ANTI-HARASSMENT TRAINING AND THE 'REASONABLE STEPS' DEFENCE

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In Allay (UK) Ltd v Gehlen, it was held that the employer could not rely on the 'reasonable steps' defence to a claim of harassment where anti-harassment training provided to employees had become 'stale'. The employer had not met the high bar required to rely on the defence.

> "An employer may defend a harassment or discrimination claim if it can show that it took 'all reasonable steps' to prevent the employee from 'doing that thing' or from 'doing anything of that description'."

BACKGROUND

An employer is potentially liable for harassment carried out by its employees during the course of employment. An employer may, however, defend a harassment or discrimination claim if it can show that it took '*all reasonable steps*' to prevent the employee from '*doing that thing*' or from '*doing anything of that description*'. The burden for establishing the defence falls on the employer.

FACTS – ALLAY (UK) LTD V GEHLEN

Mr Gehlen was employed by Allay (UK) Ltd (the "Company") for just under one year. He was dismissed in September 2017 and complained that during his employment with the Company he had been subjected to racial harassment by a colleague, Mr Pearson. An investigation by the Company found that Mr Pearson had continually made racist comments to Mr Gehlen.

Mr Gehlen brought proceedings in the Employment Tribunal for direct race discrimination and harassment relating to race. It was found that one of his colleagues, and two managers, had been aware of the continual racial harassment (including comments that Mr Gehlen should "go and work in a corner shop" and that he "drove a Mercedes car like all Indians") but took no substantive action in response.

The Company had an equal opportunities policy and an anti-bullying and harassment procedure in place. Mr Pearson (and colleagues) received equality and diversity training in January 2015 and bullying and harassment training the following month.

The Company asserted the statutory defence that it had taken 'all reasonable steps' to prevent the harassment.

The Tribunal rejected this defence, holding that the training was clearly 'stale' and that a reasonable step would have been to refresh it. The Company appealed to the Employment Appeal Tribunal.

"The Employment Appeal Tribunal concluded that the training provided by the Company was 'no longer effective' in preventing harassment and that there were 'further reasonable steps [the Company] should have taken'"

FINDINGS

The Employment Appeal Tribunal ("EAT") concluded that the training provided by the Company was *'no longer effective'* in preventing harassment and that there were *'further reasonable steps [the Company] should have taken'.* Importantly, the EAT reiterated that the statutory defence will fail if there is a *further step* that should reasonably have been taken by the employer. This is the case even if said step would not have prevented the harassment.

The EAT also noted that the very fact that harassment is happening in a workplace may serve as evidence of the poor quality of training provided to employees. It confirmed that consideration must be given to (i) the nature of the training and (ii) the extent to which it was likely to be effective, reiterating that where training involves '*no more than gathering employees together and saying: "here is your harassment training, don't harass people, now everyone back to work"'* it is, of course, unlikely to be effective.

It is not impossible that an employee will undergo rigorous, detailed anti-harassment training, but decide that it is unimportant and continue to offend. In such a scenario, if the training was of a good standard, and the employer was unaware of the continuing harassment, the statutory defence may still be made out.

The EAT considered the facts that:

> – Mr Pearson believed that what he was doing was no more than 'banter'; and
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> – the managers did not know what to do when (i) they observed harassment in the workplace, (ii) it was reported to them

as evidence that the training provided by the Company had 'faded from the memory' of all concerned and therefore needed refreshing. The EAT also noted that the Company's provision of further training to Mr Pearson after his acts of harassment towards Mr Gehlen, was evidence of the Company's belief that anti-harassment training would work to combat such behaviour.

While the Tribunal did not consider the policies or the effectiveness of the training in any detail, it did remark that '*[the policies and training] did not appear to have been very impressive, even for a relatively small employer*'.

The EAT therefore agreed that the Tribunal was entitled to draw the conclusion it did on the training, precluding the employer's reliance on the statutory defence.

PRACTICAL TAKEAWAYS

- If employees are engaging in harassment, or in any way demonstrating that they do not understand the importance of preventing (or reporting) it, this should serve as a reminder to employers to refresh anti-harassment training;

- Having equal opportunities policies and procedures in place is not enough for an employer to escape liability for acts of discrimination or harassment carried out by its employees;
- Employers should ensure that any training is not simply a 'box ticking' exercise, but thorough and refreshed as appropriate;
- Even if training is planned to take place within a certain timescale, this should be revised if it is clear such training has been ineffective;
- Employers seeking to rely on the statutory defence should be reminded that it is a very high threshold to meet. *Some* reasonable steps will not be enough – the employer must have taken *all* reasonable steps; and
- An employer's priority should be prevention, though the provision of regularly refreshed and thorough training to employees will also make it more likely that an employer can successfully rely on the statutory defence if faced with a claim.

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