

ENGLAND AND WALES / JUDGMENT

E Ewome v BMAT Education

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Ewome v BMAT Education

Neutral Citation Number: [2025] EAT 101

EMPLOYMENT AP

PEAL TRIBUN

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Case No: EA-2024-000291-AS

Rolls Building

Fetter Lane, London, EC4A 1NL

Date: 21 July 2025

Before : HIS HONOUR JUDGE BEARD

Between : MS E EWOME
- and -
BMAT EDUCATION
(formerly known as Burnt Mill Academy Trust)

Appellant
Respondent
MR WINSTON BROWN (instructed by Brown and Co. Solicitors) for the Appellant
MISS DEE MASTERS (instructed by Browne Jacobson Solicitors LLP) for the
Respondent
Hearing date: 3 July 2025

JUDGMENT

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[2025] EAT 101 Judgment approved by the court for a hand down Ewome v BMAT Education SUMMARY PRACTICE & PROCEDURE AND RACE DISCRIMINATION Section 136 of the Equality Act 2010 sets a two-stage test: at stage 1: The claimant must prove facts from which a tribunal could infer discrimination at stage 2 the burden shifts to the employer to prove that the treatment was not discriminatory if such facts are proven. The ET found that although the Appellant suffered the detriment of her PMR being downgraded, the surrounding facts of similar treatment of someone of a different race did not suggest that race was the reason. Therefore, the burden did not shift to the employer. It is to be remembered that poor treatment alone is not enough—there must be a link to a protected characteristic. Material similarity in circumstances is key when establishing a comparator. Even if the treatment is poor, if both individuals are treated similarly, it weakens the inference of discrimination. There was no basis to criticise the ET's reasoning that the first stage was not passed. The ET refused to allow live evidence from the comparator despite her email disputing the respondent's account. The key decisions were made by someone who did not give evidence, therefore the ET was required to reach conclusions based on surrounding evidence inferring the intent of the decision maker from indirect sources. ET's have wide discretion in managing evidence. Unless the decision is perverse or irrational, it will not be overturned. This was a rational decision at the stage the ET made it as it had already heard and was anticipating further evidence on intent and had a particular account which it was testing from the pleaded case. On that pleaded case the evidence was likely to undermine the claimant's stated position. © EAT 2025 Page 2

[2025] EAT 101 Judgment approved by the court for a hand down Ewome v BMAT Education HIS HONOUR JUDGE BEARD: 1. I shall refer to the parties as they were before the Employment Tribunal (ET) as claimant and respondent. This is an appeal by the claimant against the decision of the East London ET dismissing her claim of direct race discrimination. The appeal is argued on two grounds, Judge Walker having given permission: 1.1. That the ET erred in law by failing to shift the burden of proof under section 136 of the Equality Act 2010. 1.2. That the ET committed a procedural irregularity in refusing to admit live evidence from a comparator, Ms Sarah Viccars. 2. The Claimant, who is black, was employed by the Respondent from 2010 until her resignation in May 2023 at the time of these events was titled assistant headteacher. Her claim centred on the handling of her 2019/2020 Performance Management Review (PMR). The Claimant alleged that the approach to the PMR process amounted to direct race discrimination. The respondent relied on Ms Viccars, a white colleague, as a comparator. The ET found that both the Claimant and Ms Viccars experienced similar treatment in relation to their PMRs and concluded that there was no evidence that race was a factor in the decisions made.

The claim was dismissed in its entirety. It is common ground between the parties that the ET set out the law it was required to apply correctly. 3. The parties prepared a list of issues for the ET to decide and at issue 4(a) the following was set out in respect of the PMR issue: “On 30 October 2020, was the claimant told by Sahbi Benzid that she failed her performance management review because allegedly there was a failure in leadership, school behaviour had not improved, and a member of the claimant team had not met his leadership target.” © EAT 2025 Page 3

[2025] EAT 101 Judgment approved by the court for a hand down Ewome v BMAT Education 4. The ET judgment contained the following findings of fact in respect of the PMR process: 4.1. That responsibility for behaviour, attitude and Christian ethos formed part of the claimant’s job role and that the claimant was the only person with responsibility for behaviour at that time. 4.2. That Sarah Viccars was also an assistant headteacher. 4.3. That both the claimant and Ms Viccars would be appraised by a Deputy Headteacher, in the claimant’s case Mr Benzid and in Ms Viccars’ case Mr Omilli. 4.4. Both the claimant and Ms Viccars were initially appraised as a pass. 4.5. That Mr Benzid was told by the Executive Headteacher, Mr Hehir, that the issue of behaviour was still a serious issue in the school and not to pass the claimant. 4.6. That in a meeting with the claimant the claimant was told that she had failed her PMR. 4.7. That Ms Viccars had responsibility for personal development and Mr Omilli told her that she had passed PMR. 4.8. That Mr Hehir instructed Mr Omilli then to fail Ms Viccars and this instruction was likely to be because she had not exhibited leadership skills. 4.9. Both the claimant and Ms Viccars were later told that they had, in fact, passed. 5. The respondent, as part of its case, accepted that the claimant had been treated very poorly in this process. However, key to its defence was the argument that although there was detriment this was not on the grounds of race, because there was an actual white comparator. In anticipating the respondent’s argument on this the claimant gave evidence and called a witness, Ms Welch to give evidence that Ms Viccars was not a true comparator. It is apparent from that evidence that, in preparation for the hearing, the claimant accepted that Ms Viccars had been passed failed and then passed in the PMR process in the same fashion that she had. The claimant’s evidence was that she © EAT 2025 Page 4

[2025] EAT 101 Judgment approved by the court for a hand down Ewome v BMAT Education was aware that Ms Viccars had a warning on her file which the claimant did not. Ms Welch’s evidence was that a management letter had been put on Ms Viccars file. 6. The ET’s conclusions on the burden of proof, insofar as it relates to this issue, are set out in paragraphs 181 to 184 of the ET Judgment. The ET concluded that Ms Viccars had been treated in a similar way to the claimant and that her work had shown some improvement, but that the claimant’s had not shown improvement as behaviour was still a cause for concern. Both were told they would be monitored but both were not because the PMR was changed to again to a pass in both cases. Those decisions were made by Mr Hehir. Neither the claimant nor Ms Viccars should have been failed. Although shabby and unprofessional it was not an approach based on race. On this basis the ET considered that stage 1 of the

burden of proof provisions in section 136 EqA 2010 had not been reached in that: “the Claimant has failed to prove facts from which the Tribunal can infer that the reason for the failed PMR on 30 October and the intention to institute weekly monitoring, was the Claimant’s race.” 7. On the third day of the hearing the claimant’s then representative made an application to call Ms Viccars. The application refers to a document disclosed by the respondent, a letter, which purported to indicate that Ms Viccars had failed her PMR. The argument advanced in the application was that information provided would rebut that documentary evidence. There was a further application for the provision of metadata for the letter. The application was made following receipt by the claimant of an email from Ms Viccars. In that email Ms Viccars indicates that she was disturbed that a false account was being advanced about her. Ms Viccars set out that she did not remember receiving a letter of the sort described to her. She set out that at the time there was no reference to her failing a PMR. Her account was that she had been told that the Headteacher would not sign the PMR off and the reason related to her pay-scale and not her leadership. Ms Viccars also indicated that she had received a letter indicating that pay was not being increased but did not link that decision to performance. © EAT 2025 Page 5

[2025] EAT 101 Judgment approved by the court for a hand down Ewome v BMAT Education 8. In respect of the 2nd Ground of appeal the tribunal’s decision is recorded in paragraphs 48 and 49 of the Judgment:

48. When we heard evidence in November 2022, we discussed the PMR process and in particular, Ms Viccars’ process. It is likely that Ms Viccars was told about the evidence that had been given in Tribunal. She wrote to the Tribunal on the following day, to dispute the veracity of that evidence. She agreed that she had initially been told that she had passed her PMR, and that Mr Hehir had subsequently refused to Case Number: 3205417/2021 10 sign off on it. However, she believed that the reason for his decision not to approve Mr Omilli’s decision that she had passed her PMR was not the reason Ms Welch gave us in her witness statement and in live evidence. Ms Viccars wanted to come to the Tribunal to give live evidence on this matter.
49. After consideration of representations from both parties, the Tribunal decided not to allow Ms Viccars to give evidence about the reason why she was told that she had failed her PMR, after having initially been told that she had passed. The reason why she had been told that she had failed her PMR, was not an issue that we had to decide in this case. We were not hearing Ms Viccars’ complaint to the Employment Tribunal. The parties were agreed on the relevant facts, which were that Ms Viccars had initially been told that she had passed her PMR, then in October she was told that she had failed it and subsequently, probably after the half-term break, she was told that she had in fact, passed it. We therefore gave less weight to the contents of her letter to the Tribunal, in comparison to the tested evidence we had from the Claimant, Mr Omilli and Ms Welch, the last two of whom had been directly involved in her PMR process. 9. In respect of ground 1 the claimant argued that the ET had failed to apply the correct legal test under section 136 of the Equality Act 2010. Referring to the

relevant case law, including Igen Ltd v Wong [2005] IRLR 258, Madarassy v Nomura International plc [2007] EWCA Civ 33 and Bahl v The Law Society & Anor [2004] EWCA Civ 1070. Mr Brown submitted that paragraph 175 of the judgment demonstrates that the ET found “less favourable” treatment. This finding was based on the reversal of her PMR outcome. That the first decision to change from pass to fail being made without new evidence and despite HR concerns. The ET had acknowledged the mishandling of the PMR and described as shabby but concluded that there was no evidence of discriminatory motivation. Mr Brown argued that on that basis there should have been an exploration of the second © EAT 2025 Page 6

[2025] EAT 101 Judgment approved by the court for a hand down Ewome v BMAT Education stage, following which there should have been a reversal of the burden of proof by the ET. Mr Brown argued that the ET should have considered that there were facts which, if not explained, could demonstrate discrimination. 10. The Claimant further argued that the ET erred in refusing to allow Ms Viccars to give live evidence. That evidence, it is argued, would have contradicted the Respondent’s assertion that Ms Viccars had also been failed in her PMR. The ET reasons for its decision not to admit the evidence were that the relevant facts concerning Ms Viccars’ PMR were not in dispute: she was initially told she had passed, then failed, and later passed again. Mr Brown argued this was no longer necessarily the position once the potential evidence of Ms Viccars was taken into account. His argument was that this was evidence that pointed to the state of mind of the actual decision maker. Further it was evidence that would have raised doubt about how appropriate it was to consider that Ms Viccars was a proper comparator but on a different basis to that which had originally been put forward by the claimant. 11. Miss Masters’ submissions referred to the decision in Laing v Manchester City Council

[2006] ICR 1519 (approved by the Court of Appeal in Madarassy), where Elias J (P) held that an ET in drawing inferences (ie stage one) might have to and should legitimately consider all the evidence put before it prior to concluding whether the burden of proof had shifted to stage 2 for an explanation from the employer. She argued on that basis that the ET was entitled to take the one stage approach. Having done that the ET had established the “reason why” the detriment relied upon had occurred. In that regard she made reference to the finding in paragraph 173 of the judgment “because Mr Hehir decided that behaviour in the school had not improved” and behaviour being the area for which the claimant was responsible (emphasised as the reason in paragraph 182). The ET had found that Ms Viccars was an appropriate comparator because the © EAT 2025 Page 7

[2025] EAT 101 Judgment approved by the court for a hand down Ewome v BMAT Education claimant and Ms Viccars had the same status and the changes to PMR from pass to fail were in both cases the result of an instruction from the Headteacher. 12. In respect of the second ground of appeal Miss Masters submitted that we should consider what the position was before the ET at the stage the application was made. At that stage the claimant had given evidence as had Ms Welch and had presented a case which pointed to

Ms Viccars not being a comparator because there was a conduct reason relating to her not passing the PMR. A point reiterated about this was that it would mean the ET choosing between the claimant's own witnesses if Ms Viccars had been called. Miss Masters argued that at the time of making the decision the ET considered it had the evidence of Ms Welch and that of the respondent's witnesses to compare. There was at that stage no witness statement, simply the email. She argued that the real issue is did the ET err when it decided not to allow live evidence. Miss Masters made the point that the decision whether to allow late evidence of this nature is classically a case management decision where the role of the EAT is limited to asking whether the ET made a perverse decision. The ET's judgment gave three reasons for its decision firstly that there was no real factual dispute that both had passed, failed and then passed the PMR. Secondly this was not a case about what the individuals had been told was the reason for this treatment but what was the actual reason. Thirdly that they had heard evidence from Caroline Welch and would hear from Mr Omilli about the issue on the reason in dispute. There was nothing to show that this was an improper or perverse decision. 13. The ET correctly directed itself on the applicable legal principles, including the two-stage test under section 136 of the Equality Act 2010, as articulated in *Igen v Wong*, *Madarassy and Bahl*. The ET found that although the PMR process was completely mishandled and caused significant and understandable distress to the claimant, the evidence established that the reason for the treatment was not because of her race. However, the ET also understood that the two stage process would be unnecessary if the actual reason for the treatment was apparent from the evidence. © EAT 2025 Page 8

[2025] EAT 101 Judgment approved by the court for a hand down *Ewome v BMAT Education* 14. In this case the reality is that the ET was required to examine the reasons for the Headteacher making the decision to order his subordinates to change a pass to a fail. Mr Hehir did not give evidence to the ET and therefore it was required to explore that decision making from the surrounding evidence. In doing so the ET was entitled to consider all of the evidence it had heard from both parties. When deciding whether the first stage of the burden of proof provisions had been reached and so whether the burden of proof shifted to the respondent the ET took account of the respondent's evidence about Ms Viccars as a comparator; it was entitled to do this. It is unfortunate that the ET referred to the claimant being less favourably treated, but it is quite clear from the rest of the ET's reasoning that it was actually finding that the "pass, fail, pass" treatment of the claimant was a detriment. Having established there was a detriment the ET considered the evidence in the round including that of a comparator. The evidence pointed to the reasons for the treatment being related to performance in both cases. The ET were entitled, on the basis of their factual findings, to conclude that the reason was Mr Hehir's view that behaviour at the school, which was within the claimant's responsibilities, had not improved and not related to her race at all. 15. Dealing with ground 2 the ET's decision to allow the email in as evidence but not to allow live evidence from Ms Viccars as a witness appears surprising. If the evidence was not relevant or not admissible for some other

reason the email should not have been permitted to form part of the evidence. If it was relevant and admissible then it appears irrational to allow written evidence, which the ET would be required to treat with caution because it had not been tested, but not allow live testimony, which could be tested in cross examination. However, I am required to approach this ground of appeal not based on hindsight but considering the reasoning at the time the decision was made. In order for the appeal on this ground to succeed I must be of the view that the ET was certainly wrong. That is not just a matter of my disagreement with the decision the ET must have reached a conclusion that no reasonable ET could have reached. © EAT 2025 Page 9

[2025] EAT 101 Judgment approved by the court for a hand down Ewome v BMAT Education 16. That the information in the email was important evidence is in some ways shown by the submissions of the claimant recorded by the ET. The ET noting that the claimant had not challenged the authenticity of the documentary evidence of the letters relied upon as being sent to Ms Viccars until closing submissions. However, at the time when the application was made the ET could have expected, having allowed the email to be part of the evidence, that cross examination of the respondent's witnesses would include challenges on that authenticity; it did not. The three reasons advanced by the ET for its decision must be viewed in the context the decision was made. The ET did not have a witness statement, evidence had already been given which tended to point to a different reason for challenging Ms Viccars' status as a valid comparator and it would be hearing further live evidence about the reasons for the treatment. 17. The only element which appears to be concerning is that the ET did not consider that the reasons for the treatment of Ms Viccars was important to its decision making. It appears to me that although the ET was correct that it was not considering Ms Viccars case, nonetheless, in constructing a comparator it was required to consider whether the circumstances of the comparator were materially similar to the claimant's; materiality being key. The claimant was relying on the "pass, fail, pass" sequence to support a claim of discrimination and alleging that there was a conduct issue in Ms Viccars case which meant that the cases were materially different; thereby seeking to establish that there was a material fact which was different between her case and that of Ms Viccars which meant she was not a valid comparator. The email from Ms Viccars denied there was a conduct issue, thereby providing evidence which would undermine the claimant's original case. The new position of the claimant based on that email was that the letter to Ms Viccars produced by the respondent was creating a false narrative. However, what is clear, despite any reasons given to Ms Viccars, is that the "pass, fail, pass" treatment is what actually happened in her case. On that basis the ET's reasoning is sound. © EAT 2025 Page 10

[2025] EAT 101 Judgment approved by the court for a hand down Ewome v BMAT Education 18. Both grounds of appeal are dismissed the ET concluded that the reason for Ms Viccars' PMR outcome was not central to the issues it had to decide and that her live evidence would not materially affect the outcome. In my judgment there was no error of law or procedural unfairness in that decision. The ET acted within its case management

discretion. 19. The ET's judgment was thorough, well-reasoned, and consistent with the applicable legal principles. There is no error of law in the ET's approach to the burden of proof or its evidential rulings. Even if the exclusion of Ms Viccars' live evidence were arguably wrong, the ET's findings on the reasons for the Claimant's treatment were clear and supported by other evidence. Any such error would not have been material to the outcome. © EAT 2025 Page 11

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