

Briefing Note: Vicarious Liability and Discrimination

An Introduction to the Briefing Note

This Briefing Note sets out the circumstances in which an employer can be vicariously liable for the acts of its employees in breach of discrimination law. It also explains what statutory defences might be available and highlights practical steps a business can take to avoid such liability.

This Briefing Note should not be relied upon as legal advice and you should contact us for advice on your specific circumstances.

Briefing Note
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1. What is Vicarious Liability?

In the employment context, vicarious liability involves making an employer liable for the legal wrongs committed by an employee where there is a sufficiently close connection with the wrongdoing, such that it can be regarded as being carried out in the course of employment. It should be noted that an employer will be vicariously liable for the actions of its employees even where it has done nothing wrong itself.

2. Does it only apply to Employees?

Vicarious liability may arise not just where an employment contract exists but also where there is temporary deemed employment, provided either the employer has an element of control over how the “employee” carries out the work or where the “employee” is integrated into the host’s business. The employer can be vicariously liable for those seconded to it and for temporary workers supplied to it by an employment business. In *Hawley v Luminar Leisure Ltd*, a nightclub was found vicariously liable for serious injuries as a result of an assault by a doorman, which it engaged via a third party security company.

The Equality Act 2010 widens the definition of employment for the purposes of discrimination claims so that the “employer” is liable for anything done by its agent, under its authority, whether within its knowledge or not. This would, therefore, confer liability for certain acts carried out by agents such as solicitors, HR consultants, accountants, etc.

3. Vicarious Liability for Discrimination

Although vicarious liability is predominantly a common law concept, for the purposes of anti-discrimination law, it is enshrined in statute under section 109 Equality Act 2010. This states that anything that is done by an individual in the course of his employment, must be treated as also done by the employer, unless the employer can show that it took *all reasonable steps* to prevent the employee from doing that thing or from doing anything of that description.

4. What is “in the course of employment”?

The leading case on this question for some years has been *Lister v Hesley Hall Ltd*, which applied a “sufficient connection” test – in other words, were the wrongs that were carried out so closely connected with the employment that it would be fair and just to hold the employer vicariously liable? In this case, the House of Lords held that the employers of a warden were vicariously liable for his sexual assault of boys who were resident at a boarding school. Another way of putting the question is to assess whether it is appropriate to regard the wrongful act as a risk reasonably incidental to the purpose for which the employee was employed.

The correct approach is to start by analysing what the employee was employed to do and then focus on the connection between this and the wrong committed. The Canadian Supreme Court have suggested that

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vicarious liability is generally appropriate where there is a significant connection between the creation or enhancement of a risk and the wrong that accrues from it.

5. What about acts outside of working hours?

In *Waters v Metropolitan Police*, it was alleged that a policewoman had been sexually assaulted by a fellow officer whilst they were both off duty. The mere fact that the assault had occurred at a police section house where the police woman had a room was not sufficient for the act to be regarded as in the course of employment. In another case, an act of sexual harassment by a colleague outside of work was not of itself sufficient to give rise to vicarious liability.

On the other hand, a different outcome is likely to be encountered where the activity takes place on work related social occasions. For example, in *Chief Constable of Lincolnshire Police v Stubbs*, sexual harassment by a fellow police officer occurred when attending a pub immediately after work and at a leaving party for a colleague. These were gatherings of a number of fellow police officers and it was found that there was a sufficient connection with the employment for the Chief Constable to be vicariously liable. Similarly, in *Livesey v Parker Merchanting*, sexual harassment by a colleague at a Christmas party was found to be within the course of employment – as was the harassment that continued in the car journey on the way home from the party.

6. What is the Statutory Defence?

Unlike at common law, an employer has a defence to vicarious liability under the Equality Act 2010 if it can show that it took all reasonable steps to prevent the employee from doing the alleged act of discrimination or from doing anything of that description. This is a high hurdle for an employer to overcome.

It is clear from the case law that the proper approach is to identify whether the employer took *any* steps at all to prevent the employee from doing the acts in question and then to consider whether there were *any further* steps they could have taken that it was reasonable to take. A step may be a reasonable step even though it would not have avoided the discrimination, although an employer is entitled to consider whether the time, effort and expense of the suggested measure was proportionate to the result likely to be achieved. In some cases it may be legitimate to decide to adopt a low key approach – where it is felt the alternative may be counter-productive. So, in *Croft v Royal Mail Group* the employer took a number of steps to prevent the harassment of an employee who was undergoing gender reassignment to become a woman. These included agreeing to change her records, informing the workforce that she was to be addressed as a woman and stressing their harassment policy. There were further steps that could have been taken, including educating the workforce and amending the harassment policy to refer to transsexuals but an employment tribunal concluded that this would not have had any more than a marginal effect upon the workforce as a whole. Consequently, the defence succeeded.

An employer which merely pays lip service to its equal opportunities policy without implementing it in practice will not be able to rely upon the statutory defence – *Al-Azzawi v Haringey Council*. The focus will almost always be upon the preventative steps taken prior to the discriminatory act in question, rather than upon what acts the employer took after the discrimination came to light.

Where the employer has knowledge or suspicion of a particular employee's own predilections or temperament and certainly of a risk that he might commit inappropriate acts towards a particular employee, or group of employees, then the obligations upon the employer will be that much greater. Where an employee raises concerns that they may have been subject to harassment, the obligation upon the employer to take reasonable steps is heightened. These might include taking steps to warn or, at least, subject the perpetrator to closer supervision and notify other managers of the need for vigilance, notwithstanding that concerns may have been communicated in confidence.

Another rare example of the statutory defence operating in practice is found in *Caspeš v Ministry of Defence*, a case which involved alleged harassment of a police officer by the Assistant Chief Constable to

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whom she reported. The respondent had a dignity at work policy which had been conscientiously implemented. The Employment Appeal Tribunal emphasised that this should not be taken as *carte blanche* for employers to adopt a policy and do no more. If there was a good reason to think that a manager was harassing a junior employee, then the employer could not simply rely upon the policy – they would be under an obligation to take further steps to protect the junior employee.

In the aforementioned case of *Livesey*, the EAT upheld an Employment Tribunal's finding that the statutory defence was made out and emphasised the specific finding that senior management did not have any knowledge of the perpetrator's conduct until after the sexual harassment had occurred. In those circumstances, the Employment Tribunal itself was entitled to find that it was sufficient that the employer's equal opportunities and harassment policy was given a high profile and adhered to and that the perpetrator had been given training in equal opportunities and made aware of the importance attached to the equal opportunities policy.

The statutory defence only applies to claims brought under the Equality Act 2010. It does not operate to provide a defence to any common law claims, such as assault or trespass to goods nor, importantly, does it apply to a claim brought under the Protection from Harassment Act 1997.

7. What does the EHRC Code say about the Statutory Defence?

In assessing whether all reasonable steps were taken, the Employment Tribunal will have regard to the Equality Act 2010 Code of Practice on Employment produced by the Equality and Human Rights Commission (the Code). Guidance under the Code, suggests that reasonable steps might include:-

- Implementing an equality policy
- Ensuring workers are aware of the policy
- Providing equal opportunities training
- Reviewing the equality policy, as appropriate and
- Dealing effectively with employee complaints.

There is detailed guidance in the Code on how to plan, implement, monitor and review an equality policy. It also provides useful guidance on avoiding discrimination in recruitment and during employment respectively.

8. Equality Policies

The benefits of an equality policy include:-

- Instilling confidence in job applicants and workers that they will be treated with dignity and respect
- Setting minimum standards of behaviour expected of all workers
- Helping employers comply with their legal obligations
- Helping employers establish the statutory defence

The content and details of an equality policy will vary according to the size, resources and needs of the employer but generally speaking most policies will include the following:-

- A statement of the employer's commitment to equal opportunity for all job applicants and workers
- What amounts to acceptable and unacceptable behaviour at work, including conduct near the workplace and at work related social functions
- The rights and responsibilities of those to whom the policy applies and procedures for dealing with any concerns or complaints
- How the policy applies to other policies and procedures, such as disciplinary and grievance procedures
- Details of who is responsible for the policy, how it will be implemented and monitored and reviewed.

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The policy should cover all aspects of employment, including recruitment, terms and conditions of work, training and development, promotion, performance, grievance, discipline and treatment of workers when their employment ends.

It is essential that the policy is promoted and communicated to all job applicants and workers and agents of the employer and that the policy is monitored and reviewed to ensure both compliance and that it is up-to-date.

9. Equality Training

Employers should ensure that all workers and agents understand the equality policy and how it affects them. Line managers and senior management should receive detailed training on how to manage equality and diversity issues in the workplace. Training may include the following:-

- An outline of the law covering all of the protected characteristics and prohibited conduct
- Why the policy has been introduced and how it will be put into practice
- What is and is not acceptable conduct in the workplace
- The risk of condoning or seeming to approve inappropriate behaviour and personal liability.
- Further guidance on generalisations, stereotypes, bias or inappropriate language and the impact this can have on the employer's business.

Gaby Hardwicke will be pleased to arrange bespoke equality and diversity training sessions for your senior management team or your workforce as a whole.

If you would like to know more about this topic or our other legal services, please contact Paul Maynard pcm@gabyhardwicke.co.uk

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