Why employers can be liable for discrimination via their agents

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The Court of Appeal has considered the circumstances in which an employer will be held liable for acts of discrimination committed by their agents.

The Equality Act 2010 states that an act of discrimination committed by an agent will be treated as an act done by the principal, but the circumstances in which this rule will apply

are not always clear. The Court of Appeal in this case has confirmed that union workplace officials are agents for this purpose, with the result that the union can be held responsible for acts of discrimination committed by its officials.

This case concerned Ms Nailard, a regional officer employed by Unite the Union. Part of Ms Nailard's job was to liaise with elected union officials on site at Heathrow Airport; those included Mr Saini and Mr Coxhill, both of whom were employed by Heathrow Airports Limited, but carried out union-related duties full-time. Both Mr Saini and Mr Coxhill were later found to have subjected Ms Nailard to sexual harassment, and the Court of Appeal held that Unite was liable for it on the basis that they were agents of the union. The test is whether the discriminatory acts were done in the course of Mr Saini's and Mr Coxhill's performance of the functions Unite had authorised them to undertake. This was satisfied regardless of the fact that the subject of the harassment, Ms Nailard, was employed by Unite directly.

The employer's liability in cases such as these is strict. An employer is able to avoid liability for acts of discrimination or harassment committed by its employees if it can show it took reasonable steps to prevent those acts from happening. However, this defence is not open to the employer when the perpetrator of the discriminatory acts is its agent. Therefore, the employer could potentially be fixed with liability no matter what steps it has taken and whether or not it knew about the conduct in question.

Unite the Union v Nailard *[2018] EWCA Civ 1203*

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