Not my employee not my problem?
Employers liability for sexual harassment committed by a third party

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PRESIDENTS CLUB SCANDAL

- Tory aide quits over 'gropers' gala
- Minister carpeted by furious PM
- Charity bash axed, cop probe urged

SLEAZE BALL

By MATT WILKINSON

A TOP Tory donor quit over the 'gropers' gala' charity ball that has led to the club being forced to close. Organiser David Meller left as an education aide to No10 amid fury at the celebrity guests' deadly treatment of women in business. Children's minister Nadhim Zahawi faced calls to resign as PM Theresa May ordered an investigation into the allegations.

Two children's hospitals said they were unable to direct donations to the charity. A Labour MP called for a police probe, saying there was 'no way what went on was acceptable'.

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City rocked by sexism investigation

Financial elite shaken after sting reveals sexual abuse of young women at men-only dinner

- Hostesses groped and paraded before room of baying executives
- Host David Walliams says he did not witness harassment
- 'Uncomfortable' families minister urged to resign - but PM backs him
- Bank of England, charities and major firms try to distance themselves
- Gala organiser quits the board at Department for Education
S. 26 Harassment

(1) Unwanted conduct related to a relevant protected characteristic, and
- b) (i) violating B's dignity, or
- b)i) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(2) A also harasses B if—
- unwanted conduct of a sexual nature, and
- Purpose or effect referred to in subsection (1)(b).
No liability for nonemployees?

- S. 40 Equality Act 2010
- Liability for third parties
  - 3 strike rule
- Repealed - Regulatory Reform Act 2013
Historical view

Burton v De Vere Hotels [1996]
- Employer liable for sexist and Racist harassment
- Bernard Manning and patrons
- Although not employees

Disapproved of:

Pearce v Governing Body of Mayfield School [2003]
- School not liable for actions of students
EU influence

• Equal Opportunities Commission v Secretary of State for Trade and Industry 2007 [ICR] 1234
• Equal Treatment Directive 2002/73

• *knowing failure to take steps to prevent harassment by third parties*
Legal routes

• Breach of Contract
• Constructive dismissal
• Negligence (psychiatric injury)
• Protection from Harassment Act 1997

Equality Act 2010:
• Harassment – s. 26
• Direct Detrimental Treatment – s. 39
• Indirect Discrimination – s. 19
Cases of third party liability

Not sexual harassment

• Cox v Minster of Justice [2016] ILRL 370 SC
• HMRC v Saldanha UKEAT/0067/17/DA
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Liability not Automatic

• *Sheffield City Council v Norouzi* [2011] IRLR 897
• Hazards of the job
• Underhill P. ‘what precisely could have been done but was not done’

Canniffe v East Yorkshire Council (2000) IRLR 555

• **Old law** – but still influential
• What has employer done as a preventative measure – to stop discrimination occurring
• What has employer done once they knew discrimination has occurred
All reasonable steps defence

Section 109(4) Equality Act 2010

- UNITE the Union v Nailard
  - Policy alone not sufficient

- Equality and Human Rights – Employment Statutory Code of Practice
Preventative

• Policy on harassment - Covering third party actions
• Notify third parties harassment will not be tolerated
• Term in all contracts with third parties
Post incident

• Encourage employees to report
• Support the employee
  - 80% not reporting (TUC, 2016)
  - Ensure they are not Victimised
• Take appropriate action
  - Action against third party?
  - Move employee – but not to their detriment
Outside of work space

- Liability even outside of work
- Chief Constable of the Lincolnshire Police v Stubbs and others [1999] IRLR 81 EAT
Cases

• Burton v De Vere Hotels  [1996] IRLR 596
• Cox v Minster of Justice [2016] ILRL 370 SC
• Equal Opportunities Commission v Secretary of State for Trade and Industry 2007 [ICR] 1234
• Equal Treatment Directive 2002/73
• HMRC v Saldanha UKEAT/0067/17/DA
• Pearce v Governing Body of Mayfield School [2003] IRLR 512
• Sheffield City Council v Norouzi [2011] IRLR 897
• UNITE the Union v Nailard [2016 IRLR 906]
References

- James Hand, Employer's liability for third-party harassment: an "unworkable" and superfluous provision?, Industrial Law Journal, 2013, 42(1), 75-84
- Michael Rubenstein, Third-party harassment uncertainty, Equal Oppurtunity Review, 21/09/2013
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