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The Liability for Employers for the conduct of their employees – When does an employee's conduct fall within the 'the course of employment'?

All employers need to understand the exposure to risk that their organisations face. In the field of human resource management the liability of the employer for the actions (or omissions) of an employee is a key part of managing that risk. The scope of such liability is delimited by both statute and case law which has helped clarify the position of employer liability, thereby allowing an employer to mitigate risk.

It is a long established principle of law that employers are liable for the actions of their employees, this is referred to as 'vicarious liability'.

Vicarious liability primarily occurs in one of two ways, either by a discriminatory act under the Equality Act 2010 or in tort. We shall consider each in turn.

Vicarious Liability of Employers under the Equality Act 2010

Section 109 of the Equality Act 2010 identifies the liability of employers and principals; providing in section 109(1) that: 'Anything done by a person (A) in the course of A's employment must be treated as also done by the employer'. Stating in section 109(2) that: 'It does not matter whether that thing is done with the employer's or principal's knowledge or approval'. Section 109(4) provides the employer with a defence if they take 'all reasonable steps' to prevent the employee from undertaking that action in the course of employment.

Therefore, our starting point is clear an employer is liable for acts of discrimination (including harassment and victimisation) by their employees. Their knowledge or approval is not required for such a liability to arise.

With such a high burden of responsibility resting on the employer we turn to the scope and meaning of the term 'course of employment' and 'all reasonable steps' under the Equality Act 2010.

The Court of Appeal in *Jones v Tower Boot Co Ltd 1997ⁱ*, provides guidance under the comparable legislation at the time (Race Relations Act 1976). Jones working in a shoe factory as a last operative was subjected to physical and verbal racial abuse. This included: throwing metal bolts at him; burning him with a screwdriver; calling him 'baboon' and 'chimp'.

The question facing the court was whether such acts were in 'in the course of employment'. The Court of Appeals decision was that the term was to be given its natural everyday meaning. The point being made that if this was not the case then the worse the act of discrimination the less likely the employer is to be liable; thereby undermining the purpose of the Act.

The scope of 'course of employment' was again examined in the House of Lords case *Waters v Commissioner of Police of the Metropolis (1997)ⁱⁱ* (See Note 1), where a police woman

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3 complained that she had been sexually assaulted by another police officer. As both parties were
4 off-duty at the time and he was a visitor to her room (in a police section house), this failed to
5 fall within the course of employment under the scope of the comparable legislation at the time
6 (Sex Discrimination Act 1975).
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9 In the case of Chief Constable of Lincolnshire Police v Stubbs (1998)ⁱⁱⁱ, the Employment Appeal
10 Tribunal decided that two incidents of inappropriate sexual behaviour by another police officer
11 were in the course of employment. Both incidents were in a public houses, the first where
12 Stubbs met other police officers, the next at a leaving party.
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16 The Employment Appeal Tribunal said, 'We concur with the findings of the industrial tribunal,
17 that the two incidents referred to, although 'social events' away from the police station, were
18 extensions of the workplace. Both incidents were social gatherings involving officers from work
19 either immediately after work or for an organised leaving party. They come within the
20 definition of course of employment, as recently interpreted by the Court of Appeal in Jones v
21 Tower Boot Co Ltd [1997] IRLR 168 and the case of Waters v The Commissioner of Police of the
22 Metropolis [1997] IRLR 589'. (Paragraph 44).
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28 For cases of discrimination, the precise scope of the term 'course of employment' will turn on
29 the facts of the case. This can be seen, in the Court of Appeal case of Sidhu v Aerospace
30 Composite Technology Ltd (2001)^{iv}. A racial incident took place during a social event at Thorpe
31 Park organised by the company. The event was held outside work hours with a significant
32 majority of attendees not being employees. Therefore, the Employment Tribunal could
33 legitimately find that that such behaviour did not fall within the 'course of employment' thus
34 finding the employer was not vicariously liable.
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40 In Livesey v Parker Merchanting Ltd (2004)^v under the Sex Discrimination Act 1975, the term
41 course of employment covered sexual harassment at a party which continued in a car on the
42 way home. The Employment Appeals Tribunal said that this was a continuous course of
43 conduct and that distinction could not be made between the activities at the party and in
44 the car. The employer was vicariously liable.
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48 In Otomewo v The Carphone Warehouse Ltd (2012)^{vi}, the updating of Otomewo's Facebook
49 status without his knowledge by a member of his staff with the comments "Finally came out the
50 closet. I am gay and proud" amounted to harassment. The tribunal at Para 42 stated : "For the
51 avoidance of doubt the Tribunal considered whether the comments and the entries were made
52 on the Claimant's phone in the course of their employment such that the Respondent would be
53 liable for any actions. The actions were done at work, during working hours and involved
54 dealings between staff and their manager. In all the circumstances the Tribunal considered that
55 this matter fell within the course of the employment".
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59 Vicarious Liability of Employers in Tort
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3 Here we will examine the liability of an employer for the actions of their employees which are
4 not discriminatory and therefore fall outside the scope of the Equality Act 2010.

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6 Determining whether vicarious liability arises in these circumstances relies upon the answers to
7 two questions.
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10 The first is whether the relationship between the defendant and the wrongdoer is one that can
11 result in the defendant being held liable for the wrongdoers conduct.
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14 In the Supreme Court case of *The Catholic Child Welfare Society and others (Appellants) v*
15 *Various Claimants (FC) and The Institute of the Brothers of the Christian Schools and others*
16 *(Respondents) (2012)*^{vii} Lord Phillips stated at Paragraph 35: 'The relationship that gives rise to
17 vicarious liability is in the vast majority of cases that of employer and employee under a
18 contract of employment. The employer will be vicariously liable when the employee commits a
19 tort in the course of his employment'. Therefore, as an employee this criterion will be satisfied.
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23 In this same case the judgement Lord Phillips went on at Paragraph 47, to look beyond the
24 employment contract stating: 'Where the defendant and the tortfeasor are not bound by a
25 contract of employment, but their relationship has the same incidents, that relationship can
26 properly give rise to vicarious liability on the ground that it is "akin to that between an
27 employer and an employee"'. This approach was followed in *Cox v Ministry of Justice 2016*^{viii},
28 where vicarious liability encompassed a wrongdoer who was not an employee, but a prisoner
29 working in the catering department of a prison.
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33 This demonstrates the relationship required for vicarious liability to arise is not dependent
34 upon the existence of a contract of employment.
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38 The second question that needs to be addressed is whether there is a sufficiently close
39 connection between the wrongdoing of the employee to make the employer vicariously liable.
40 *Mohamud v WM Morrison Supermarkets plc 2016*^{ix} gave the Supreme Court an opportunity to
41 review this aspect of vicarious liability.
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45 The facts of this case were that Mr Khan (an employee) who worked at the petrol station was
46 responsible for serving customers and seeing that the pumps and kiosk were maintained in
47 good order. A customer asked if he could print out something from a USB stick and was verbally
48 abused by Mr Khan who then pursued him to his car and physically attacked him whilst he was
49 trying to leave the petrol station.
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53 Was the act of violence one that Morrison's could be held vicariously liable for?
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56 The test to determine if this was the case was determined by a twofold test.

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58 1. What was the nature of the job?
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Mr Khan's role was to attend to customer. The fact that he chose to do this in an abusive fashion did not take him outside what Lord Toulson described in the judgement at Paragraph 47 as: '...the "field of activities" assigned to him'.

2. Was there sufficient connection between the nature of the job and the act of wrongdoing to so that it was correct to hold the employer responsible?

The pursuit of the claimant and Mr Khan's violence towards him whilst telling him not to return, meant there was a connection with the business and therefore the employer was vicariously liable for the actions of Mr Khan. Whatever the motive of Mr Khans for his actions – these were not relevant.

Lord Dyson at Paragraph 50 states: 'As Lord Nicholls said in Dubai Aluminium Co Ltd v Salaam [2002] UKHL 48; [2003] 2 AC 366, para 26, the test is imprecise, but that is inevitable given the infinite range of circumstances where the issue of vicarious liability arises. The court, he said, has to make an evaluative judgment in each case, having regard to all the circumstances and to the assistance provided by previous court decisions on the facts of other cases'.

The circumstances therefore by which an employer can be held vicariously liable for the acts of their employees will rely on the nature of their role and the connection between that and their actions.

The advice for human resource professionals seeking to reduce employer's vicarious liability for the actions of their employees under the Equality Act 2010 is:

1. Train and regularly retraining employees on their obligations under the Act – check understanding and maintain records. It may be worth mentioning during the training that S. 110 (1) of the Act also makes employees and agents *personally liable* for their Acts of discrimination.
2. Have appropriate policies that are implemented; accessible; communicated and adhered to, for which there is clear responsibility for monitoring.
3. Managers should be trained to deal with complaints that may fall under the Act promptly; appropriately and in accordance with organisational policies and procedures.

The advice for human resources professions seeking to reduce employer's vicarious liability for the actions of their employees for torts is:

1. Get the right people – train managers to recruit and select carefully.
2. Have a thorough induction and probationary period to allow early identification of any potential employee problems.
3. Ensure that managers have the skills to manage performance and understand the need to deal with minor incidents that could potentially lead to more serious matters early.

Notes:

1. Note that on appeal [Waters (appellant) v. Commissioner of Police of the Metropolis (respondent) [2000] IRLR 720]^x it was held that the Commissioner was negligent and had breached his duty of care by not protecting the appellant from victimisation and harassment.
2. Employer can also be held vicariously liable under (a) Protection from Harassment Act 1997 for harassment that is a course of conduct and not limited to discrimination and (b) under the Enterprise Regulatory Reform Act 2013, from being subject to detriment by a co-worker or agent of employer as a result of a whistleblowing (making a disclosure in the public interest).
3. This article is provided for general purposes only. It does not constitute legal or other professional advice. Appropriate legal advice should be sought for specific circumstances and before action is taken.

ⁱ Jones v Tower Boot Co Ltd - [1997] 2 All ER 406

ⁱⁱ Waters v Commissioner of Police of the Metropolis [1997] ICR 1073

ⁱⁱⁱ Chief Constable of Lincolnshire Police v Stubbs - EAT/145/97, (Transcript)

^{iv} Sidhu v Aerospace Composite Technology Ltd - [2001] ICR 167

^v Livesey v Parker Merchanting Ltd - [2004] All ER (D) 27 (Jan)

^{vi} Otomewo v Carphone Warehouse Ltd ET/2330554/2011

^{vii} The Catholic Child Welfare Society and others (Appellants) v Various Claimants (FC) and The Institute of the Brothers of the Christian Schools and others (Respondents) [2012] UKSC 56

^{viii} Cox v Ministry of Justice [2016] UKSC 10

^{ix} Mohamud (in substitution for Mr A Mohamud (deceased)) v WM Morrison Supermarkets plc [2016] UKSC 11

^x Waters (appellant) v. Commissioner of Police of the Metropolis (respondent) [2000] IRLR 720