of chambers including its Heads of Chambers) initiated the investigation into the Claimant and upheld the

> complaint against her **at the explicit or implied inducement or instruction of [Stonewall**].
>
> 18. [Stonewall]'s "Diversity Champion" programme involves lecturing and educating its champions on issues relevant to [Stonewall]'s campaigning priorities. This includes gender theory. It also involves providing public recognition to organisations named as Diversity Champions. The Claimant's case is that **[Stonewall] induced, caused or instructed and/or dictated the direction of [GCC]'s treatment of the Claimant**."

31. Ms Bailey argued that the Stonewall complaint was, in and of itself, a detriment to her (para 24(b)(iii)), as was the upholding of that complaint by GCC (para 24(b)(iv)). The allegation at para 24(b)(iii) was referred to by the ET as "Detriment 3". By the time of the hearing, Detriment 3 was an allegation of collusion between GCC and Stonewall in relation to the Stonewall complaint. The ET rejected that allegation as unfounded on the facts (para 200 of the ET's Decision) and in consequence rejected Detriment 3 (para 319 of the ET's Decision).

32. That left the allegation at para 24(b)(iv), known as Detriment 4, which related to the upholding of the complaint by GCC. The ET upheld Detriment 4 in terms I have already examined (paras 26 and 27 above).

Findings In Relation To Stonewall

33. In relation to the case against Stonewall, the ET directed itself as follows:

> "360. Of the mental element required, where the basic contraventions themselves require a mental element (as in direct discrimination and victimisation) then the tribunal must find that A's reason for its instruction, inducement, causing, or attempts to induce or cause conduct that would amount to a basic contravention were significantly influenced by the claimant's protected characteristic (here, belief), even if that was not the motive, or was not the conscious reason.
>
> 361. Any conduct amounting to instructing, causing or inducing, or attempting the latter two, must result in C being subjected to detriment, even if no basic contravention occurred – section 111(5). …"

34. The ET reminded itself that there must be evidence of actual instruction, causation, inducement or attempt to cause or induce and it was not sufficient to show that persons were in a position to do those things, citing *NHS Development Authority v Saiger* [2018] ICR 297 (ET Decision para 362), and that the burden of proof lay on Ms Bailey (ET Decision para 363).

35. The conduct which Ms Bailey complained about as amounting to discrimination by Stonewall fell into three areas, recited by the ET:

> "364. The conduct on which the claimant relies is set out in paragraph 15 of the list of issues. The first five are matters arising in the conduct of the Diversity Champion scheme, already discussed. The next group are the actions of Shaan Knan and Alex Drummond on 25 October (6-8,10) asking for messages of support to be sent to Garden Court, and sending their own messages to Garden Court (13), and Shaan Knan's messages to Michelle Brewer on 24 October and 6 November (11,12). Stonewall denies liability for any action of Shaan Knan and Alex Drummond. Finally the claimant relies on the Kirrin Medcalf's response to Shaan Knan's message on the wall (9), and his complaint to Garden Court on 31 October (14)."

36. The ET dismissed Ms Bailey's arguments on the first two areas. The ET held that Stonewall did not know about Ms Bailey's protest relating to GCC's participation in the Diversity Champion Scheme (para 365 of the ET's decision) and that Stonewall was not responsible for Shaan Knan or Alex Drummond, alternatively the actions of those individuals were insufficient to amount to an inducement, cause or attempt (paras 387-389 of ET's decision). No issue now arises in relation to those matters.

37. The ET also dismissed Ms Bailey's case against Stonewall to the extent that it rested on the actions of Kirrin Medcalf, which was the third area of Ms Bailey's complaint. The reasons for the ET's rejection of that part of the case were contained in the following passage which I cite in full because the ET's reasoning on this point is central to this appeal:

> "367. We next address Kirrin Medcalf's complaint on behalf of Stonewall - (9) and (14). As Head of Trans Inclusion he objected to the claimant on a number of grounds: (a) transgendering [sic] in various of the claimant's tweets, including Morgan Page, a member of staff (b) attacks on trans people's rights to access to women's prisons and hospital wards (c) aligning Stonewall with extremism, intimidation and inflaming the debate (d) chairing meetings of Women's Place, a 'hate group'.
>
> 368. It is obscure what he wanted to achieve or Garden Court to do. The claimant sees the statement that continued association with her put them in a difficult position as a threat that she should be expelled if Stonewall was to continue its relationship with Garden Court. This is certainly one reading. Kirrin Medcalf said it was about the safety of staff if they were to continue working with Garden Court. This is not clear from his email, but is consistent with the protest about "targeting our staff with transphobic abuse" on a public platform, and to "the safety of our staff and community" being their priority. Kirrin Medcalf explained that his staff safety as his purpose in writing the email in a little more detail. He is himself trans. Transwomen are apprehensive of being challenged in a hostile way by natal women if they use female toilets. They are often objects of violence. He did not say whether the violence came from women

or men. He did attend a further meeting at Garden Court a month later, on prison policy, and decided that to mitigate the risk of challenge he would not arrive early, would attend with a cis-male colleague, and would not wear anything that associated him with Stonewall. But if mitigation of risk was his purpose in writing the complaint email, we considered it will have been wholly obscure to the recipients. Other than the final mention of safety, this concern could not be detected. Agreeing that he had not given any detail of his safety concern or what would mitigate any risk, he said in evidence that he had thought they would get back to him about it and they could have a discussion. To our minds however it was implausible that what he wanted was a discussion of arrangements for access to female toilets, or he would have said so.

369. Challenged on why he was not more specific about what he wanted, he said he had "had his advocacy hat on", which we understand to mean that he was writing to protest about her views (stated to come from a member of Garden Court) and put the case for transgendered people. In other words, he wrote without any specific aim in mind except perhaps a public denial of association with her views.

370. He denied it was a response to the Sunday Times article on 27 October, saying he did not read the paper, and in any case that kind of abuse of Stonewall was a normal media perception. A clipping of the article was however shown in one of the tweets he complained about, and was considered relevant by Maya Sikand.

371. Asked about the delay between drafting the email on 28 October and sending it on the 31 October, he agreed that it was inconceivable that he would send a complaint in the name of Stonewall after only 5 weeks in the job without some input from a supervisor, but had no recollection of specific supervision. There is a supervision note of 30 October with Laura Russell, which mentions an email, but not the subject matter.

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

373. What is not present in the complaint is any reference to Garden Court being a Diversity Champion; he mentions only work by Alex Sharpe, and use of the premises for round table meetings, which relate only to individual members' activity, not

any corporate relationship. In this context, Garden Court provided voluntary services to Stonewall, not Stonewall to Garden Court; it was Stonewall that stood to lose. The email contains no instruction. If there [was] some *inducement* here (fear of losing Stonewall Diversity Champion status, more generally a breach of obligation to Stonewall, and some loss of brand association), it lay in the minds of Garden Court managers and Heads. It did not come from Stonewall. There was not even an attempt at inducement. It was clear from evidence that Kirrin Medcalf was alive to Stonewall's soft power – of the Diversity Champion scheme, he said organisations liked to be associated with Stonewall "because it made them look good" – but we did not consider that the terms of his letter, which did not mention the scheme, suggested brand damage, or amounted to inducement.

…

376. Was it in fact seen by Garden Court as an inducement? Only the tweets which seemed to allege criminal behaviour were taken seriously, and Stonewall had not complained of allegations of criminal behaviour in one of those. Concern about the claimant's tweets and the BSB guidance had preceded this complaint – it came from Leslie Thomas [one of GCC's heads of chambers] at the time of the various protests about the claimant's launch tweet. Although both David de Menezes [head of communications and marketing at GCC] in October (before Kirrin Medcalf's letter) and Maya Sikand when she read tweet 10, had mentioned Stonewall in the context of the claimant's tweets, that status was not the basis of the decision to investigate these two tweets out of the many complained of. Nor did it play a part in her finding that these tweets were likely to breach core duties. At most, their reaction to an attack on Stonewall, seen as an ally, was to consider whether there were any grounds for finding the claimant in the wrong, and reaching for BSB [Bar Standards Board] social media guidance as the only candidate. That was Stephanie Harrison's response to the claimant's tweet 10, which Stonewall did not complain about. That did not come from Stonewall. Kirin Medcalf did not know about Bar standards or barristers' duties.

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

38. From these paragraphs, and by way of summary, it is clear that the ET accepted that it was possible to read the Stonewall complaint as a threat that GCC should take some action against Ms Bailey if GCC wished to continue its relationship with Stonewall (para 368 of ET's Decision), but the ET did not think that was the right way to read the Stonewall complaint; rather, the correct reading was that the Stonewall complaint was no more than a "protest" or an appeal to GCC as a "perceived ally" (para 377 of ET's Decision); neither Kirrin Medcalf nor Stonewall was looking for any specific action by GCC against Ms Bailey (paras 369 and 372 of ET's Decision); the Stonewall complaint was not the basis of GCC's decision to investigate the two tweets, and did not play any part in the outcome of GCC's investigation (para 376 of ET's Decision).

39. The ET held that the Stonewall complaint was merely the "occasion for" the report (the report being a reference to Maya Sikand's final report to GCC, which led to Detriment 4) (para 377). Ms Bailey's claims that Stonewall instructed, induced or caused, or attempted to instruct or cause detriment to Ms Bailey failed (para 390).

The EAT's Decision

40. On appeal to the EAT, Ms Bailey advanced two grounds: (i) that the ET had wrongly rejected the claim for causing a basic contravention by applying the wrong test for causation and/or remoteness under section 111(2) and/or by wrongly focussing on Kirrin Medcalf's subjective intentions and/or wrongly importing a requirement that he must have intended the specific basic contravention which occurred; and (ii) that the ET adopted the wrong approach to inducement under section 111(3).

41. Bourne J made some preliminary remarks about section 111, finding that it was intended to eliminate the evil of discrimination in certain sectors (EAT Decision para 94) and to be of broad scope (EAT Decision para 96), that the applicable mental element was to be identified as a matter of common sense from the provisions themselves (EAT Decision para 100), that causing and inducing were overlapping concepts but that it would be difficult to envisage a contravention being induced without also being caused by a person (EAT Decision para 104), that "caused" meant "to bring about" and "induced" meant to "persuade" (EAT Decision paras 104 and 105). In interpreting section 111(2), he drew on *Kuwait Airways Corp v Iraqi Airways Co (Nos 5 and 6)* [2002] UKHL 19, [2002] 2 AC 883 to conclude that a two stage inquiry was necessary, asking: (i) whether the wrongful conduct causally contributed to the loss on a "but for" basis; and (ii) if so, what was the extent of the loss for which the defendant ought to be held liable fairly or reasonably or justly (citing from Lord Nicholls in *Kuwait Airways* at para 70) (EAT Decision paras 110-111, 123). He held that foreseeability was not a component of the statutory tort under section 111(2) but it would be a relevant area of inquiry in determining whether it was fair or reasonable or just to impose liability (EAT Decision para 123). He held that the Stonewall complaint was significantly influenced by Ms Bailey's protected belief (EAT Decision para 126), but that the ET had been entitled to conclude that the Stonewall complaint was no more than a protest (EAT Decision para 128). He held that it was not particularly likely that GCC would have discriminated against Ms Bailey on account of her protected beliefs given its role as a barristers' chambers specialising in human rights (EAT Decision para 129). If reasonable foreseeability was the test, he held that GCC's conduct was not reasonably foreseeable (EAT Decision para 130). On the facts as found, he held that the ET was entitled to find that Stonewall was not liable for causing the basic contravention because "responsibility for determining the complaint <u>in a discriminatory way</u> lay only with

GCC" (EAT Decision para 131). He noted that Kirrin Medcalf's beliefs were also protected by the 2010 Act (EAT Decision para 132). He held that the ET was entitled to decide that Kirrin Medcalf had not induced or attempted to induce a basic contravention by GCC (EAT Decision para 139) and that the ET had not been perverse in reaching its conclusion (EAT Decision paras 133-134). He dismissed the appeal (EAT Decision para 142).

42. I would wish to pay tribute to Bourne J's careful analysis and concise judgment. Because the challenge in this appeal is to aspects of the ET's Decision, I shall focus my attention on that decision, returning to consider the EAT's analysis at the end of this judgment.

Grounds of Appeal

43. By grounds of appeal dated 29 August 2024, Mr Cooper advanced the following grounds:

    i) Ground 1: the ET and the EAT failed to apply the correct test of liability for causing direct discrimination under section 111(2) of the 2010 Act. Liability is established where (a) person A acts because of the protected characteristic; and (b) but for a person's actions, the direct discrimination would not have occurred.

    ii) Ground 2: the ET and the EAT acted perversely in dismissing the claim against Stonewall. Whatever the correct test for causation, liability under section 111(2) of the 2010 Act must be established in circumstances where GCC's opposition to Ms Bailey's beliefs was in part prompted by GCC's association with, and support for, Stonewall and its position.

    iii) Ground 3: the EAT had erred in relying on irrelevant matters that had not been argued, namely (a) that it was not particularly likely that GCC would discriminate in responding to Stonewall's complaint; and (b) that Kirrin Medcalf was expressing his own beliefs which were protected under the 2010 Act.

    iv) Ground 4: the EAT should have remitted the issue of liability for a basic contravention to the ET. The EAT had applied a test of liability which had not been applied by the ET – namely whether, in addition to but for causation, it was fair or reasonable or just to find person A liable - and the case should have been remitted to the ET to determine the outcome of that test which was not obvious on the facts of this case.

    v) Ground 5: the ET and the EAT failed to apply the correct test for inducing (including attempting to induce) a basic contravention under section 111(3). If they had applied the correct test they would have been bound to conclude that it was satisfied.

44. Within Ground 2, there are elements of challenge to the ET's findings of fact on grounds of perversity. I shall take that aspect of Ground 2 first. Then I shall turn to the arguments on "causing" a basic contravention, which is the subject of Ground 1 and the remaining parts of Ground 2. I shall next deal with "inducing" a basic contravention, which is raised by Ground 5. The issues raised by Grounds 3 and 4 relate to the EAT's approach and will be addressed last in sequence.

Ground 2: Findings of Fact

45. By Ground 2, Mr Cooper invited us to infer that by the Stonewall complaint, Kirrin Medcalf was inviting GCC to "do something likely to be detrimental to" Ms Bailey (para 65.2 of the skeleton), that "whatever [Kirrin Medcalf] may or may not have intended, at the time he made the complaint Kirrin Medcalf understood that action against [Ms Bailey] was a possible outcome" (para 65.3 of the skeleton) and that GCC discriminated against Ms Bailey because GCC had been influenced by opposition to Ms Bailey's beliefs "in part prompted by [GCC's] association with, and support for, Stonewall and its position" and because GCC and Stonewall "acted on shared prejudice" (para 65.4 of the skeleton). These points were advanced in writing and remained a central building block in Mr Cooper's oral submissions, to which end he made detailed submissions to this Court about the email containing the Stonewall complaint, and how that email should be interpreted. When asked by the Court whether he was seeking to go behind para 377 of the ET's Decision (where the ET found that the Stonewall complaint was "no more than a protest"), he sought to characterise para 377 as a finding by the ET only that Stonewall did not *intend* to discriminate against Ms Bailey but that the ET's findings did not extend to the "objective terms" of Stonewall's complaint, as to which this Court was entitled to draw inferences; further, that the appropriate inference was that Kirrin Medcalf wished to advocate for action to be taken against Ms Bailey and was, by the Stonewall complaint, seeking her ejection from GCC.

46. Ms Omambala resists these aspects of Ground 2, arguing that Mr Cooper is impermissibly attempting to go behind the primary facts as they were quite properly found by the ET.

47. I agree with Ms Omambala. The ET held that the Stonewall complaint was no more than a protest by Stonewall; it was an appeal to a perceived ally and nothing more; that neither Stonewall nor Kirrin Medcalf had been looking for any specific action by GCC against Ms Bailey; and that the Stonewall complaint did not play any part in the outcome of GCC's investigation (see above at para 38). Mr Cooper cannot go behind those findings which were reached by the ET after hearing and reading a great deal of evidence. The ET was alive to the argument that the Stonewall complaint contained a threat to GCC (in other words that it was designed to put pressure on GCC to take action against Ms Bailey) – that was "certainly one reading" as the ET recorded at para 368 of its Decision – but the ET rejected that reading of the Stonewall complaint. Instead the ET found that the Stonewall complaint was not motivated by any desire for action to be taken by GCC against Ms Bailey and was not relevant to the discriminatory outcome of the GCC investigation.

48. Para 377 is to be read in a straightforward way to mean what it says. The ET concluded that the Stonewall complaint was "no more than a protest, with an appeal to a perceived ally …". That finding cannot be limited in the way Mr Cooper suggests.

49. I would reject ground 2, to the extent that it contains elements of challenge to the facts as found by the ET. I address Mr Cooper's remaining grounds on the basis of the facts as they were found by the ET.

Grounds 1 and 2 (remaining parts): was the ET justified in concluding that Stonewall had not caused GCC's basic contravention?

(i) Submissions

50. By Ground 1, Mr Cooper challenges the test of causation used by the ET and proposes a substitute test, namely that liability is established where two criteria are met: (i) person A acts because of a relevant characteristic; and (ii) but for person A's actions, the direct discrimination would not have occurred. These two criteria were said to be implicit in section 111(2) and definitive of liability under the provision.

51. The first criterion was to be implied, so Mr Cooper argued, in order to reflect the underlying cause(s) of action, in this case direct discrimination and victimisation. Section 13 of the 2010 Act (direct discrimination) required the immediate discriminator to act "because of" the protected characteristic. Conscious motive or intention to discriminate was not a necessary ingredient but still it was necessary to show that the immediate discriminator had been materially influenced by the protected characteristic. That same mental element needed to be present in the mind of any third party alleged to have "caused" the discrimination in question. It was not necessary for the third party to be responsible for the immediate discriminator's mental state and it was sufficient if both of them possessed that mental state independently of each other. Analogous reasoning applied in the context of section 27 of the 2010 Act (victimisation) which required the immediate discriminator to act "because of" the protected act or belief that there is or may be a protected act so that in that context too the third party had to be significantly influenced by the protected act. These submissions were built on *Nagarajan v London Regional Transport* [1999] ICR 877 per Lord Nicholls at p 884G-886F.

52. The second criterion was the application of the general law of tort which required, at the very least, that 'but for' the acts or omissions of the alleged tortfeasor the damage would not have occurred.

53. Mr Cooper finessed his submissions in oral argument, accepting that the EAT had been right to look to the nature, purpose and scope of the obligation in question to determine the extent to which the defendant "ought to be liable" applying *Kuwait Airways, Essa v Laing Ltd* [2004] ICR 746 and *Bullimore v Pothecary Witham Weld* [2011] IRLR 18 (which cases I shall consider below). However, the EAT had been wrong to treat *Kuwait Airways* as itself posing the test and this had led to an approach that was too open-ended. The correct analysis was that the two identified criteria formed the basic elements of this statutory tort, at least in the context of direct discrimination and victimisation, and if those two criteria were present, it would follow that it was fair or just or reasonable (applying *Kuwait Airways*) to hold the defendant liable because that met the purpose of the statute and fitted within its scope. Where a person's actions were significantly influenced by a person's protected characteristics or protected acts, and were the 'but for' case of the resulting discrimination, that person should be liable consistently with the purpose and breadth of the 2010 Act, and the *Kuwait Airways* second stage was inevitably answered in the same way.

54. Mr Cooper relied on *Bullimore* to illustrate his case. In that case, the first employer gave the claimant a reference which referred to her employment tribunal proceedings for sexual harassment, as a result of which the second and prospective employer

withdrew their unconditional offer of employment. The EAT (Underhill J) held both defendants liable for the discrimination. The same answer should have been reached here.

55. Mr Cooper, by way of reply, further developed his argument to contend that the principle of *novus actus interveniens* could not apply in the context of section 111(2) because once his two proposed criteria were established on the evidence, liability for the statutory tort was made out and there was no room for a novus actus interveniens analysis. Further, section 111(2) explicitly envisaged the actions of one person causing someone else to commit the basic contravention, and it would undermine its purpose and scheme to permit the basic contravention to be characterised as the sole cause of the discrimination.

56. If foreseeability was relevant (he suggested it was not), Kirrin Medcalf obviously did expect GCC to act on his complaint in some way to Ms Bailey's detriment, which was sufficient to establish foreseeability for section 111(2) purposes.

57. Ms Omambala disagreed. Her case was that the ET had made findings of fact which were open to it and the dismissal of Ms Bailey's claim against Stonewall flowed from those facts. The Court had no basis to interfere. As to the elements of the statutory tort, in her submission there was no required mental element. What was required was (i) causation established on a "but for" basis in line with the ordinary approach in tort law; and (ii) that the acts in question were the "direct" cause of the discrimination. It was possible that a third element existed too, namely (iii) that on evaluative assessment, it was fair or just or reasonable for the Respondent to be fixed with liability. In this case, the direct cause of the discrimination (in the form of Detriment 4) was GCC's investigation (and the problems with that investigation which the ET had identified). Stonewall had nothing to do with the investigation and was not responsible for those problems. Element (ii) was not established. GCC's actions broke the chain of causation and meant that Stonewall was not liable. Element (iii), if part of the test, was also not established because on the facts as found by the ET it would not be fair or just or reasonable to impose liability on Stonewall.

58. Alternatively, if (contrary to Ms Omambala's primary case) foreseeability had any part to play in the analysis, the failings by GCC were not reasonably foreseeable in consequence of Stonewall's complaint.

Case Law

59. A number of propositions of law, relevant to the interpretation of section 111(2) and (3), were not in dispute and can be summarised shortly:

    i) The proper interpretation of "causing" and "inducing" a basic contravention for the purposes of section 111(2) and (3) depends on an objective assessment of the meaning of the words used, considered in their statutory context and having regard to the legislative purpose (see *R (O) v Home Secretary* [2022] UKSC 3, [2023] AC 255 per Lord Hodge JSC at paras 29-31, and *Uber BV and Others v Aslam and Others* [2021] UKSC 5, [2021] ICR 657, per Lord Leggatt JSC at para 70).

ii) The 2010 Act has as its central purpose the elimination of discrimination in the spheres in which the Act applies: see *Jones v Tower Boot Co Ltd* [1997] ICR 254 at p 262B-G (per Waite LJ). The Act was brought in to remedy a very great evil and should have a broad application to achieve that end: see *Savjani v Inland Revenue Comrs* [1981] QB 458 per Templeman LJ at p 466-467.

iii) Conscious motive or intention is not a necessary component of discrimination and is not therefore a component part of liability under sections 111(2) or (3) (*Nagarajan v London Regional Transport* [1999] ICR 877 per Lord Nicholls at p 885-886).

60. Other authorities required more careful analysis. Three such authorities have played a significant part in this appeal.

61. The first is *Kuwait Airways.* That case concerned the tort of conversion in the context of the claimant's aircraft being expropriated by the defendant on the orders of the Iraqi Government following Iraq's invasion of Kuwait in 1990. Lord Nicholls (in the majority) examined the role of the 'but for' test in tort law in the following passage, encapsulating a now familiar two-stage test (emphasis added):

> "69. How, then, does one identify a plaintiff's "true loss" in cases of tort? This question has generated a vast amount of legal literature. I take as my starting point the commonly accepted approach that **the extent of a defendant's liability for the plaintiff's loss calls for a twofold inquiry: whether the wrongful conduct causally contributed to the loss and, if it did, what is the extent of the loss for which the defendant ought to be held liable.** The first of these inquiries, widely undertaken as a simple "but for" test, is predominantly a factual inquiry. The application of this test in cases of conversion is the matter now under consideration. I shall return to this in a moment.
>
> 70. The second inquiry, although this is not always openly acknowledged by the courts, **involves a value judgment ("*ought* to be held liable"). Written large, the second inquiry concerns the extent of the loss for which the defendant ought fairly or reasonably or justly to be held liable** (the epithets are interchangeable). To adapt the language of Jane Stapleton in her article "Unpacking 'Causation" in *Relating to Responsibility,* ed Cane and Gardner (2001), p 168, the inquiry is whether the plaintiff's harm or loss should be within the scope of the defendant's liability, given the reasons why the law has recognised the cause of action in question. The law has to set a limit to the causally connected losses for which a defendant is to be held responsible. **In the ordinary language of lawyers, losses outside the limit may bear one of several labels. They may be described as too remote because the wrongful conduct was not a substantial or proximate cause, or because the loss was the product of an intervening cause. The defendant's responsibility may be excluded because the**

plaintiff failed to mitigate his loss. Familiar principles, such as foreseeability, assist in promoting some consistency of general approach. These are guidelines, some more helpful than others, but they are never more than this.

71. **In most cases, how far the responsibility of the defendant ought fairly to extend evokes an immediate intuitive response. This is informed common sense by another name**. Usually, there is no difficulty in selecting from the sequence of events leading to the plaintiff's loss, the happening which should be regarded as the cause of the loss for the purpose of allocation responsibility, In other cases, when the outcome of the second inquiry is not obvious, it is of crucial importance to identify the purpose of the relevant cause of action and the nature and scope of the defendant's obligation in the particular circumstances. What was the ambit of the defendant's duty? In respect of what risks or damage does the law seek to afford protection of the particular tort? Recent decisions of this House have highlighted the point. When evaluating the extent of the losses for which a negligent valuer should be responsible the scope of the valuer's duty must first be identified: see *Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd* [1997] AC 191. In *Reeves v Comr of Police of the Metropolis* [2000] 1 AC 360 the free, deliberate and informed act of a human being, there committing suicide, did not negative responsibility to his dependants when the defendant's duty was to guard against that very act.

72. The need to have in mind the purpose of the relevant cause of action is not confined to the second, evaluative stage of the twofold inquiry. It may also arise at the earlier stage of the "but for" test, to which I now return. This guideline principle is concerned to identify and exclude losses lacking a causal connection with the wrongful conduct. Expressed in its simplest form, the principle poses the question whether the plaintiff would have suffered the loss without ("but for") the defendant's wrongdoing. If he would not, the wrongful conduct was a cause of the loss. If the loss would have arisen even without the defendant's wrongdoing, normally it does not give rise to legal liability. In *Barnett v Chelsea and Kensington Hospital Management Committee* [1969] 1 QB 428 the night watchman's death did not pass this test. He would have died from arsenic poisoning even if the hospital casualty department had treated him properly. **Of course, even if the plaintiff's loss passes this exclusionary threshold test, it by no means follows that the defendant should be legally responsible for the loss**.

73. This threshold "but for" test is based on the presence or absence of one particular type of causal connection: whether the wrongful conduct was a necessary condition of the occurrence

> of the harm or loss. In the *Barnett* case the hospital's negligence was not a necessary element in the conditions which led to the watchman's death. He would have died anyway. In very many cases this test operates satisfactorily, but it is not always a reliable guide. Academic writers have drawn attention to its limitations: see, for example, the late Professor Fleming's *The Law of Torts,* 9th ed (1998), pp 222-230, and *Markesinis & Deacon, Tort Law,* 4th ed (1999), pp 178-191. **Torts cover a wide field and may be committed in an infinite variety of situations. Even the sophisticated variants of the "but for" test cannot be expected to set out a formula whose mechanical application will provide infallible threshold guidance on causal connection for every tort in every circumstance.** In particular, the "but for" test can be over-exclusionary.
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> 74. This may occur where more than one wrongdoer is involved. The classic example is where two persons independently search for the source of a gas leak with the aid of lighted candles. According to the simple "but for" test, neither would be liable for damage caused by the resultant explosion. In this type of case, involving multiple wrongdoers, the court may treat wrongful conduct as having sufficient causal connection with the loss for the purpose of attracting responsibility even though the simple "but for" test is not satisfied. In so deciding the court is primarily making a value judgment on responsibility. In making this judgment the court will have regard to the purpose sought to be achieved by the relevant tort, as applied to the particular circumstances. ”

62. In the same case, Lord Hoffmann (also in the majority) spoke of the widely differing kinds of causal connections and examined the limits on liability, including by the concept of *novus actus interveniens* (emphasis added):

> “127. My Lords, it would be an irrational system of tort liability which did not insist upon there being *some* causal connection between the tortious act and the damage. **But causal connections can be of widely differing kinds. Sometimes the act may have been a necessary condition but followed by a voluntary human act or exceptional natural event (novus actus interveniens). Such a causal connection is usually insufficient to found liability in negligence.** But in the case of certain kinds of duty, even in negligence, it will be enough. It may be sufficient to show that the act was a necessary condition, even if the subsequent voluntary act of a third party *(Stansbie v Trontan* [1948] 2 KB 48) or the plaintiff himself *(Reeves v Comr of Police of the* Metropolis [2000] 1 AC 360) was also a necessary condition. And the same may be true when liability is strict: see *Environment Agency (formerly National Rivers Authority) v Empress Car Co (Abertillery) Ltd* [1999] 2 AC 22.

> Sometimes the act cannot be shown to have been even a necessary condition but only to have added substantially to the probability that the damage would be suffered. But in some situations even this limited causal connection will suffice: see *Bonnington Castings Ltd v Wardlaw* [1956] AC 613*; McGhee v National Coal Board* [1973] 1 WLR 1.
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> 128. **There is therefore no uniform causal requirement for liability in tort. Instead, there are varying causal requirements, depending upon the basis and purpose of liability. One cannot separate questions of liability from questions of causation. They are inextricably connected.** One is never simply liable; one is always liable *for* something and the rules which determine what one is liable for are as much part of the substantive law as the rules which determine which acts give rise to liability. It is often said that causation is a question of fact. So it is, but so is the question of liability. Liability involves applying the rules which determine whether an act is tortious to the facts of the case. Likewise, the question of causation is decided by applying the rules which lay down the causal requirements for that form of liability to the facts of the case."

63. The second case is *Essa v Laing*. That was a case closer to the present context, involving the statutory tort of unlawful race discrimination (under sections 56 and 57 of the Race Relations Act 1976, the predecessor to parts of the 2010 Act). The claimant had been racially abused by an employee of the defendant company; he had become depressed and lost interest in his work and in his amateur boxing career. The issue related to the approach to quantifying damages. The employer argued for a narrow test based on what was reasonably foreseeable (see para 12). The claimant, supported by various interveners, argued for a broader test to compensate for all losses flowing naturally and directly from the discrimination (see para 27). Pill LJ (in the majority) cited *Kuwait Airways* for the proposition that regard was to be had to the nature and scope of the defendant's obligation in the particular circumstances (see para 34). He rejected the defendant's submission that reasonable foreseeability of injury or damage was required. He said this (with emphasis added):

> "37. … I see no need to superimpose the requirement or prerequisite of reasonable foreseeability upon the statutory tort in order to achieve the balance of interests which the law of tort requires. **It is sufficient if the damage flows directly and naturally from the wrong.** While there is force in the submission that, to prevent multiplicity of claims and frivolous claims, a control mechanism beyond that of causation is needed, **reliance upon the good sense of employment tribunals in finding the facts and reaching conclusions on them is a sufficient control mechanism, in my view**. As a mechanism for protecting a defendant against damages which, on policy grounds, may appear too remote, **a further control by way of a reasonable foreseeability test is neither appropriate nor necessary in present circumstances.**

> 38. In torts such as negligence and nuisance, the need to establish foreseeability of the relevant kind of harm is a "prerequisite" of the recovery of damages: Lord Goff in *Cambridge Water* case [1994] 2 AC 264, 300 and 301. In order to do justice between parties in circumstances which may be complex, that requirement has been held to be appropriate and the facts of such cases as *The Wagon Mound* [1961] AC 388 and the *Cambridge Water* case demonstrate the need for it. In *The Wagon Mound* the defendants neither knew or could reasonably have known that furnace oil was capable of being set on fire when spread on water.
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> 39. In present circumstances of direct discrimination by racial abuse in the face of the victim, the same considerations do not apply. The present facts are akin to the torts of assault and battery in that there was deliberate conduct towards and in the presence of the victim, though the abuse was verbal and not physical. The statutory tort in my view affords protection against that conduct and, applying Lord Nicholls's test, to the extent that the victim is to be compensated for the loss which arises naturally and directly from the wrong. It is possible that, where the discrimination takes other forms, different considerations will apply."

64. Clarke LJ concurred:

> "48. The question whether, in Lord Nicholls's phrase, the defendant "ought to be held liable" only if he ought reasonably to have foreseen that the type of injury alleged was reasonably foreseeable seems to me to depend upon a consideration of the 1976 Act and the policy behind it. The court should I think have in mind the purposive approach to the construction of the Act adopted by Waite LJ in *Jones v Tower Boot Co Ltd* [1997] ICR 254, 261-263 and by Templeman LJ in *Savjani v Inland Revenue Comrs* [1981] QB 458, 466-467. Although those cases were concerned with a different problem, they do not support a suggestion that a restricted approach should be adopted to compensation for unlawful racial discrimination.
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> 49. As Templeman LJ put in a well known phrase, the Act was brought in to remedy a very great evil. In these circumstances, it seems to me that it should be sufficient if the claimant shows that the particular type of injury alleged was caused by the act of discrimination. Both Miss Moor and Miss Monaghan relied upon the fact that the wrong created by the statute is an intentional wrong in the sense that it cannot be committed accidentally. As Pill LJ observed, the act or omission must be deliberate and in that sense intentional."

65. The third case is *Bullimore,* where the EAT considered whether the discriminatory act of the second employer broke the chain of causation flowing from the discriminatory

act by the first employer. Underhill J cited *Essa v Laing* as authority for the approach to be taken to the question (the same as in common law torts) and held that the chain of causation was not broken on these facts:

> "15. **The starting point … is that it is trite law that the award of compensation in discrimination cases is governed by the same approach as is followed in the award of damages for common law torts: see *Essa v Laing Ltd* [2004] IRLR 313.** We have here a case in which the appellant has suffered loss as a result of the combination of two wrongful acts – the [first employer]'s in giving (for a proscribed reason) the damaging reference, and [the second employer]'s in (likewise, for a proscribed reason) withdrawing the offer following receipt of that reference. The torts in question can properly be described as 'concurrent' in the sense that they both contributed to the occurrence of the loss, but it is also important to the analysis that they are consecutive, the [first employer]'s act being earlier in time and thus necessarily further up 'the chain of causation'. … **The ultimate question is how far, in the circumstances of the particular case, the responsibility of the tortfeasor ought fairly to extend.**
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> …
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> 21. Standing back from the tribunal's particular reasoning, it seems to us that as a matter of policy and fairness the [first employer] 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. As the case law shows, the giving of damaging references is a not uncommon form of victimisation (or alleged victimisation). It would be most unsatisfactory if a claimant who lost the opportunity of employment as the result of such a reference were unable to recover substantial damages from the person giving it. A remedy against the prospective employer, ie the recipient of the reference, will by no means always be available. It was only so in the present case because part of the damaging information supplied took the form of information about the earlier proceedings, which constituted a protected act, and [the second employer] were held to have been motivated by that specific information: it would have been otherwise if [the first employer] had given an equally damaging reference but had not directly referred to any protected act."

66. To these cases, I would add this familiar passage from the judgment of Lord Sumption JSC in *Hughes-Holland v BPE Solicitors* [2017] UKSC 21, [2018] AC 599, a professional negligence case which examined the scope of the duty of care owed by

solicitors and, in relevant part, turned on whether the negligence of the defendant solicitors had caused the claimant's loss. Lord Sumption addressed the role of 'but for' causation in establishing liability and referred to the various legal "concepts" or "filters" by which liability in tort is limited, alongside the "developed judicial instinct" in determining issues of liability. The points he made in this paragraph bear a similarity to those made by Lord Nicholls in *Kuwait Airways* (Lord Nicholls using the phrase legal "labels" alongside "informed common sense") (emphasis added):

> "20. "Courts of law", said Lord Asquith of Bishopstone in *Stapley v Gypsum Mines Ltd* [1953] AC 663 , 687, "must accept the fact that the philosophic doctrine of causation and the juridical doctrine of responsibility for the consequences of a negligent act diverge". What Lord Asquith meant by the philosophic doctrine of causation, as he went on to explain, was the proposition that any event that would have not have [sic] occurred but for the act of the defendant must be regarded as the consequence of that act. **In the law of damages, this has never been enough. It is generally a necessary condition for the recovery of a loss that it would not have been suffered but for the breach of duty. But it is not always a sufficient condition.** The reason, as Lord Asquith pointed out, is that the law is concerned with assigning responsibility for the consequences of the breach, and a defendant is not necessarily responsible in law for everything that follows from his act, even if it is wrongful. **A variety of legal concepts serves to limit the matters for which a wrongdoer is legally responsible.** Thus the law distinguishes between a mere precondition or occasion for a loss and an act which gives rise to a liability to make it good by way of damages: *Galoo Ltd v Bright Grahame Murray* [1994] 1 WLR 1360. **Effective or substantial causation is a familiar example of a legal filter which serves to eliminate certain losses from the scope of a defendant's responsibility.** It is an aspect of legal causation. So too is the rule that the defendant cannot be held liable for losses that the claimant could reasonably have been expected to avoid: *Koch Marine Inc v D'Amica Societa di Navigazione ARL (The Elena D'Amico)* [1980] 1 Lloyd's Rep 75 . **But the relevant filters are not limited to those which can be analysed in terms of causation. Ultimately, all of them depend on a developed judicial instinct about the nature or extent of the duty which the wrongdoer has broken**.

Discussion

67. There are two headline questions: (1) what did the ET decide and why? And (2) was that conclusion open to the ET on the law and/or the facts?

(1) <u>What the ET decided and why</u>

68. I have set out the relevant paragraphs of the ET's Decision already but the core of the ET's reasoning is contained in para 377 of the ET's Decision which for convenience I set out again below. The first two sentences of the paragraph address Ms Bailey's case on causing discrimination (under section 111(2)). The decision on that aspect of her case is contained in the words with added emphasis, ie that the Stonewall complaint was merely the occasion of GCC's report, no more. The last two sentences address Ms

Bailey's case that Stonewall had attempted to cause discrimination, which is rejected because the Stonewall complaint was a protest and nothing more:

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

69. It would have been better, I accept, if the ET had given a fuller explanation of its reasons for rejecting Ms Bailey's case on causing or attempting to cause discrimination, within section 111(2) and (8) of the 2010 Act. It may be that the dispute between Ms Bailey and Stonewall was understood by the ET to be one of fact: either Kirrin Medcalf had colluded with GCC to cause or attempt to cause detriment to Ms Bailey and/or had acted with the express intention of causing her detriment (as Ms Bailey argued – see the extracts from her pleaded case set out above at para 30); or he had not (which was Stonewall's case). That may explain why, when it came to para 377, having rejected Ms Bailey's case on the facts, the ET simply dismissed her claim against Stonewall shortly. Certainly, it does not appear that either party invited the ET to engage in a separate evaluation stage (following *Kuwait Airways*) or suggested that the ET should consider the issue of causing or attempting to cause as a legal matter, even if the ET rejected Ms Bailey's case against Stonewall on the facts.

70. However, although put shortly, the ET's analysis is clear enough. The notion that a person's actions can be the occasion of subsequent loss, without in law causing that loss, is well established. That is the point Lord Sumption made in *Hughes-Holland,* in stating that but for causation "has never been enough" (and see a similar point made at para 73 of *Kuwait Airways*). Lord Sumption went on to note that the law distinguishes between a "mere precondition or occasion for a loss" and an act which gives rise to a liability to make it good by way of damages. In my judgment, that was precisely the distinction which the ET was making in this case, deciding that Stonewall's actions fell into the first category and were no more than the occasion for GCC's discrimination, rather than being the effective cause of it.

71. That means that the dominant and effective cause of Detriment 4 was GCC's investigation, not anything done by Stonewall; it followed that Stonewall was not liable. That fitted comfortably with, and flowed from, the ET's findings that Kirrin Medcalf did not want action to be taken against Ms Bailey and that Stonewall had nothing to do with GCC's investigation or the outcome of it (see para 38 above). There were a variety of legal routes to that conclusion, including, possibly, a scope of duty analysis and a remoteness of damage analysis. But far and away the most obvious was *novus actus interveniens* – ie, that GCC's actions and omissions in the course of the investigation broke the chain of causation. In my judgment, that was what the ET concluded.

(2) Was that conclusion open to the ET?

72. Mr Cooper says that it was not open to the ET to conclude that causation was not established. He relies on his formulation of the criteria for liability under section 111(2), but I am not with him. As to his first criterion (the existence of 'but for'

causation), I accept that 'but for' causation is a threshold requirement for section 111(2) to be engaged, in the same way as with other torts at common law. *Kuwait Airways* says as much (para 73), and Ms Omambala agrees with that proposition. However, the cases show that 'but for' causation is not enough to establish liability in and of itself (see, as examples, *Kuwait Airways* at para 72 and *Hughes-Holland* at para 20). Whether causation is established depends on an evaluation of the causal potency or efficacy (to adopt other familiar phrases) of the defendant's acts. And that forms part of the second stage, on the *Kuwait Airways* approach.

73. Mr Cooper's second criterion is the existence of the mental element required for the underlying offence. Where the basic contravention amounts to direct discrimination or victimisation, he argues that the section 111(2) defendant (alleged to have caused the basic contravention) must also have been "significantly influenced" by the protected characteristic or act. The ET agreed with that (Decision para 360, although it is not clear whether that was a point in dispute at that stage). The EAT disagreed, holding that section 111(2) did not import any fixed mental element although the fact that the defendant's actions were significantly influenced by the claimant's protected characteristics was likely to be a significant factor in the balancing exercise (EAT Decision paras 118 and 123). Ms Omambala supports the EAT's approach.

74. This requires a bit of unpicking. The proposition that the immediate discriminator must be at least significantly influenced by the person's protected characteristics or acts is not disputed by Ms Omambala and is based on the following passage in *Nagarajan* (per Lord Nicholls at p 886 E-F, emphasis added):

> "… Discrimination may be on racial grounds even though it is not the sole ground for the decision. A variety of phrases, with different shades of meaning, have been used to explain how the legislation applies in such cases: discrimination requires that racial grounds were a cause, the activating cause, a substantial and effective cause, a substantial reason, an important factor. No one phrase is obviously preferable to all others, although in the application of this legislation legalistic phrases, as well as subtle distinctions, are better avoided so far as possible. If racial grounds or protected acts had a **significant influence** on the outcome, discrimination is made out. …"

75. The modern context for this passage is section 13 of the 2010 Act which imposes liability for direct discrimination where a person treats another less favourably *because of* that person's protected characteristic(s); and section 27 of the 2010 Act which imposes liability for victimisation where a person subjects another to detriment *because of* a protected act. However, section 111(2) does not contain the words "because of" or any other words to similar effect. Yet the consequence of Mr Cooper's submission is that those words are in effect to be read in. I do not consider that to be warranted. In my view, the better analysis is that a person's intention, motivation or reason for acting (including whether they are influenced by another's protected characteristic(s) or act(s)) is a matter to be taken into account at the second stage of the analysis, as part of the evaluation of whether that person should be liable. I accept Mr Cooper's wider point that it is difficult to envisage liability being established without some mental element connecting the defendant's acts with the claimant's protected characteristic or act. But the legislation is to be understood as leaving that assessment to the ET at the second stage, once the threshold of 'but for' causation is passed.

76. In summary, I am not with Mr Cooper. I do not accept his submission that there are two defining criteria for liability under section 111(2). That approach is overly formulaic. The reality, applying the *Kuwait Airways* approach, is much more flexible than that. Once 'but for' causation is established, the question becomes one of evaluative judgement as to whether the defendant should be liable.

77. It is convenient to deal with Ms Omambala's approach at this point. She submits that, in addition to being the 'but for' cause (which I accept is a threshold requirement, see above), the defendant's actions must be the "direct" cause of the discrimination (her second criterion). Here, too, there is a danger of becoming too formalistic. I accept that references to 'direct' losses and 'direct' causes can be found in the cases. Whether losses were 'direct and natural' was considered in *Kuwait Airways* in contrast to whether they were reasonably foreseeable: see para 100 of that case where the two approaches were contrasted. A similar distinction was made in *Essa v Laing* and Pill LJ's conclusion at para 37, including his reference to damage which "flows directly and naturally from the wrong", is to be understood as a rejection of the defendant's approach based on reasonable foreseeability. Neither of those cases suggests the directness of the cause as a criterion for liability, as a principal or as an accessory. There are two reasons why I would reject "direct cause" as a criterion. First, because the *Kuwait Airways* second stage test would be undermined because the search at the second stage is for what is fair or reasonable or just; and there may well be cases arising under section 111(2) where a defendant's contribution is indirect but is nonetheless a significant cause of the damage so that in justice the defendant should be liable. Secondly, to require a distinction to be drawn between direct and indirect causes in any given case is potentially difficult because causal connections can be of widely differing kinds (Lord Hoffmann, *Kuwait Airways,* para 127). In the likely absence of any neat line to separate direct from indirect causes, there is a risk of unnecessary complication.

78. In their starting positions, neither counsel invited foreseeability as a criterion of liability, although in oral argument, Mr Cooper seemed to edge away from that position. The ET made no finding on whether Detriment 4 (or any detriment) was foreseeable as a result of the Stonewall complaint. The point was raised on first appeal, and Bourne J held that reasonable foreseeability was not part of the section 111(2) test (para 112 of the EAT Decision). He held that foreseeability would often be a relevant area of inquiry in the context of the evaluative second stage (para 123 of the EAT Decision). I agree with Bourne J. Foreseeability of damage, whether of the precise damage sustained or damage of that sort, is plainly a relevant factor to take into account but is not a formal criterion for application of the provision.

79. It follows that I am in substantial agreement with Bourne J as to the applicable test under section 111(2). He concluded that once 'but for' causation had been established, the question was whether, having regard to the statutory context and all the facts, it was fair and just and reasonable to find the defendant liable (see para 123 of the EAT's Decision). I would, however, invite greater precision about what is being evaluated at the second stage. Bourne J correctly identified the big picture as being what is fair and just and reasonable (that is what is "written large", according to Lord Nicholls in *Kuwait Airways* at para 70); but that evaluation is not open-ended, rather it requires focus on the various legal labels (or concepts or filters – those terms are used interchangeably in the case law) by which liability may be limited (see again *Kuwait* at para 70). One of those labels is *novus actus interveniens*.

80. I therefore reject Mr Cooper's submission that section 111(2) precludes a *novus actus interveniens* analysis. *Novus actus interveniens*, like other labels (or concepts or filters) by which liability may be limited, is available at the second stage. I reject Mr Cooper's submission that the basic contravention cannot, in and of itself, constitute a *novus actus interveniens*: the purpose of the second stage is to identify the effective cause of the damage, and just because section 111(2) envisages a situation where A is liable for causing B's basic contravention towards C, it does not follow that B can never be held to bear sole responsibility for that basic contravention; it all depends on the facts.

81. It was, therefore, open to the ET to conclude that the acts of GCC broke the chain of causation between Stonewall's complaint and the discrimination suffered by Ms Bailey in the form of Detriment 4. The ET identified the various actions of GCC which led to Detriment 4 and found that those were actions attributable to GCC alone. It characterised the Stonewall complaint as the occasion for those failings, no more. This was a coherent conclusion that the causal potency or efficacy of Stonewall's actions was eclipsed by GCC's actions. I have interpreted that as a finding of *novus actus interveniens*. The ET conducted the exercise required of it in a lawful manner.

82. As part of ground 2, Mr Cooper argues that the ET's conclusion that Stonewall had not caused the discrimination for section 111(2) purposes was perverse. This was, as I understood it, an adjunct to his Ground 2 challenge to the findings of primary fact, extending that challenge to the ET's evaluation of those facts. But the ET's evaluative conclusion followed from and reflected the ET's findings of primary fact and was undoubtedly open to the ET on those facts. The perversity challenge is unrealistic.

83. Mr Cooper relied on *Bullimore*. It is easy to see why, in that case, Underhill J thought that both defendants should be held responsible; the actions of both materially contributed to the detriment and both acts of discrimination (reference by first employer and withdrawal of offer by second employer) were effective causes of the detriment suffered. In this case, on the ET's findings, Stonewall had not contributed to the outcome which was the responsibility of GCC. *Bullimore* does not assist Mr Cooper.

84. I would dismiss Ground 1 and, to the extent that I have not already dismissed it, Ground 2. In my judgment, the ET was entitled to find that Stonewall was not liable for causing a basic contravention under section 111(2). The effective cause of the discrimination was GCC's actions. The ET was also entitled to find that Stonewall had not attempted to cause a basic contravention under section 111(8) read with section 111(2), given that the Stonewall complaint was merely a protest, no more.

Ground 5: Did Stonewall induce GCC's basic contravention?

Submissions

85. It is common ground that inducement means persuading or prevailing upon or bringing about: see *CRE v The Imperial Society of Teachers of Dancing* [1983] ICR 473 per Neill J at p 475H-476D.

86. Mr Cooper starts with the language of section 111(3) and says that the provision should be broadly construed to meet its objective (as with section 111(2)). He submits that inducement involves an intention to bring about some action, whether or not there is an exact correspondence between the intended action and the actual action. He argues that

the following elements must therefore be present: (i) a person, A, acted because of (or substantially influenced by) a protected characteristic; (b) with the intention of persuading 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). He submits that these elements are established on the facts, or alternatively that the Stonewall complaint amounts to an attempt to induce GCC to directly discriminate against Ms Bailey, whether or not the actual detriment was what Kirrin Medcalf intended.

87. Ms Omambala says that Ms Bailey's case under ground 5 fails on the ET's findings of fact.

Discussion

88. I agree with Ms Omambala. Mr Cooper's case that Kirrin Medcalf acted with the intention that action should be taken against Ms Bailey does not get off the ground in the light of the ET's findings: see para 372 of the ET's Decision; and see para 38 above. There is, in consequence, no substance to the suggestion that GCC was persuaded to take action against Ms Bailey of the kind intended by Kirrin Medcalf, because Kirrin Medcalf (on the ET's findings) was not looking for any action. Elements (b) and (c) on Mr Cooper's list are not made out.

89. Further and in any event, it is difficult to see how Ms Bailey could succeed in her appeal on inducement where her case under section 111(2) (causing) has failed. Causing discrimination presents a lower hurdle than inducing which involves, at the very least, some element of deliberate conduct.

90. The assertion of attempted inducement fails for similar reasons: the basic elements of inducement, whether as an attempt or the completed act, are not established on the facts.

Ground 3: Wrong Findings by the EAT

91. Mr Cooper complains that the EAT wrongly took account of two irrelevant matters that had not been argued before the EAT, first that it was not particularly likely that GCC would discriminate in responding to Stonewall's complaint (EAT Decision para 129), and secondly that Stonewall's complaint was a legitimate expression of protected beliefs (EAT Decision para 132).

92. Ms Omambala says that the EAT's comment that it was not particularly likely that GCC would discriminate in responding to Stonewall's complaint was justified, given that the issue of foreseeability was argued in the EAT. But in any event, she submits that whatever the EAT said about foreseeability of outcome has no bearing on the ET's Decision, given that the ET did not address foreseeability at all, and the point was made only by way of aside in the EAT. She says that the EAT was entitled to observe that the Stonewall complaint was an expression of beliefs which were protected under the 2010 Act; this was correct; but it is anyway immaterial to the EAT's Decision.

93. I agree with Ms Omambala on both issues. The EAT was entitled to comment on the likelihood of GCC's discrimination in the context of a discussion about foreseeability,

but in any event that comment was not a material part of the EAT's conclusion. The EAT was entitled to observe, based on the ET's findings, that Kirrin Medcalf was only expressing his own beliefs. It is a feature of this appeal that the two sides, Ms Bailey and Stonewall, both hold strong views which are diametrically opposed. Both sets of beliefs warrant protection under the 2010 Act. That is a reasonable point for the EAT to have made even if there was no finding by the ET to that effect. That point was anyway not material to the EAT's conclusion.

Ground 4: Failure to remit by the EAT

94. Mr Cooper argues that the EAT should have remitted the appeal to the ET for the ET to determine the outcome based on the legal test which the EAT had identified (to the extent that was a different test from that articulated and applied by the ET); this is to follow the guidance in *Jafri v Lincoln College* [2014] EWCA Civ 449, [2014] ICR 920 per Laws LJ at para 21. Mr Cooper says that the outcome of the appeal, applying that test, was not a foregone conclusion.

95. Ms Omambala says that there was no need to remit the appeal to the ET. The EAT did not find any material misdirection by the ET nor any perversity of conclusion. In any event, even accepting for present purposes that the EAT had laid down a different test, there was only one conclusion which the ET could legitimately have reached applying that test, so remittal would serve no purpose.

96. I agree with Ms Omambala. The EAT found, as I have found, that the ET was entitled to conclude that Stonewall was not liable to Ms Bailey. There was no reason to remit; the outcome on the EAT's test (or indeed the test which I have described to the extent that it is different) would inevitably have been the same in the light of the ET's findings of fact.

Conclusion

97. I would dismiss this appeal on all grounds.

Lord Justice Newey

98. I agree.

Lord Justice Bean

99. I also agree.