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PEOPLE & LEADERSHIP SOLUTIONS

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Vicarious Liability

It is such a cliché to warn employers of the risk of discrimination or harassment claims arising from employees' behaviour at Christmas parties. But there is an interesting legal principle involved – the vicarious liability of employers for the actions of their employees. When will an employee's behaviour at a Christmas party – or other social event for that matter – be treated as the behaviour of the employer?

There are two distinct ways in which vicarious liability arises. There is the common law principle – that means it has been developed over time by the courts – that the employer should in certain circumstances be held liable for the unlawful acts of employees. That applies when the claim being brought is, for example, one for personal injury. When it comes to discrimination, however, the common law rule does not apply. Instead there is Section 109 of the Equality Act which says that anything done by a person in the course of his or her employment must be treated as also having been done by the employer.

We used to think that the Equality Act test was easier to meet than the common law test. This was established as far back as 1996 in the case of Jones v Tower Boot Co Ltd. In that case an employee was subjected to appalling racial abuse from colleagues – both verbal and physical. The conduct towards him was so extreme that the Employment Appeal Tribunal held that it was not done 'in the course of employment'. At the time the common law principles of vicarious liability required the conduct in question to be within the scope of the employee's duties – albeit that the employee might be performing those duties in an unauthorised way. The Court of Appeal rejected this technical approach in discrimination cases and held that the phrase 'in the course of employment' had to be given an ordinary, common sense meaning – which clearly covered the abuse to which Mr Jones had been subjected in the workplace.

Ove the years since that case, however, the common-law approach to vicarious liability has shifted quite dramatically. The test now is whether there is a sufficient connection between the employees 'field of activities' and his or her wrongful conduct to make it right for the employer to be held liable for it.

This approach can be seen in the recent case of **Bellman v Northampton Recruitment Ltd** the employer was a small business whose managing director – Mr Major – organised a Christmas party for the staff at a local golf club. When the party broke up, he invited a number of colleagues and their partners to return to his hotel for further drinks. One of those was Mr Bellman, a sales manager. At about 2.45 am an argument developed about the pay of one of the employees and Mr Major took exception to what he considered to be a challenge to his authority. He lost his temper

and punched Mr Bellman in the face. He was restrained but broke free and punched Mr Bellman again, this time knocking him out. Mr Bellman fell and knocked his head on the floor, suffering a fractured skull and permanent brain damage.

The Court of Appeal held that the employer was liable for Mr Major's conduct and the injury that it caused. He was the 'directing mind' of the company and discussing company matters with staff – even during the early hours of the morning and under the influence of alcohol - fell within his 'field of activities' as managing director. When he assaulted Mr Bellman he had been lecturing assembled members of staff about his authority to do as he saw fit with the company. Indeed, the incident itself arose as a result of a disagreement about staffing matters rather than about anything personal or disconnected from the workplace. In other words, Mr Major was acting as the managing director of the company when he assaulted Mr Bellman. The fact that the drinking session was unscheduled and that employees were not required to attend it did not alter the fact that there was such a close connection between Mr Major's wrongdoing and his work that it was right for the company to be held liable for it.

This is probably the same approach that would be taken if the claim was one brought under the Equality Act. But that does not mean that all activities taking place after a work-related party will be the employer's responsibility. It is noticeable that the Court relied on the fact that the conversation that led to the assault was work-related and that Mr Major was used to giving directions related to work at all times of the day – he had no fixed working hours. Indeed, the Court of Appeal emphasised that he assaulted the employee in the course of seeking to assert control and dominance in relation to staffing matters. This was not merely a social drink between a number of colleagues which went wrong – the late-night drinking session was, in effect, an extension of the working day.

It is generally accepted that behaviour at a social event organised by the employer and which employees are expected to attend will be seen as taking place 'in the course of employment'. But the Bellman case suggests that it is only in very limited circumstances that anything taking place before or after the event itself will be treated in the same way. The further removed the incident is from the work that the employees are employed to do, the less likely it is that the employer will be held liable.

Nevertheless, employers would be wise to take advantage of a unique feature of vicarious liability in discrimination claims. Under s.109(4) of the Equality Act the employer has a defence if it can show that it took all reasonable steps to prevent employees from committing the act complained of. So it does make sense for employers to do what they can to ensure that employees behave in an appropriate way at a Christmas party. But what is needed is a comprehensive approach to dignity at work involving clear codes of conduct consistently applied and supported by training and awareness raising where appropriate. An intolerance for harassment in any circumstances needs to be embedded in the culture of an organisation for the defence to apply. When that is done right, then not only will the employer be protected against legal action, but there is also a decent chance that the harassment will not occur in the first place. But if these steps are not taken then just sending an email to all employees before the event telling them to behave themselves is not going to be enough and will usually just invite ridicule. Dignity at work is for the whole year round – not just for Christmas.

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