STEPHENSON HARWOOD

10 February 2021

Employment – 20:20 vision

Providing clarity and insight on employment law matters

Have you taken "reasonable steps" to prevent a discrimination or harassment claim?

The recent Employment Appeal Tribunal decision in ***Allay (UK) Ltd v Gehlen*** held that an Employment Tribunal was entitled to reject an employer's "reasonable steps" defence to a claim of racial harassment. Although the employer had provided its employees with equality and diversity training, such training had become "stale" and ineffective. A further reasonable step would have been to provide refresher training. In this alert we look at what went wrong and the practical takeaways from this decision.

Background

The Claimant alleged that he was subject to harassment related to race by a fellow employee, Mr Pearson. An investigation was carried out. Mr Pearson was found to have made racist comments and was ordered to undertake further equality and diversity training. The Claimant brought a claim for harassment related to race.

At the Employment Tribunal, the Respondent sought to rely on the "reasonable steps" defence, which provides that it is a defence for an employer to show that it took "all reasonable steps" to prevent employees from committing discriminatory acts. The Employment Tribunal rejected the Respondent's attempt to rely on this defence. Although it was accepted that employees had received training that covered harassment related to race, this training was "stale" and ineffective; it had been provided in 2015 and a reasonable employer would have provided refresher training.

The appeal

Dismissing the Respondent's appeal, the Employment Appeal Tribunal held that the starting point when considering the "reasonable steps" defence is to consider whether the employer took any steps to prevent the harassment or discrimination occurring. Once that has been established, it is important to consider the nature and the extent to which those steps are likely to be effective. The Employment Appeal Tribunal also considered whether there were any other reasonable steps that the Respondent should have taken. The likelihood of such steps being effective was a factor in determining whether such further steps were reasonable.

The Employment Appeal Tribunal concluded that the training the Respondent's employees had received was no longer effective to prevent harassment. In addition to Mr Pearson making racist remarks and categorising them as "banter", a colleague who heard his comments did not report them, and two managers who were informed about Mr Pearson's remarks did not take any action. This was sufficient evidence for the Employment Appeal Tribunal to conclude that, whatever training had been provided, it was "stale" and no longer effective; the training that had been provided had clearly faded from the memories of Mr Pearson and his colleagues. There were further steps by way of refresher training that should have been taken. As a result, the Respondent was unable to rely on the "reasonable steps" defence.

Practical takeaways

This case is an important reminder for employers to revisit their equality and diversity training and their policies and procedures regularly. Having policies and procedures in place, and conducting training, is not a tick box exercise. The policies, procedures and training should be continually reviewed for effectiveness and updated as and when required.

We regularly assist clients in implementing and reviewing policies and procedures and provide

bespoke equality and diversity training. If you would like to discuss any of the issues covered in this e-alert please get in touch with Kate or Imogen or your usual Stephenson Harwood contact.

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