Failure to provide regular and effective equality training leaves employers on the hook for harassment claims

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Failure to provide regular and effective equality training leaves employers on the hook for harassment claims

In the recent case of Allay (UK) Ltd v Gehlen, the EAT upheld a decision that staff equality training had become stale after 20 months. The employer's failure to refresh the training meant it couldn't rely on the "reasonable steps" defence to a race harassment claim.

What does the law say?

Employers can defend claims that they are vicariously liable for the discriminatory actions of their workers where they have taken "all reasonable steps" to prevent them from doing such actions. A similar defence is available in the whistleblowing sphere, where employers can defend claims that they are vicariously liable for the detrimental actions of their workers where they have taken all reasonable steps to prevent the detrimental treatment.

In the equality sphere, the reasonable steps that employers should take will include:

- having well-drafted equal opportunities and anti-harassment and bullying policies in place;
- ensuring that all workers are made aware of those policies and understand them;
- providing equality training to workers, with additional training for those with management responsibilities; and
- dealing with complaints quickly and effectively, including taking appropriate disciplinary action.

What happened in this case?

Mr Gehlen is of Indian origin and began working for Allay (UK) Ltd (**Allay**) in October 2016. In August 2017, Mr Gehlen complained to a manager that another employee, Mr Pearson, had made racist remarks to him on a regular basis throughout his employment. The manager took no action apart from telling Mr Gehlen to report the matter to HR. It was also the case that some of the racist remarks had been overheard by two other employees, including another manager. Neither had escalated

the matter to HR.

Mr Gehlen was dismissed on 15 September 2017 on the grounds of performance. He went on to raise a formal complaint about the harassment. Allay investigated and concluded that Mr Pearson had made the remarks in question. As a result, Mr Pearson was made to undergo equality training, however, it's not clear whether he was disciplined.

Mr Gehlen went on to bring a claim of harassment in the Employment Tribunal. Allay sought to rely on the reasonable steps defence, pointing to the fact that it had equal opportunities and anti-bullying and harassment policies in place and had trained staff, including Mr Pearson, on these areas in early 2015 (around 20 months before Mr Gehlen had started work). That training contained one slide on harassment and also set out what employees should do if they overheard unacceptable remarks.

The Tribunal rejected Allay's defence on the basis that the 2015 training had become stale and ceased to be effective. This was demonstrated by the fact that the remarks had been made at all, and also by the fact that the two managers (and the other employee) had failed to react appropriately. All of this was contrary to the training they had received and demonstrated a clear need for it to be refreshed. It would have been a reasonable step to deliver such further training and this had not been done.

Allay appealed to the Employment Appeal Tribunal (**EAT**), arguing that the statutory defence only required reasonable steps to be taken and the effectiveness of those steps was not relevant.

What was decided?

The EAT rejected Allay's appeal and upheld the Tribunal's decision. In doing so, the EAT offered some useful guidance on how the reasonable steps defence works in practice.

The EAT said that Tribunals should begin by looking at the steps that had already been taken. Tribunals should assess how effective those steps were likely to be at the time they were taken. Here, the EAT noted that Tribunal should have made more detailed findings about the effectiveness of Allay's internal policies and the 2015 training. Despite some obvious flaws, the Tribunal had accepted these as adequate and shifted their focus onto the question of whether the training had ceased to be effective over time. Ultimately, this oversight did not undermine the Tribunal's reasoning, but employers should expect Tribunals to scrutinise the content of policies and training much more closely in future in order to assess their quality and effectiveness.

When moving on to whether it would have been reasonable to have taken further steps, Tribunals should take into account when the existing steps ceased to be effective, as well as the cost and practicality of taking such further steps. It may also consider the likely effectiveness of any such further steps – although it may still be reasonable to take a further step even if it wouldn't prevent the discriminatory behaviour.

The EAT made some interesting observations on how training should be assessed:

- **The length and depth of the training is important:** the EAT said that "brief and superficial" training is unlikely to have a substantial effect in preventing harassment or have long lasting consequences. By contrast, "thoughtful and forcefully presented" training is more likely to be effective, and last longer.
- **When training needs to be refreshed:** the EAT said that if it becomes clear that harassment is still occurring and/or that staff didn't understand the training, the employer will be on notice of the need to take further steps i.e. to improve and refresh the training. However, it conceded that if the training was of a good standard and the employer was unaware of the continuing

harassment then the reasonable steps defence might still succeed.

In this case, the fact of the racist remarks and the managers' failures meant there was sufficient evidence to conclude that the 2015 training was no longer effective. Allay was deemed to have knowledge of the continued harassment (via the two managers) and this should have alerted them to the fact that more training was needed.

What are the learning points for employers?

The fundamental learning point for employers is to make sure that equality and whistleblowing policies and training are of a high quality and updated regularly.

In terms of frequency, we would recommend that policies are updated and circulated to staff each year. Ideally, training should also be rolled out annually, and at any point that it becomes clear that the training has ceased to be effective (e.g. following an incident of harassment). However, the better quality the training, the longer the shelf life, meaning longer training intervals may be appropriate.

As far as the format of training is concerned, the "gold standard" is to provide bespoke, face-to-face training in small groups, either in person or virtually. This allows the training to be tailored to the particular industry, business and type of worker. It also promotes engagement and allows the trainer to check that understanding is secure. Together, this will help demonstrate the effectiveness of the training at the time it was delivered and that it had a longer shelf life.

However, training in this format will not always be feasible, for example, because of cost or the way that staff are organised (although geographical limitations will be less persuasive in the age of Zoom). What other options are available to train staff and check continued understanding?

As a minimum, employers should ensure that policies are kept up to date and read by staff on a regular basis, perhaps with a signed acknowledgement from workers confirming that this has been done.

This can be supplemented by more cost-effective online training – either on a bespoke or generic basis. As a starting point, Acas offers free online training on bullying and harassment and equality and diversity. Again, workers should acknowledge that they have viewed such training and their learning should be tested via quizzes with a minimum pass mark. However, additional training is still likely to be needed for managers and anyone with special responsibility for equality or whistleblowing matters, such as members of HR or investigation teams.

If you would like to discuss how BDBF can help you deliver effective equality and whistleblowing training to your staff please contact Amanda Steadman (amandasteadman@bdbf.co.uk) or your usual BDBF contact.

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