

# Know your liability

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## **Businesses can be liable for acts of harassment by their workforces and also by third parties, Helen Crossland warns**

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Most businesses are aware of the duty of care they have to their workforce, which extends to ensuring that employees conduct themselves so they do not expose the organisation to risk, and act in accordance with company policies governing the treatment of others while at work.

This is not only to uphold the business's standards and reputation, but also to reduce the prospect of claims of health and safety infringements, discrimination or harassment, for which the business may be liable under the principle of "vicarious liability".

A business may be held accountable where claims are brought by its workforce due to harassment from third parties while at work. Such parties could include persons over which the business has no direct control, such as clients or their staff, self-employed contractors, the general public or visitors to a site.

But in such instances, is it always the duty of the organisation to protect staff and to take responsibility for the actions of others?

### **Protection from harassment**

Any individual has the right not to be harassed while undertaking work duties. Unlike most other legal rights, contractors and workers ? including agency temps and those on casual and zero-hours contracts ? have as much protection as employees if they are subject to harassment in the course of their work. No minimum length of service is necessary to claim for harassment, neither for discrimination.

A claim can be brought against an organisation if the perpetrator is a fellow staff member, but third-party harassment laws also mean that employers are potentially liable for harassment where a member of the public, visitor, contractor, a client of the company or one of its workers makes derogatory comments ? including those of a racist, sexist or homophobic nature ? to someone employed or engaged by the business.

The business will be liable where the following all apply:

1. a member of its workforce has been harassed on 2 or more occasions, although not necessarily by the same third party
2. the employer is aware that the harassment happened
3. the employer failed to take reasonable steps to stop it from occurring again.

For the law to apply, third-party harassment must relate to a protected characteristic of the

worker concerned, such as their age, sex, disability, race, religion or sexual orientation.

## **Unfair management**

Some businesses may take the view that the actions of third parties who come into contact with their staff cannot be policed, and as businesses they cannot be responsible for something in which they did not participate and do not condone.

Certainly, the 3 criteria listed above show that the circumstances in which an employer can be held liable for third party harassment are limited. Liability will be also discharged where the employer had no knowledge of the harassment, including circumstances where the individual concerned did not report the incident, or where the employer could not reasonably have taken any action to prevent further harassment occurring.

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However, where a business is aware that one of its workers had been harassed on at least 2 occasions, whether by the same or different third parties, and it has failed to take reasonable steps to prevent such harassment occurring again, its ability to defend itself against such a claim will be severely weakened.

An employer's standing will be further undermined if it does not have any policies and practices that set benchmarks for the treatment of others during working hours, or guidance as to the course of action that those who consider they have been harassed or discriminated against at work should follow. Such a situation could be seen as meaning that a business has little regard for such issues. A business may also receive little sympathy if it has procedures in place but does not apply them in practice.

## **Cooperate, don't discriminate**

A business can also be subject to claims of discrimination brought either by its employees or by workers or freelancers. For a business to be culpable, the act of discrimination must, however, be "sufficiently close" to the individual's duties, in accordance with the [Equality Act 2010](#), and related to a protected characteristic of the worker concerned as described above.

Any business will have a defence against a claim if it can show that it took all reasonable steps to:

- prevent the discriminatory act occurring; for instance, taking disciplinary action against an employee who is seen or reported to have used discriminatory language to another worker
- do anything else to deter such acts, for example, having and actively implementing an equality policy, as well as having in place a procedure to deal with any complaints effectively.

## **Wrongful acts**

As a general rule, a business can only be vicariously liable for the actions of its own employees, although this also covers acts that do not constitute discrimination or third-party harassment. That business will not ordinarily be liable for the actions of those it does not control, such as freelancers; neither will it be responsible for seconded staff or casual or agency workers, unless it is evident the individual is integrated into the business and subject to a notable level of control from the company.

*In most cases, a wrongful act giving rise to vicarious liability will constitute a breach of an organisation's policies, amounting to gross misconduct or a gross breach of an individual's contractual obligation to exercise reasonable skill and care in their duties*

This does not apply to every wrongful act that an employee perpetrates. As before, an organisation is only vicariously liable for actions that are "sufficiently close" to what the employee was employed to do. For instance, a person injured as a result of an employee's failure to secure equipment they had been using at work would most likely be seen as being sufficiently connected to the employment; claims resulting from a prank performed at work will, on the other hand, likely keep the employer at arm's length from the actions of the individual responsible, absolving them of liability.

## **Alternative measures**

In most cases, a wrongful act giving rise to vicarious liability will constitute a breach of an organisation's policies, amounting to gross misconduct or a gross breach of an individual's contractual obligation to exercise reasonable skill and care in their duties.

This potentially offers an organisation the opportunity to take action against the person responsible, or make them personally or jointly responsible for paying any damages to the injured party.

## **Preventative practice**

It goes without saying that, insofar as any form of harassment or discrimination at work is concerned, it is unacceptable whether it is carried out by employees, contractors or third parties. Businesses that take a relaxed approach to such conduct should do so in the knowledge they run the risk of having claims made against them, with possible costly reputational damage as a consequence.

The primary focus for any business should be on prevention. It is therefore essential to adopt practices which make it transparent that such behaviour will not be tolerated and will be subject to decisive action.

Reporting procedures should also be in place to encourage staff to inform a business if they have been subject of any conduct that can be considered harassment or discrimination, or where another individual is putting others at risk by reason of their negligence or other detrimental behaviour.

This will go a long way towards deterring or defending against claims by individuals who often stand to gain more from taking action against a company than they do against an individual perpetrator, purely because a company will have deeper pockets and more at stake in terms of its reputation.

Helen Crossland is a partner in the Employment team at [Seddons](#)

## **Further information**

Related competencies include:

- [Business planning](#)
- [Managing people](#)

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