

Case Update



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Third Party Harassment

The employee in this case was a mental health nurse for an NHS trust. He was assaulted and racially abused by a patient who had a known history of racist behaviour. He brought claims of race discrimination and harassment against the Trust arguing that it had failed to take steps to prevent racial abuse from patients.

The Employment Appeal Tribunal (EAT) ruled that the Trust was not liable for the racial harassment from the patient. The EAT said that the Trust could have done more to prevent the harassment – it had a policy requiring staff to record incidents of racial abuse but this was not enforced, which contributed to the abuse of the employee in this case. However, the Trust's failure to act was in no way related to race. An employer can only be liable for racial harassment of employees by third parties where its own conduct or inaction is related to race.

The case appears to limit the circumstances in which employers can be liable for the harassment of employees by third parties, such as customers, clients and contractors. However, the case is likely to be appealed so it may not be the final word on the issue. In addition, the Government recently ran a public consultation on whether new legislation should be introduced to make employers liable for third party harassment and, if so, in what circumstances. The consultation closed on 2 October 2019 and the Government is considering feedback before announcing its proposals.

In any case, employers should still take action to protect staff where there is evidence of harassment or potential harassment by third parties. Not only is this the right thing to do but it is also part of the employer's general duty to protect the safety and health of employees, and failure to do so could give rise to a constructive unfair dismissal claim from an employee who has at least two years' service. The appropriate steps will depend on the particular circumstances and should ideally be taken in consultation with the employee to ensure the employee is not penalised by, for example, being taken off a particular client contract or excluded from client events to avoid contact with the offender.

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