

Combat harassment

It is well recognised that employers can be liable if an employee subjects a colleague to unlawful discrimination. However the situation regarding employer's liability for the actions of a third party is more complicated.

As a general rule employers are not responsible for the actions of those that it does not employ. In the case of *Burton v De Vere Hotels Limited* (1996) an employer was found liable for claims of race discrimination brought by two waitresses. The two ladies had been working at a private function at their employer's hotel, where Bernard Manning was performing. They were subjected to racist jokes, and successfully argued that their employer had directly discriminated against them by permitting this harassment to occur when it could have been prevented.

However, in *Pearce v The Governing Body of Mayfield School* (2003) the House of Lords found that the decision in *Burton* was wrong. It held that an employer could only be guilty of direct race discrimination under the Race Relations Act 1976 ("RRA") if, on racial grounds, it treats an employee less favourably than it would treat others. In the *Burton* case there was nothing to suggest that the employer's actions was influenced by race.

Shortly after the *Pearce* decision the UK implemented the Equal Treatment Directive by the Employment Equality (Sex Discrimination) Regulations. Accordingly the RRA was amended to specifically prohibit harassment by employers on grounds of race, ethnic, or national origins. Harassment is defined as unwanted conduct that has the purpose or effect of creating an intimidating, hostile, degrading, humiliating or offensive environment. A similar change was also made at the time to the Sex Discrimination Act 1975 ("SDA").

Two recent cases have examined these new harassment provisions. In *Gravell v London Borough of Bexley* (2007) the claimant brought a claim under the RRA as a harassment claim rather than one of direct discrimination. Ms Gravell had been told at her induction that it was Council's policy to ignore racist comments made by customers and that she could not tell customers that she found such language offensive. She therefore brought a claim of racial harassment, arguing that the Council's policy of not challenging the racist behaviour by clients created an offensive environment for her.

An Employment Tribunal, in view of *Pearce*, struck out her claim as having no reasonable prospects of success. However the EAT held that in a harassment complaint, unlike a direct discrimination case, there was no need to make a comparison with how others were treated. As most people would be offended by racist language, an employer's failure to do anything to prevent it could be unwanted conduct creating an offensive atmosphere. Therefore an employer could be found liable for such harassment arising from the actions of a third party.

However the High Court has also recently dealt with an application by the Equal Opportunities Commission regarding the changes made to the SDA. *Equal Opportunities Commission v Secretary of State for Trade and Industry* (2007) confirmed that although an employer is not directly responsible for acts of a third party, if it was aware of the harassment but failed to take available steps to prevent it, this failure could be deemed harassment under the SDA. However it was held that the wording of the SDA does not correctly implement the

European Directive because at present unlawful harassment can only be established if the employer failed to intervene because of the claimant's sex. An amendment to the legislation can be expected in due course.

In the meantime it appears that an employer can be responsible for harassment by third parties if it is in a position to prevent or reduce the harassment but fails to do so. Employers should therefore consider re-visiting harassment and equal opportunity policies, and ensure that positive action is taken to combat harassment when they are aware that it is taking place.

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