EMPLOYMENT

Third party harassment

To what extent can employers be held liable for harassment caused to their employees by third parties? **Michael Salter** and **Chris Bryden** report

IN BRIEF

- The failure of an employer to introduce steps and procedures to combat harassment by third parties suffered by their employees may give rise to a cause of action against them.
- Employees can compel their employer to introduce steps and procedures to combat the harassment they have suffered.
- However, employers need to have some degree of awareness of the harassment taking place before the employee is likely to be able to succeed in a claim against them.
- Employers may be able to better protect themselves by rigorously enforcing a "zero tolerance" policy and encouraging employees to complain and log incidents.
- Employers may be compellable by mandatory injunction to introduce procedures to combat harassment suffered by employees.

The Employment Appeal Tribunal (EAT) in *Gravell v London Borough of Bexley* UKEAT/0587/06/CEA, [2007] All ER (D) 220 (May) opens up the possibility that employers can be held liable for the harassment of their employees by the actions of third parties, be they customers in a shop or schoolchildren in a classroom.

DISCRIMINATION LAW

The law of discrimination, before the addition of the relevant harassment provisions into the various discrimination legislation, was quite clear. In *Burton v De Vere Hotels Ltd* [1997] ICR 1, [1996] IRLR 596 the EAT allowed an appeal by two waitresses against the finding of the employment tribunal that they had not been directly discriminated against by their employer when they were subjected to racially offensive remarks by a person working as a comedian at a private function in their employer's hotel, but not employed by the respondent. While the harassment provisions were not in effect at this time, the EAT held that this did amount to direct discrimination against the waitresses. It was therefore the case that an employer could be liable for discriminatory remarks made to employees by a person not employed by him.

However, in *Pearce v Governing Body of Mayfield Secondary School* [2003] UKHL 34, [2004] 1 All ER 339 the House of Lords stated that *Burton* had been wrongly decided. The law lords opined that to render an employer liable for the direct discrimination claimed, there must be a failure of the employer which must itself be an act of discrimination. So the failure of the employer must subject the employee to less favourable treatment for one of the protected reasons—in *Burton* this was race. This, the law lords found, could not be shown in *Burton*. Lord Nicholls said:

"The hotel's failure to plan ahead properly [by for example ensuring that the waitresses did not have to work in the room occupied by the private function] may have fallen short of the standards required by good employment practice, but it was not racial discrimination. I consider the case [of *Burton*] was wrongly decided by the Employment Appeal Tribunal." (para 35)

It must be remembered that *Pearce* is a creature of its time, and must be viewed in context. The law has moved on a great deal in the intervening decade and attitudes both among legislators and decision-makers have shifted. The ratio of *Pearce* is that the Sex Discrimination Act 1975 (SDA 1975) applies to sex and not sexuality; the part of the decision concerning harassment was strictly *obiter*. Further, even if SDA 1975 did apply to sexuality, the harassment provisions contained in it had yet to be brought into effect. Now reg 5(1) of the Employment Equality (Sexual Orientation) Regulations 2003 (SI 2003/1661) prohibits harassment on the grounds of sexuality.

GRAVELL

The issue of third party harassment recently arose in Patricia Gravell's case. She was employed by the respondents in their housing department. She complained inter alia that customers of the respondent used racist language, and that the respondents had a policy of not preventing such conduct. At a pre-hearing review in the Ashford Employment Tribunal her claims in this regard were struck out on the basis of the *obiter* dicta expressed by the House of Lords in *Pearce*. The claimant appealed.

The matter came before Judge Peter Clark sitting alone. Referring to his decision in *Wandsworth Primary Care Trust v Obonyo* UKEAT/0237/05/SM, [2006] All ER (D) 210 (Jul), he noted that there was no comparative exercise needed when considering the Race Relations Act 1976 (RRA 1976), s 3A as opposed to s 1(1)(a), and stated at para 14:

"Thus it seems to me at the strike-out stage that there is considerable scope for argument as to whether the observations of the House of Lords on *Burton* in *Pearce*, based on s 1(1)(a) RRA 1976, also hold good in a claim of s 3A harassment. No decided case on point has been shown to me."

Seemingly, therefore, the EAT's view is that to constitute harassment the acts complained of do not themselves need to be discriminatory in as much as they can apply equally to all people—many people would be offended by the use of racist language in their workplace, no matter what racial origin they are themselves. If the harassment provisions of RRA 1976 were in effect at the time of *Burton* it would seem that the claimants may have been able to succeed in their claim, as the actions of the hotel would not have

needed to subject them to less favourable treatment on the basis of their race when compared to a white waitress.

In *Gravell* the EAT allowed the claimant's appeal and pointed out that:

"The case which the Claimant wishes to advance is that the Respondent's policy of not challenging racist behaviour by its clients is capable of itself of having the effect of creating an offensive environment for her. That, if established on the facts, is capable in my judgement of falling within s 3A RRA 1976."

LACK OF COMPARATOR

Therefore there seems to be an argument that the lack of a comparator required in the RRA 1976, s 3A exercise means that an employer could be held directly liable for harassment by a third party if the employer's conduct, by failing to address such harassment, can be said to amount to unwanted conduct which has the purpose or effect of violating that other person's dignity or creating a hostile intimidating, degrading, humiliating or offensive environment.

If correct, this raises issues about whether a failure by an employer to put in place an anti-harassment policy can amount to "unwanted conduct" as required by the harassment provisions of the discrimination legislation. If an employee has raised the issue of harassment and proposed or asked for a course of action to be undertaken by the employer to reduce this harassment the failure to consider or implement the proposal may amount to the employer engaging in unwanted conduct, ie intransigence. Of course, this would seem to require the employee to put the employer on notice of the harassment.

It does appear that any assumption that an employer can simply sit back and ignore harassment of which it is aware, on the basis that it will never have any liability, is a dangerous one. Certainly it seems that a policy of simply ignoring racist language, perhaps because this is seen as the easiest thing to do, risks a successful claim. Further, such a policy can potentially be seen as harassment on racial grounds. While a single, isolated incident is unlikely to found liability, such a policy is now more likely to do so. Employers may be able to protect themselves better by rigorously enforcing a zero tolerance policy and encouraging employees to complain and log incidents, which can then be dealt with.

It seems that *Gravell* has been remitted to the employment tribunal for a fresh decision. Given the current advance of harassment throughout the law, it seems likely that this is yet another growth area in the employment law field.

A SECOND WAY?

An alternative mechanism by which employers could be held liable for the actions of third party harassers is under the Protection from Harassment Act 1997 (PHA 1997). Here harassment is not specifically defined, but PHA 1997, s 7 does state:

"References to harassing a person include alarming the person or causing the person distress."

What form the harassment takes does not matter, nor the reason for it. Therefore it covers harassment that has been inflicted on grounds other than a protected ground of discrimination. In this respect the scope of PHA 1997 is considerably wider than in the employment field. Thus harassment owing to height or hair colour, for example, is covered, as is harassment caused to the employee because of who the employer is, eg, an employee is harassed for working for a life sciences company. If a policy of not preventing, or taking any steps to prevent, racist language by third parties can amount to racial harassment under RRA 1976, it is feasible that the continuation of such a policy by the employer may itself also lead to the possibility of a discrete claim against the employer under PHA 1997. While injunctions can be obtained against the harasser in these cases (see *Huntingdon Life Science Ltd v Stop Huntingdon Animal Cruelty* [2003] All ER (D) 280 (Jun)) there is nothing in theory to prevent an employee seeking an injunction against their employer to compel that employer to take steps to reduce the impact of the harassment.

However, again there needs to be some sort of knowledge by the employer of the conduct of the third party. It should be noted, however, that the principles of vicarious liability may be relevant in respect of PHA 1997. In many cases it may be simply the decision of the office manager or similar to adopt a deliberate *laissez-faire* attitude. Even so the employer may be vicariously liable for harassment caused by such a policy. PHA 1997 requires there to be a course of conduct, namely two or more acts, or at least one act and a perceived second act. Once again, therefore, employers have nothing to fear should there be a single isolated incident. However, how they react to any complaint may be relevant to any later claim should further incidents follow.

Indeed, the possibility of a mandatory injunction means that existing employees can compel the employer to introduce steps and procedures to combat the harassment they have suffered.

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DEGREE OF AWARENESS

As can be seen there is arguably considerable scope for employers to be found liable for harassment caused by the actions of their customers or other third parties. While the discrimination legislation does provide some measure of protection, for existing employees PHA 1997 allows them to seek injunctions compelling their employers to take steps to protect them, and may be seen as a more constructive remedy than the simple punitive award of compensation that an employment tribunal can award.

However, neither scheme presents a *carte blanche* for such claims. Employers can take some solace in the fact that they need to have some degree of awareness of the harassment taking place before the employee is likely to be able to succeed in a claim against them. They cannot, however, simply shut their eyes and pretend that things are not happening. If there is a problem with discriminatory language, or behaviour that results in an employee being harassed, and the employer actively encourages and promotes a policy of toleration, the likelihood of a successful claim is greatly increased.

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