Employers’ liability for its agents in discrimination claims

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In discrimination cases, employers are responsible for the actions of both employees and their agents. But who is an

employer's agent?

In *Kemeh v MoD*, the Court of Appeal held that the common law test applies when working out whether someone is an agent for the purposes of discrimination law. The question therefore is *'Was there a fiduciary relationship which exists between two people where both expressly or impliedly consent for one to act on behalf of the other?'* This is likely to be a very limited group of people.

Mr Kemeh, a black man, worked as an army chef for the MoD, and brought a claim for race discrimination against the MoD based on two incidents:

- The MoD contracted out its catering to Serco who sub-contracted to Sodexho. Ms Ausher worked as a butcher for Sodexho. When Mr Kemeh ordered meat from Ms Ausher, he was asked *'Why should I trust you…you are black.'*
- Mr Kemeh was told by his manager, Sgt Simmons, to *'Shut up you dumb black bastard'.*

The Court of Appeal found that:

- Ms Ausher was not the MoD's agent. There was no evidence that the MoD consented either expressly or impliedly to Sodexho or its employees acting as its agent; therefore the MoD were not liable for her discriminatory comment.
- The MoD accepted liability for Sgt Simmons comment and Mr Kemeh was awarded £6,000 for injury to feelings. This was reduced from an earlier award of £12,000 because it was held to be too high an award for a one off comment.

Going forward, whilst employers should make sure that anyone working under their control complies with their equality policies they should do so in a way which seeks to avoid an agency relationship.

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