Employment

The Presidents Club and third party harassment

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Last month's revelations about the Presidents Club fundraising dinner, at which female hostesses were reportedly harassed by male guests, has raised questions about the third party harassment provisions under the Equality Act 2010 (EqA 2010). While the relevant provisions were repealed from 1 October 2013, there has been some suggestion that they should be re-enacted. Until Parliament intervenes, what protection is currently available to employees and which steps should employers consider taking?

Position before EqA 2010

Until 2003, it was considered to be the position that where an employer could have prevented an act of discrimination committed by a third party against its employees, the employer would be liable for discrimination. In *Burton v De Vere Hotels Ltd [1997] ICR 937*, a hotel was held to have discriminated against its waitressing staff where they were subjected to racial harassment in the form of racist "jokes" by the comedian Bernard Manning and insulting conduct by guests at the function.

However, this authority was held to be wrongly decided in *Pearce v Governing Body of Mayfield Secondary School* [2003] UKHL 34, [2003] IRLR 512: the House of Lords held that the failure to take reasonable steps to prevent an employee from racial or sexist abuse was discrimination only where the reason for that failure to act amounted to discrimination on a protected ground. This was subsequently qualified in *Equal Opportunities Commission v Secretary of State for Trade and Industry* [2007] IRLR 327, in which Burton J held, on judicial review, that aspects of the reasoningwere not compatible with the Equal Treatment Directive, insofar as the conduct complained of related to sex.

Following this, the harassment provisions in the Sex Discrimination Act 1975 were amended so that employers could be liable for third party sex harassment. The other strands of discrimination legislation were not amended. However, the EAT held in *Sheffield City Council v Norouzi [2011] IRLR 897* that public sector employers could find themselves liable for third party harassment, on grounds other than sex, by means of application of EU law. Consequently, statutory protection for employees was somewhat asymmetric.

EqA 2010 and third party harassment

The EqA 2010 extended statutory protection from third party harassment to all the protected characteristics, except for marriage or civil partnership and pregnancy or maternity (section 40(2)(a)). There remained high hurdles for an employee to overcome. An employer was not liable unless it knew that the employee had already been harassed by a third party on at least two occasions, in circumstances where the third party could be a different person on each occasion (section 40(3)). Arguably, the actual knowledge of an employer was required: the statutory language could be contrasted with other provisions under the EqA 2010 where constructive knowledge is permissible. Moreover, an employer was not liable where it took reasonably practicable steps to prevent the harassment (section 40(2)(b)).

The third party harassment provisions were repealed with effect from 1 October 2013 by the Enterprise and Regulatory Reform Act 2013, as part of the coalition government's "regulatory bonfire". However, there is growing pressure on the

government to re-enact the provisions in some form following the Presidents Club events, including an online petition signed by more than 100,000 people. The Fawcett Society has also recommended reducing the knowledge requirement to one incident only and extending protection to individuals with the protected characteristics of marriage or civil partnership and pregnancy or maternity.

What protection remains available to employees?

A third party harassment claim could be brought against an employer directly under section 26 of the EqA 2010. A loose causal link is required: harassment can occur where conduct is "related to", rather than "on grounds of", a protected characteristic. A worker could argue that an employer's inaction is itself unwanted conduct related to the protected characteristic which violated dignity or created a proscribed environment. There would be no need to show that the employer knew of any prior harassment by a third party.

However, it may be difficult to show that an employer's inaction in the face of third party harassment actively "created" a hostile environment. Furthermore, in *Norouzi*, the EAT commented that there are some environments, such as prisons, care homes or schools, where employees may be subject to harassment which is a "hazard of the job". In such cases, the employer should not be found liable unless the tribunal identifies what steps could have been taken by the employer to prevent the harassment. Therefore, a tribunal is obliged to consider the wider circumstances, such as the type of work undertaken by the employee and nature of their clients or service users.

Employees should also take care where they have signed a non-disclosure agreement (NDA) with respect to the nature of their work or conduct by third parties. Usually, this does not prevent an employee from making disclosures as required by law, including to HMRC or any regulatory body. However, bringing a claim in a tribunal may amount to a breach of confidentiality in respect of which an employer may claim damages. That said, an employer is unlikely to try, or to be able, to enforce an NDA if the information is already in the public domain. This stance has been taken by the staffing agency which hired the hostesses for the Presidents Club dinner: the hostesses have been informed that they may disregard the NDAs they signed in order to report any alleged criminal behaviour to the police.

Employers should continue to ensure they take reasonable steps to prevent any harassment by third parties. The *EHRC Employment Statutory Code of Practice* recommends the following steps, depending on the size and resources of an employer:

- A harassment policy.
- A public notice reminding third parties that harassment is unlawful.
- An express term in contracts with third parties requiring them to adhere to the harassment policy.
- A suitable reporting and investigation mechanism.

Harassment of third parties by employees

Employers should take reasonable steps to prevent any harassment by employees of third parties. For example, there have been allegations that delivery drivers used personal data of customers to send unsolicited messages. A harassment claim could be brought against the service provider under section 29(3) of the EqA 2010, as anything done by an employee in the course of employment is treated as having been done by the employer, regardless of whether the employer knew or approved of the act (section 109(1) and (3)). The phrase "in the course of employment" is given its ordinary meaning, rather than the meaning used to establish vicarious liability in tort. Consequently, the determination of whether an employee's act was done in the course of employment is highly dependent on the facts.

Moreover, as implementation of the General Data Protection Regulation ((EU) 2016/679) approaches, employers must take steps to ensure a reasonable level of protection for personal data of customers, which includes ensuring that such data is not misused by its employees. A failure to do so could result in a complaint to the Information Commissioner's Office and fines. An employer should consider taking similar steps to those outlined above to prevent harassment of third parties by its employees.

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