



XpertHR Podcast

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- Laura Merrylees: Hello and welcome to this week's podcast with me, Laura Merrylees. Predicting whether or not your organisation is likely to be liable for the acts of its employees can be difficult and if liability is established, the cost and reputational risk can be high. Well with me to discuss how liability for an employee's acts can arise and, crucially, the steps that you can put in place to protect your organisation is Employment Law Editor Fiona Cuming. Fiona, let's start by looking at the legal tests that the courts use to establish whether or not an employer is responsible for an employee's actions. Now that's a concept that's known in the law as vicarious liability. [0:00:46.4]
- Fiona Cuming: Yes and it's fair to say that vicarious liability has a long history, with case law going back as far as the seventeenth century. So not surprisingly the legal test has evolved over time and indeed the scope of vicarious liability has broadened in recent years as we will see when we look at some cases. But the essential tests for vicarious liability under common law involves two stages and putting this at its simplest, the first question is what is the nature of the employee's job? And secondly, is there is a sufficiently close connection between that job and the employee's wrongful conduct to make it right for his or her employer to be held liable?
- Laura Merrylees: Okay. But nowadays vicarious liability isn't just limited to the acts of employees, is it? [0:01:30.5]
- Fiona Cuming: No. This is where the law has indeed been on the move and we can see this by looking at the case of *Cox v Ministry of Justice* which went all the way to the Supreme Court.
- Laura Merrylees: Yes, indeed and the question before the Supreme Court in that case was whether the prison service was in fact vicariously liable for the act of a prisoner in the course of his work which was in a prison kitchen when he fell and dropped a sack of kitchen supplies on a member of the prison staff and injured her. [0:01:55.2]
- Fiona Cuming: That's right. And the Supreme Court said yes to that question and the rationale was that the prison took the benefit of the work of the prisoners and there was no reason why it should not take the burden. If anything the relationship between the Prison Service and the prisoner, the Supreme Court thought, was a closer one than that of employment and, of course, the Court's ruling affirmed the approach that was taken in the *Various Claimants v The Catholic Child Welfare Society* case.

- Laura Merrylees: Yes, and that case concerned the question of whether a Christian institute was vicariously liable for the sexual abuse of children at a school by its members, who were Christian brothers. So another organisation managed the school and employed the brothers as teachers, but the Court held that the institute was also vicariously liable for the abuse, even though it didn't employ the brothers. And the Court identified five reasons why it will usually be fair, just and reasonable (as the Court put it) for an employer to be vicariously liable. The Court went on to reason that where the defendant and the wrongdoer are not parties to a contract of employment, their relationship may still give rise to vicarious liability on the basis that it is akin to that between an employer and an employee. [0:03:04.8]
- Fiona Cuming: Exactly. And just coming back to the prison case, the Supreme Court held that the five factors identified in the Christian brothers case basically boiled down to the essential idea that an employer should be vicariously liable for wrongful acts that may fairly be regarded as risks of its business activities, whether or not they are committed for the purpose of furthering those activities.
- Laura Merrylees: So the effect of the Supreme Court's judgment is that employers could potentially be vicariously liable for the wrongful acts of freelancers and other independent contractors and that the key issue will be whether or not the individuals are being tasked with carrying out the business of the employer and whether the opportunity for committing the wrongful act has arisen from that fact? And so far we've been discussing vicarious liability under common law because it's predominantly a common law concept, but it is also codified in statute for the purposes of discrimination law, and of course that has huge practical consequences, doesn't it? [0:04:01.6]
- Fiona Cuming: It does, yes. The principle is contained in s.109 of the Equality Act 2010 and it means that an employer will be liable for acts of discrimination, harassment or victimisation if they are carried out by individuals in the course of employment unless – and this is important – the employer has taken all reasonable steps to prevent such conduct.
- Laura Merrylees: And breaking that down, the course of employment has been construed quite widely in discrimination cases. [0:04:29.1]
- Fiona Cuming: Yes. It's basically established that course of employment should be interpreted in the broad sense in which it's employed really in everyday speech. So it may cover discrimination that occurs outside work, but provided that there is a close link to the work. So, for example, a work outing, Christmas work party or a work travel trip abroad.
- Laura Merrylees: Yes. And the case of *Waters v Commissioner of Police for the Metropolis* is an example of where the close link wasn't, in fact, established. Now this case was a discrimination case and it concerned a police officer who had alleged that she had been sexually assaulted by a fellow officer in a police section house while they were both off-duty. And the Court found that the Commissioner wasn't vicariously liable for that assault, as I say, because in the Court's view it was inconceivable that any tribunal that was applying

the correct test could find that the alleged assault was committed in the course of the male officer's employment as you've just been describing. I mean both parties were off duty at the time, and really it wasn't any different to social acquaintances who had no working connection at all. [0:05:30.0]

Fiona Cuming:

Yes. But there may be a different outcome where the activity takes place on a work-related social occasion. So, for example, in *Chief Constable of Lincolnshire Police v Stubbs* here the Police Force was found to be vicariously liable for the sexual harassment by a fellow police officer, because it was during a social function in a pub directly after work and the event was connected to the work and the workplace. The EAT said that when there was a social gathering of work colleagues, it's appropriate for a Tribunal to consider whether the circumstances show that what was occurring was, in fact, an extension of their employment.

Laura Merrylees:

And of course there is a question of whether or not employers can be held vicariously liable in discrimination law for an employee's wrongful acts that just can't be foreseen? [0:06:13.6]

Fiona Cuming:

Yes and this brings us to the case of *Mohamud v WM Morrison Supermarkets* because in this case a customer asked a Morrison's employee at a Morrison's petrol station if he could print some documents from a USB stick. The employee responded in an abusive and racist manner and he followed the customer to his car and, despite his supervisor telling him to stop, he punched him and severely assaulted him. The Court of Appeal held that Morrisons weren't vicariously liable for the employee's actions because while the employee's job involved some interaction with customers, it involved really nothing more than serving and helping them. So there wasn't a sufficiently close connection between what he was employed to do and his assault of the customer. But as we know, the story didn't end there, because the customer appealed to the Supreme Court.

Laura Merrylees:

Yes and the Supreme Court allowed the appeal, because it found that the employee's job was to attend to customers and respond to their enquiries, and dealing with customers was within the field of the employee's activities. So in the Supreme Court's view, the connection between the employee's assigned field of activities and his employment didn't simply end when he left the petrol station and pursued the customer and that he had not, as the Court said "metaphorically taken off his uniform". [0:07:27.8]

Fiona Cuming:

And that's why it's such an important judgment, because previously the courts have been reluctant to find an employer liable for an employee's irrational actions that come out of the blue and that an employer, basically, can't predict. But this is a recent judgment and only time is going to tell to what extent the parameters of vicarious liability have been extended.

Laura Merrylees:

Yes and, as ever, it's important to stress that each case will depend on its own facts. And that can be seen, I suppose, by another judgment which was delivered earlier this year in the case of *Bellman v Northampton Recruitment*. Now that was a personal injury case,

where the High Court held that the employer was not vicariously liable for the brutal assault of an employee by a managing director during a drinking session after the Christmas party. So following the principles in the *Morrison* case, Fiona, that you've just been talking about, the Court found that the employee as a director was authorised to act on behalf of his employer and that could be quite a wide remit. But this didn't mean that the director could always be considered to be on duty when he was in the company of other employees and in this particular case there was an insufficient connection between the position in which the director was employed and the assault itself to establish vicarious liability. [0:08:40.3]

Fiona Cuming:

Exactly. Well we've discussed a few common law and discrimination cases now and I just want to go back to vicarious liability under the Equality Act and the reasonable steps that I mentioned earlier. And that is because unlike common law, an employer has a defence to vicarious liability under the discrimination legislation if it can show that it did everything that was reasonably practicable to stop discriminatory acts in the workplace.

Laura Merrylees:

Yes. I mean the reasonable steps defence is hugely important and in deciding whether or not the defence is made out, the tribunal focuses on what the employer had done before the act of discrimination occurred and not how the employer acts after it occurred. And this can be seen by the case of *Al-Azzawi v Haringey Council*. [0:09:22.6]

Fiona Cuming:

That's right. Mr Al-Azzawi complained to his employer that he had been subjected to race discrimination by a colleague. Now the council investigated and gave his colleague a written warning and they made him apologise to Mr Al-Azzawi. But Mr Al-Azzawi still took his claim to an Employment Tribunal and his claim of race discrimination was successful. The council appealed to the EAT, because it argued that they'd actually taken reasonable steps to stop that type of discriminatory behaviour and the EAT agreed with the council. It said that the tribunal had wrongly focused on events after the incident, and the fact that in the tribunal's view the colleague who had committed the discriminatory act had received a lenient penalty. The EAT said that that was irrelevant and what the tribunal should have focused on was whether the council had taken such steps as were reasonably practicable to prevent the conduct and the EAT said that the tribunal had, in fact, by its own findings, found that the council had implemented a comprehensive equal opportunities policy. It had provided training courses on racial awareness for its employees. So it had taken all reasonable steps to prevent a discriminatory act and could not be held liable for it.

Laura Merrylees:

And it's a useful case, isn't it, because it provides a neat example of the practical measures that employers do need to put in place in order to avoid vicarious liability. [0:10:39.8]

Fiona Cuming:

Yes. And it's quite a high test as well. But the measures do include having a written policy on equal opportunities and ensuring that your managers are trained on the operation of the policy. Also it is important for employers to ensure that employees are in fact aware of the policy and that employers remind them of its application and its

importance from time to time. And also employers must be able to show that they deal effectively with workers' complaints.

Laura Merrylees:

And it's never going to be enough just to have a policy as the employer has to show that it has been implemented and embedded within the culture of its organisation. A tribunal is going to attach very little weight to a policy if that is not the case and indeed witnesses can expect to be cross-examined on what they know about the training out of the policy if they are ever challenged in tribunals. [0:11:24.9]

Fiona Cuming:

Absolutely. A defence will certainly fail if a well-worded policy is locked away in a cupboard never to be referred to again. So the policy must be fully implemented, monitored and reviewed on a regular basis to ensure that it's fit for service and this is important because workers really must be aware that the policy means what it says and that those found to have committed a discriminatory act will face disciplinary action.

Laura Merrylees:

And the policy needs to cover the entire history of the employment relationship in terms of its aspects. So that would start off with recruitment going through to terms and conditions of work, training, development, promotion, performance, grievance, disciplinary and of course, because liability doesn't just end when employment terminates, the treatment of workers when their employment ends. [0:12:09.2]

Fiona Cuming:

That's right. And also employers should ensure that all workers and any other agents, not just employees, understand the nature of the policy. The training really should be covering an outline of the discrimination legislation, how the policy works in practice, examples of behaviour which is and isn't acceptable in the workplace, the risks of condoning or seeming to approve inappropriate behaviour and guidance on generalisations, stereotypes, bias or inappropriate language that should not be permitted in the workplace.

Laura Merrylees:

And of course employers should ensure that non-employees – such as volunteers and contractors – are given the same instruction and training. [0:12:51.0]

Fiona Cuming:

That's right, but not just in respect of equal opportunities but also to avoid vicarious liability under the common law in respect of matters such as health and safety, just to give one example.

Laura Merrylees:

Well thanks very much, Fiona. And to help you put those steps in place, we have plenty of resources on the site. You'll find example equal opportunities policies in our policies and documents section. There is good practice guidance to help with the training out of those policies and of course you can find out further details on the cases we've been discussing today in both the equality and human rights chapter of the employment law manual and the law reports section. We're back next Friday, but until then, it's goodbye from us.