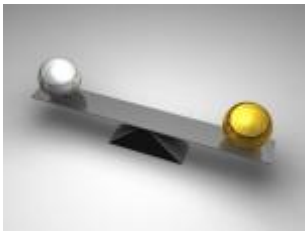
Blog: Dealing with the thorny legal issue of vicarious liability

Posted by Sandra Beale, director of SJ Beale HR Consult in Managing people, Employment law on Mon, 07/01/2013 - 11:29



Employers should not turn a blind eye to allegations of harassment.

They should be investigated fully as quickly as possible and dealt with appropriately and fairly.

In cases of sexual or racial harassment that are taken to an employment tribunal, an employer may have to defend an allegation of vicarious liability.

Vicarious liability refers to a situation where an employer can be liable for the acts or omissions of its employees, provided it can be shown that they took place in the course of their employment or work-related duties.

Employers can be liable for a range of actions committed by their employees in the course of their employment - these can include bullying and harassment, violent or discriminatory acts or even libel and breach of copyright.

It's also possible to take action against an employer for the behaviour of third parties, such as clients and customers, provided these parties are deemed to be under the control of the employer.

The key question of any case of vicarious liability is whether the employee was acting in a personal capacity what has been termed "a frolic of their

own", or in the course of their employment. This can often be difficult to determine.

Close connections

Furthermore, an employer's liability does not end once the employee leaves the organisation - as the law stands, action can still be taken against an employer even though the person in question no longer works for them.

In determining vicarious liability, previous case law has considered the test to be applied to determine if employers were at fault. In Lister v Helsey Hall Limited (2001), the case concerned the sexual abuse by a warden of a school boarding house on a pupil.

The question and the test applied in this case was where the warden's action in abusing the pupil was so closely connected with employment, would it be fair and just to hold his employers liable?

The court found that the company which owned and ran the school was responsible for the warden's conduct as the warden's responsibilities included the welfare and safety of his charges.

It was considered that vicarious liability would not have attached to other employees, for example, the gardener whose job would have no connection with the welfare of the pupils.

In the application of this close connection test, Mattis v Pollock (trading as Flamingos Nightclubs) 2003 provides additional guidance as to how this would be applied. Mattis was a doorman who returned in his working hours to stab a victim as an act of revenge.

The court had to determine whether the action of the employee was so closely connected with what was authorised or expected of the employee, whether it would be fair and just to hold the employer to be vicariously liable.

It determined that the employer was vicariously liable as it expected the doorman to be burly and act aggressively in his role.

Active commitment

The test to be applied when looking at the actions of employees who have committed negligent acts at work is whether the tort was so closely connected with what was authorised or expected of the employee that it would be fair and just to hold the employer liable.

The case of JGE v English Province of Our Lady of Charity and Trustees of the Portsmouth Roman Catholic Diocesan Trust (2011) provides yet further questions that the court should take into account:

1. the nature and purpose of the relationship
2. whether tools, equipment, uniform or premises were provided to assist the performance of the role
3. the extent to which one party had been authorised or empowered to act on behalf of the other
4. the extent to which the employee may reasonably be perceived as acting on behalf of the employer.

To defend an allegation of vicarious liability, an employer needs to show that they have taken all reasonable steps to ensure the prevention of such acts or omissions, therefore providing a statutory defence.

Employers may do so by having in place an up-to-date equal opportunities policy, a code of conduct, a bullying and harassment policy, written guidance for managers on harassment and discrimination and to have implemented training on the subjects. Policies should be clearly communicated and fairly and consistently operated.

New starters should be made firmly aware of the company policies and should undergo equal opportunities and anti-discrimination/harassment

training as part of induction. Existing employees should occasionally go on refresher training.

Written records of these actions should be retained on file eg training records and new starters sign a form to show they have read the employee handbook.

This will demonstrate an active commitment on the part of the employer and would reduce the likelihood of an employer being held vicariously liable for any discriminatory acts committed by its employees.

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