Appeal No. UKEAT/0031/20/AT (V)

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON, EC4A 1NL

At the Tribunal
On 20 November 2020
Judgment handed down on 04 February 2021

Before

HIS HONOUR JUDGE JAMES TAYLER

MR M CLANCY

MRS M V McARTHUR BA FCIPD

ALLAY (UK) LIMITED — APPELLANT

MR S GEHLEN — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS ANISA NIAZ- DICKINSON (of Counsel) Instructed by: DWF Law LLP 2nd Floor Central Square South Orchard Street Newcastle Upon Tyne NE1 3AZ
For the Respondent	Written Submissions MR RICHARD OWEN (Representative) Gateshead Citizens Advice The Davidson Building Swan Street Gateshead Tyne and Wear NE8 1BG

SUMMARY

RACE DISCRIMINATION

An employer can defend a claim resulting from the otherwise unlawful discriminatory actions of an employee if it is able to rely on section 109(4) **Equality Act 2010** because it can demonstrate that all reasonable steps were taken to prevent the employee from doing "that thing", or "anything of that description". In considering the steps that have been taken, and whether further reasonable steps were required, it is legitimate to consider how effective the steps that have been taken were likely to be when they were taken and, in appropriate circumstances, how effective they have proved to be in practice. The tribunal in this case was entitled to conclude that such training as had been provided to the perpetrator of race harassment, and a number of other employees, including two managers who failed to report matters to HR, had become stale and required refreshing.

HIS HONOUR JUDGE JAMES TAYLER

The Appeal

1. This is an appeal against a decision of the Employment Tribunal: Employment Judge A M Buchanan, with Non-Legal members, Ms L Jackson and Ms P Wright, heard from 28-30 November 2018 in North Shields, with deliberation on 18 January 2019. The Judgment and Reasons were sent to the parties on 7 March 2019.

The Claim

2. I will refer to the parties as the Claimant and Respondent as they were before the Employment Tribunal. The Tribunal dismissed a claim of direct race discrimination, but upheld a complaint of harassment related to race. The Respondent was ordered to pay compensation of £5,030.63 to the Claimant, including interest.

The Facts

3. The following facts are taken from the Reasons. The Respondent is a company that specialises in processing consumer claims, predominantly dealing with financial mis-selling and other regulated services.

4. The Claimant commenced employment with the Respondent on 3 October 2016 as a Senior Data Analyst.

5. The Claimant was dismissed with immediate effect on 15 September 2017. The Tribunal accepted that the reason for the dismissal of the Claimant was his performance. After being dismissed, the Claimant raised a complaint that he had been subject to race harassment by a fellow

employee, Ian Pearson. The Claimant describes himself as being "of Indian origin" for the purposes of his race discrimination claim.

6. An investigation was undertaken. It was established that Mr Pearson had made racist comments. He underwent further Equality and Diversity training. It is not stated in the Judgment whether he was subject to any disciplinary sanction.

7. The Tribunal reached the following conclusions about the conduct of Mr Pearson:

> **"12.1.1 We did not hear evidence from Ian Pearson ("IP") and only saw the result of the investigation of CB with the employees of the respondent including IP. In the course of that investigation IP accepted that he had engaged in some limited so called "*racial banter*" with the claimant. We did hear the evidence of the claimant and in this respect we found the claimant to be a truthful witness. We accept that comments were made to the claimant on a regular basis by IP to the effect that the claimant should go and work in a corner shop and references were made by IP (and indeed the claimant) to the fact the claimant has brown skin. We also accept that IP made references to the claimant driving a Mercedes car like all Indians and asked why the claimant was in the country."**

8. The Tribunal held that the comments were made regularly throughout the Claimant's employment:

> **"13.1 We conclude that the remarks made by IP were made on a regular basis throughout the employment of the claimant and we accept the evidence of the claimant that such remarks were made at least once per month. We reject as not credible the evidence of the respondent that the remarks were one off remarks. If that were so it would be highly unlikely that such remarks were overheard on the two occasions they were uttered by AB and by CR as we accept they were. We accept the evidence of the claimant that the remarks were made regularly."**

9. The Tribunal made the following finding of fact about David Armstrong, the Customer Service Manager:

> **"We did hear evidence from DA and we accept his evidence that he did not hear IP making any racist remarks to or about the claimant. However, we accept his further evidence that the claimant told him in August 2017 that IP had made racist remarks to him and that DA had told the claimant to report the matter to HR. We note that DA himself did not report the matter further which given his position as a manager (Customer Service Manager) could have been expected."**

10. The Tribunal made the following finding of fact about Cheyne Ravenscroft, a Data Analyst:

> **"We did not hear from CR. We heard the evidence from the claimant about his conversation with CR and we accepted that evidence. Once again, we see no reason why the claimant should make up such evidence and we are satisfied that he did not. We conclude that CR did tell the claimant in August 2017 that he had heard IP making comments about the claimant working in a corner shop and being like all Indians in driving a Mercedes motor car. We conclude that CR recognised that such comments were uncalled for and should not have been said …"**

11. In respect of Andrew Bowman, who it would appear was Technical Operations Manager at the relevant time, the Tribunal held that:

> **"We heard from AB who denied having heard any comment from IP and denied having said** *[after Mr Pearson made a racist comment]* **"*Ian, man*". We prefer the evidence of the claimant on this matter. We did not find the evidence of AB credible or reliable on this matter. The evidence was given in a somewhat defensive manner and on balance we preferred the evidence of the claimant on this point. We are satisfied that AB, like CR, heard the remarks of IP and took him to task about them in a relatively relaxed way but took no further action to address the matter of the comments which we conclude AB knew should not have been made."**

12. The Respondent sought to rely on the defence provided for by section **109(4) Equality Act 2010**.

13. The Tribunal accepted that the Respondent had an equal opportunity policy and an anti-bullying and harassment procedure dating from February 2016. It seems that there must have been a predecessor to the anti-bullying and harassment procedure as the Tribunal found that Mr Pearson and Mr Armstrong underwent bullying and harassment training on 11 February 2015. They had also received equality and diversity training on 15 January 2015. The Tribunal only made limited findings about the scope of the policies and nature of the training:

> **"6.21 The staff handbook of the respondent includes the Equal Opportunity Policy and procedure and the Harassment policy and procedure (page 153). A victim of harassment is told to raise the matter with his line manager or another manager if the concern relates to the line manager (page 157).**
>
> **6.22 Equality and diversity training had been given by the respondent to its staff at various times. That training included a slide on what could be considered to be harassment (page 193) and included "offensive jokes, suggestive or degrading comments"."**

The Tribunal's direction on the Law

14. The Tribunal directed itself as to the law, rather briefly, as follows:

> **"9.10 We have reminded ourselves of the decision in Canniffe (above) and the necessity to adopt a structured approach to the question of whether a defence under section 109(4) of the 2010 Act is made out by a respondent. We note that the availability of that defence suggests the necessity that someone will have committed an act of discrimination notwithstanding the taking of reasonable steps. On the other hand, a respondent will not avoid liability if it has not taken reasonable steps simply because, if it had taken such steps, they would not have led anywhere or achieved anything or in fact prevented anything from occurring."**

The Tribunal's conclusion

15. The Tribunal rejected the attempt by the Respondent to rely on the section 109(4) defence, holding:

> **"13.6 We have considered the defence advanced by the respondent in respect of the remarks of IP and the reaction of AB and CR to them. We note and accept that all three employees had received training by the respondent in race discrimination and how it should be avoided in the workplace. We accept that that training had covered harassment related to race. However, in all cases the training which had been delivered was several years before the events in question and was clearly stale. We do not accept that the respondent had taken all reasonable steps to avoid discrimination in the workplace for a reasonable step would have been to refresh that training. The fact that it needed to be refreshed is amply demonstrated by the remarks made by IP and the way both AB and CR and DA failed to properly react to the harassment or allegations at least of harassment. The training had made plain to the employees what they should do if they heard unacceptable remarks and they all failed to follow that guidance. The training patently needed to be refreshed and it would have been a reasonable step to do so. The statutory defence advanced by the respondent is not made out."**

The Notice of Appeal

16. The Respondent appealed by a Notice of Appeal received by the Employment Appeal Tribunal on 17 April 2019. Two of the grounds were rejected, but the appeal was permitted to proceed in respect of the rejection of the section 109(4) employer's defence. The pleaded summary ground of appeal is:

> **"It was unlawful/perverse for the Tribunal to fail to properly engage with the statutory defence at section 109(4), Equality Act (2010)"**

The Law

17. The starting point is that the employer is potentially liable for harassment carried out by one of its employees because of the provisions of section 109 **Equality Act 2010**:

> **109 Liability of employers and principals**
>
> **(1)Anything done by a person (A) in the course of A's employment must be treated as also done by the employer.**

18. Section 109(4) provides a potential defence:

> **(4) In proceedings against A's employer (B) in respect of anything alleged to have been done by A in the course of A's employment it is a defence for B to show that B took all reasonable steps to prevent A-**
>
> **(a) from doing that thing, or**
>
> **(b) from doing anything of that description.**

19. Because the surprisingly few reported cases that consider this defence were decided under predecessor legislation, it is helpful to consider the previous wording which, for example, in section 41 **Sex Discrimination Act 1975** provided that:

> **(3) In proceedings brought under this Act against any person in respect of an act alleged to have been done by an employee of his it shall be a defence for that person to prove that he took such steps as were reasonably practicable to prevent the employee from doing that act, or from doing in the course of his employment acts of that description.**

20. We do not consider that the change in wording from taking **"such steps as were reasonably practicable"** to taking **"all reasonable steps"** involved any significant change in approach. The wording of the **Equality Act 2010** is, if anything, a little clearer. Ms Niaz-Dickinson, unsurprisingly, did not contend that the wording of the **Equality Act 2010** lowered the threshold for establishing the defence from the predecessor legislation.

21. As is clear from the wording of section 109(4) **Equality Act 2010**, and the predecessor provisions, it is for the employer to establish the defence; the burden of proof falls fairly and

squarely on the employer; see also **Enterprise Glass Co Ltd v Miles** [1990] ICR 787 at 790 C-D.

22. Section 41 **Sex Discrimination Act 1975** was considered by the Employment Appeal Tribunal in **Canniffe v East Riding of Yorkshire Council** [2000] IRLR 555, a case in which the claimant was subject to sexual harassment and assault. The employer argued that it had taken such steps as were reasonably practicable to prevent such acts. The tribunal held that they could not see that any further actions that the employer might have taken would have had any effect in relation to the very serious criminal behaviour perpetrated upon the applicant by her fellow employee. Burton J held at paragraph 14:

> **"We are satisfied that the proper approach is:**
>
> **(1) to identify whether the respondent took any steps at all to prevent the employee, for [whom] it is vicariously liable, from doing the act or acts complained of in the course of his employment;**
>
> **(2) having identified what steps, if any, they took to consider whether there were any further acts, that they could have taken, which were reasonably practicable. The question as to whether the doing of any such acts would in fact have been successful in preventing the acts of discrimination in question may be worth addressing, and may be interesting to address, but are not determinative either way. On the one hand, the employer, if he takes steps which are reasonably practicable, will not be inculpated if those steps are not successful; indeed, the matter would not be before the court if the steps had been successful, and so the whole availability of the defence suggests the necessity that someone will have committed the act of discrimination, notwithstanding the taking of reasonable steps; but on the other hand, the employer will not be exculpated if it has not taken reasonable steps simply because if he had taken those reasonable steps they would not have led anywhere or achieved anything or in fact prevented anything from occurring."**

23. This suggests a two stage approach of first considering what steps have been taken and then considering what further steps could have been taken that were reasonably practicable. It is worth noting, particularly when considering the Appellant's submission in the appeal, that the comment that "the question as to whether the doing of any such acts would in fact have been successful in preventing the acts of discrimination in question may be worth addressing, and may be interesting to address, but are not determinative either way" was made in relation to the second

stage, when considering what further steps could have been taken, in addition to those that were taken.

24. Paragraph 22 of **Canniffe** suggests that the analysis may involve a three stage approach:

> **"It appears to us, given the context of s.41(3), the requirement under *Jones v Tower Boot Co Ltd* to apply a purposive construction and the serious nature of the kind of allegations made in this case, that it is important that a tribunal carrying out its function under s.41(3) should be careful not to skip over any stages. It appears to us that the tribunal has found that the respondent took some steps and was satisfied that those steps that the respondent had taken were reasonable. The tribunal has not however asked itself the missing question, which is: were there any other steps which could reasonably have been taken which the respondent did not take?"**

25. This passage suggests that the stages are 1) identify any steps that have been taken, 2) consider whether they were reasonable, 3) considerer whether any other steps should reasonably have been taken.

26. **Canniffe** supports the proposition that if there is a further step that should reasonably have been taken by the employer to prevent harassment the defence will fail even if that step would not have prevented the harassment that occurred in the case under consideration. That does not mean that in deciding the anterior question of whether a further step was one that it would have been reasonable for the employer to have taken, the tribunal cannot consider the likelihood that it would have been effective. In a case that was not cited by the parties, but was sent to them before the hearing so that they could comment; **Croft v Royal Mail Group plc** [2003] ICR 1425 Pill LJ held, at paragraph 61, in respect of further action it was contended that the employer should have taken to prevent harassment:

> **"I agree that a consideration of the likely effect, or lack of effect, of any action it was submitted the employers should have taken is not the sole criterion by which that action is to be judged in this context. In considering whether an action is reasonably practicable, within the meaning of the subsection, it is however permissible to take into account the extent of the difference, if any, which the action is likely to make. The concept of reasonable practicability is well known to the law and it does entitle the employer in this context to consider whether the time, effort and expense of the suggested measures are disproportionate to the result likely to be achieved. The**

> **tribunal were entitled to conclude that, at each stage, the employers did take such steps as were reasonably practicable to prevent the acts complained of."**

27. Pill JL clarified at paragraph 63:

> **"If Burton J was adopting a different approach in the Canniffe case [2000] IRLR 555, I respectfully disagree. In the concluding part of paragraph 14 of his judgment, however, the part relied on by the applicant, Burton J does twice refer to "reasonable steps". In considering what steps are reasonable in the circumstances, it is legitimate to consider the effect they are likely to have. Steps which require time, trouble and expense, and which may be counterproductive given an agreed low-key approach, may not be reasonable steps if, on an assessment, they are likely to achieve little or nothing."**

The Appeal

28. Ms Niaz-Dickinson submitted a skeleton argument for the Respondent (the Appellant in the appeal) that expanded upon the grounds of appeal. She departed from it to an extent, as explained below, in oral argument. The Claimant's representative, Mr Richard Owen of Citizens Advice Gateshead, submitted a brief written submission, but did not attend the video hearing.

29. The appeal as set out in the Notice of Appeal, and expanded upon in the skeleton argument, was based on the argument that the Tribunal erred in law in the legal approach they adopted by determining that the Respondent had not taken all reasonable steps to prevent harassment because it had not provided refresher training.

30. The main criticism the Respondent made of the Employment Tribunal was that they relied solely on the conclusion that the training that had been provided had ceased to be effective to conclude that a further step should reasonably have been taken by providing refresher training. At paragraph 29 of the skeleton argument Ms Niaz-Dickinson stated:

> "**It is submitted that from the outset the ET was therefore focused on the effectiveness of the harassment training which it appeared to equate with reasonableness. To put it colloquially the ET *"got off on the wrong foot"*"**

31. At its highest Ms Niaz-Dickinson argued:

> **"14. It is submitted that an interpretation of reasonableness that equates that concept with effectiveness is erroneous and contrary not only to the intention and purpose of the statutory defence but also contrary to the correct legal interpretation of the word 'reasonable'.**
>
> **15. Furthermore, it is submitted that effectiveness must be irrelevant to the test of reasonableness in relation to the statutory defence as the focus of a Tribunal should purely be on whether the steps taken were reasonable in all of the circumstances. Such an approach should apply regardless of whether the steps taken were, or could have been effective and the judgment in Canniffe recommends such an approach."**

32. It was a brave submission to suggest that the Employment Tribunal should disregard the question of whether any steps were, or were likely to be, effective when considering whether such steps as were taken were reasonable, and whether there were any additional steps that reasonably should have been taken. Ms Niaz-Dickinson stepped back from that submission in oral argument and contended that effectiveness should not be "the sole criterion" for assessing reasonableness. She accepted on questioning that in assessing whether the steps that have been taken were sufficient, so that no further steps were reasonably required, effectiveness might, in certain circumstances, be the sole criteria. For example if there was a case in which excellent anti-harassment training had been provided, but nonetheless employees immediately thereafter to management's knowledge continued to engage in harassing "banter", the sole fact that the training had failed could be enough to demonstrate that further reasonable steps were required to address the ongoing harassment. However, if further steps were taken, and they appeared to have been effective, but another act of harassment occurred, the occurrence of that further act would not, of itself, establish that all reasonable steps had not been taken, so as to prevent the employer relying on the defence.

33. It does not follow from the authorities that the likelihood of a step preventing harassment is irrelevant in considering whether the steps that have been taken are reasonable and whether

A there are further reasonable steps that were required. The likely effectiveness of a step is evidently relevant. That is the point made by Lord Justice Pill in **Croft**.

B 34. The starting point is to consider whether the employer took any step, or steps, to prevent harassment.

C 35. In considering the reasonableness of steps that have been taken the analysis will include consideration of the extent to which the step, or steps, were likely to prevent harassment. Brief and superficial training is unlikely to have a substantial effect in preventing harassment. Such training is also unlikely to have long-lasting consequences. Thorough and forcefully presented D training is more likely to be effective, and to last longer.

36. Considering this matter during the Coronavirus pandemic, as we look forward to widespread vaccination, we are interested not only in whether the vaccine will be effective in E eliciting an immune system response, but also how long the response will last. There is an analogy to be made; how effective will training be to prevent harassment, and how long will it last.

F 37. It is not sufficient merely to ask whether there has been training, consideration has to be given to the nature of the training and the extent to which it was likely to be effective. If training involved no more than gathering employees together and saying "here is your harassment G training, don't harass people, now everyone back to work", it is unlikely to be effective, or to last.

38. It is relevant to consider what has happened in practice. The fact that employees have H attended anti-harassment training but have not understood it, or have chosen to ignore it, may be relevant in determining whether all reasonable steps have been taken to prevent harassment.

Firstly, if management become aware that despite such training employees are continuing to engage in harassment, or demonstrating that they do not understand the importance of preventing it and reporting it to managers, this may serve as a notification to the employer that they need to renew or refresh the training. The fact that harassment takes place after such training, even if unknown by the management at the time, may provide some evidence that demonstrates the poor quality of the training that was provided, particularly if it is not only the alleged harasser who did not understand the training, or act on it, but that was also the case with other employees.

39. Once the tribunal has considered what, if any, steps have been taken by the employer, the tribunal should go on to consider whether there were any other reasonable steps that the employer should have taken. The likelihood of such steps being effective will be a factor in determining whether such further steps are reasonable. The determination of whether further steps are reasonable may, when appropriate, include considerations such as the cost or practicality of taking the steps. While the likely effectiveness of the further steps is relevant, it certainly is not necessary to conclude that it would be more likely than not to prevent discrimination of the type being considered, although it is unlikely that a further step would be considered reasonable if it had no realistic prospect of preventing discrimination.

40. Ms Niaz-Dickinson based her submissions on the contention that the Tribunal got off on the wrong foot by equating effectiveness of training with reasonableness. She went as far as to contend at paragraph 15 of her skeleton argument that effectiveness is irrelevant to reasonableness. In oral submissions she contended that effectiveness should not be the sole criteria. On that analysis, if reasonable training has been provided, even if the employer is aware that the training has been totally ineffective, the defence is made out because effectiveness cannot

be the sole criteria for concluding that there were further steps that should have been taken. We reject that argument.

41. The provision has to be considered having regard to its purpose within equality legislation. It is designed to encourage employers to take significant and effective action to combat discrimination. The defence is available, but only to the employer that can show that all reasonable steps to prevent harassment have been taken.

42. We did not find the examples of the use of the word "reasonable" that Ms Niaz-Dickinson relied upon form authorities in respect of other legal provision were of assistance. Her key proposition was that the word reasonable does not set the barrier at a particularly high level, although she accepted that the argument might not take her very far as the defence requires not only that reasonable steps have been taken, but that all reasonable steps have been taken. We agree that is the real point. The employer has to establish that they have taken all reasonable steps, which clearly is a high threshold.

43. The Tribunal did not consider in any great detail the steps that the Respondent had taken to prevent harassment. On a fair reading of the Judgment it appears that the Tribunal thought they were adequate. The Respondent put the relevant policies in the bundle for this hearing. The equal opportunities policy does not make any reference to harassment. The anti-bullying and harassment procedure only refers to harassment in the title; the document thereafter only refers to bullying, and makes no mention of race.

44. Mr Pearson had undertaken equal opportunities training and bullying and harassment training in January and February 2015, respectively. The Tribunal did not make any detailed

findings about the policies or the content or effectiveness of the training. We were provided with the PowerPoint slides from the training that defined harassment as "behaviour which is intended to trouble or annoy someone, for example repeated attacks on them, or attempts to cause them problems" and which gave an example of harassment as "offensive jokes, suggestive or degrading comments". There was no reference to race or racial stereotypes. The Tribunal did find at paragraph 13.6 that training had covered harassment related to race. That must have been based on other evidence that was not put before us. Overall, the policies and training do not appear to have been very impressive, even for a relatively small employer. However, it is not for us to go behind the implicit reasoning of the Tribunal that some reasonable steps had been taken.

45. It would have been better if the Tribunal had made more detailed findings about the policies and training rather than, apparently, accepting it was adequate and focusing on whether the effects had worn off. It would have been better if the Tribunal had done more than just find that two of the relevant employees had undergone training in 2015 and stated somewhat inaccurately that it was "several years before the events". The training had been delivered around one year and eight months before the Claimant began his employment and around two years and eight months before the Claimant was dismissed. Several years was a slight overstatement, but one we do not consider undermined the reasoning of the Tribunal.

46. Where an Employment Tribunal considers training should have been refreshed it may be important to determine how regularly such refresher training should have been provided. However, if it is clear that training has not been effective, further action will be required, even if refresher training would not usually have been provided within such a timescale.

47. Whatever the merits of the training, the Tribunal clearly concluded it was stale. Underlying that finding must be the obvious point that the less effective training is, the more quickly it becomes stale.

48. The Tribunal did not conclude that the training was stale merely from the fact that Mr Pearson had made racist comments. The tribunal held that a colleague had heard Mr Pearson make a racist comment but did not report it to HR or management. David Armstrong, the Customer Services Manager, had been told by the Claimant that Mr Pearson had made racist remarks. Although he told Mr Pearson to report the matter to HR, he did not himself take any further action. Andrew Bowman, who was Technical Operations Manager, had heard Mr Pearson make a racially harassing comment but, rather than taking any steps to report it, had just said "Ian, man!". That was sufficient evidence for the Tribunal to conclude that, whatever training there had been, it was no longer effective.

49. The fact that the Mr Pearson made the harassing comments was not irrelevant. There might be circumstances in which an employee has undergone training but is contemptuous of it and continues to harass. If the training was of a good standard and the employer was unaware of the continuing harassment, the defence might be made out. However, it appears in this case that Mr Pearson, despite having undergone the training, thought that what he was doing was no more than "banter". That provided some further evidence that the training that was provided had faded from his memory. The Tribunal was also entitled to conclude the fact that managers did not know what to do when they observed harassment, or it was reported to them, suggested that the training had also faded from their memories.

50. The fact that managers were aware that harassment had taken place meant that the Respondent should have appreciated that they needed to do more to prevent harassment and provide some further training. The Respondent, through their managers, knew that harassment was taking place, but did not take action to prevent it. These were matters that the Employment Tribunal was entitled to take into account.

51. In oral argument, Ms Niaz-Dickinson contended that the Tribunal did not specifically raise the issue of training being refreshed. That did not form one of the grounds of appeal and permission was not sought to add it as a further ground of appeal. In any event, the training that had been provided clearly was in issue, as was the date of its occurrence, which is demonstrated by the fact that the records that showed that Mr Pearson and Mr Bowman had undertaken training in 2015 were placed before the Tribunal. The currency of the training was something that the Respondent considered relevant to raise itself.

52. Ms Niaz-Dickinson also argued that the Tribunal was required specifically to consider whether there was a likelihood that refresher training would have been effective before concluding that it was a further reasonable step that should have been taken. This was more strongly argued in the grounds of appeal than the skeleton argument. There was nothing in this case to suggest that further training of a good standard would not have had a good chance of being effective. Indeed the employer did provide Mr Pearson with further training after the event. They must have thought that it was likely to be effective. Further, there was no reason to consider that refresher training would not have been effective to prevent managers taking action when they were made aware that harassment was occurring. We do not read the findings of the Tribunal as suggesting that any refresher training would have been limited to the precise same training as had previously taken place, it could, and probably should, have improved upon it. If an employer

wishes to rely on the section 109(4) defence by contending that although further steps could have been taken, they were not reasonably required because they would have been bound, or very likely, to be ineffective; the burden would rest on the employer to establish that was the case, as the burden in establishing the defence rests firmly on the employer.

53. The Tribunal did not err in its approach to the law or reach a determination that came close to being perverse. While it would have been better for the Tribunal to have made more detailed findings about the policies that were in place, and the training that had been undertaken, they were entitled to conclude the training was stale and was no longer effective to prevent harassment, and that there were further reasonable steps by way of refresher training that the Respondent should have taken. That finding meant that the Respondent could not rely on the defence under section 109(4) of the **Equality Act 2010**.