Not on the clock but still on the hook? EAT considers employer's liability for sexual harassment.

The EAT's recent decision in *AB v Grafters Group Ltd* reminds HR teams that employer responsibility for harassment may extend beyond the workplace.

What happened in this case?

The Claimant worked for a hospitality recruitment agency. On 1 November 2021, the Claimant mistakenly believed that she was due to work at an event taking place at Hereford Racecourse. She arrived late to her employer's office and thought she had missed the transport to Hereford. A colleague who had just finished work (CD) offered to give her a lift. She agreed.

CD had previously sent sexually suggestive messages to the Claimant, including in the early hours of 1 November 2021 when he was at work. During the journey, the Claimant learnt that she was not, in fact, required to work that day and she asked CD to take her home. However, CD drove her to a golf course, where he subjected her to sexual harassment.

The Claimant claimed that her employer was vicariously liable for the sexual harassment. The Employment Tribunal found that CD *had* sexually harassed the Claimant. However, it held that the employer was not vicariously liable because CD was not

acting “in the course of his employment” at the time of the incident. The Tribunal determined that CD was not working at the time, the incident did not occur in the workplace, nor was the transport arrangement part of his work duties or otherwise approved by the employer. It also concluded that CD’s motive in offering the lift was not linked to his employment.

The Claimant appealed to the EAT.

What was decided?

The appeal focused on whether CD’s actions were “in the course of employment”. The EAT found that the Tribunal was entitled to conclude that the harassment occurred outside of CD’s working hours and not while he was performing his work duties. However, it had failed to consider whether a sufficient nexus or connection with work was present, such that the lift and subsequent conduct could be deemed an extension of his employment. The EAT held that this step was required by case law, and the Tribunal had failed to carry out the necessary “second question” analysis.

The EAT also considered whether the Tribunal had failed to consider three *relevant* factors, namely:

- the sexual messages that CD had been sent during his working hours;

- whether the harassment in the car was part of a continuous course of conduct starting when CD was at work; and

- the connection between CD’s job, previous arrangements for lifts between colleagues, and the reason why the Claimant was in his car.

The EAT concluded that the Tribunal’s failure to address these factors made its legal reasoning incomplete, because they were all directly relevant to the analysis of whether a sufficient nexus or connection with work existed.

The EAT also considered whether the Tribunal had given weight to two *irrelevant* factors, namely:

- CD’s “motive” for giving the lift, asking if it was because of a requirement linked to his employment; and

- whether the employer had knowledge of, or sanctioned, CD giving a lift to the Claimant.

The EAT considered that CD's motive in offering the lift was immaterial to whether the acts were "in the course of employment." However, the question of whether the employer knew or approved of the general arrangement could be relevant to the analysis of whether an act was in the course of employment.

The appeal was upheld, and the case was remitted to the same Tribunal for reconsideration.

What does this mean for employers?

Employers may be held liable for harassment committed by workers in the course of their employment. However, as previous caselaw has made clear, the meaning of "in the course of employment" is wider than just those actions occurring during working hours in the workplace. It is possible that conduct off the premises and out of normal working hours may be considered an "extension of employment", for example, at a colleague's leaving party, or during work-related travel. However, in all cases the decision is for the Tribunal to reach on the particular facts. This decision reminds us of this nuanced approach needed, although it remains to be seen whether the harassment which took place in this case will meet the threshold.

The decision also underlines the need for employers to give careful consideration to the reasonable steps it can take to prevent sexual harassment. If the actions are held to be within the course of employment, the employer may still avoid liability if it can show that it took *all* reasonable steps to prevent sexual harassment occurring. This will include things like having an appropriate policy in place and providing training to staff. In this case, it could potentially include steps like empowering staff to call a taxi at the employer's expense to reach the workplace or return home where they have missed the arranged transport and feel vulnerable.

The taking of reasonable steps is also necessary to discharge the statutory duty on employers to prevent sexual harassment at work. At present, the duty requires employers to take some, but not all, reasonable steps. From October 2026, the duty will be upgraded to require all reasonable steps to be taken (aligning it with the reasonable steps defence). A failure to discharge the duty gives rise to an uplift to compensation in relevant claims of up to 25% and could provoke an investigation by the Equality and Human Rights Commission.

AB v Grafters Group Ltd t/a CSI Catering Services International

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