Harassment – Employer Defence – 'Reasonable Steps'

An employer wishing to put forward a defence under Section 109 (4) of the Equality Act 2010 must demonstrate that 'all' reasonable steps have been taken to prevent employees from doing 'that thing' or 'anything of that description'. In Allay v Gehlen – BAILII [2021] UKEAT 0031_20_0402, a case of racial harassment, the employer put forward a defence that their staff handbook contained written policies and procedures on Equal Opportunities; Harassment and Bullying and that they provided their staff with training in order to deter such behaviour. However, the Employment Appeals Tribunal (EAT) upheld the finding of the Employment Tribunal (ET) that this was not sufficient.

One person in a management position had overheard an employee racially abusing another employee but, deciding that it was just banter, failed to report the incident to the Human Resources (HR) Department. The harassment continued and, when the claimant reported it to another manager, the manager told the employee to speak to HR directly about the matter; thereby failing to take action himself. The ET picked up on the fact that the written procedure required the person being harassed to report it to their line manager or, where it was the line manager that was harassing the employee, they were to report it to someone else holding a management position. However, this was not the main reason why the employer lost their appeal at the EAT.

The person who continuously made comments of a racial nature, together with the two managers involved, had received their equality and diversity training some years prior to the incidents reported by the claimant. The ET had upheld the Claimant's claim that the employer had failed to take 'all' reasonable steps to prevent the harassment from taking place; as the equality and diversity training had been so long ago that it had become 'stale'. This judgement provides a number of useful points with regard to what constitutes a defence under Section 109 (4) of the Equality Act 2010.

It establishes that such a defence must constitute a 'high threshold'. In this particular case both the ET and the EAT felt that the provision of training and the production of written policies and procedures alone did not meet that threshold. It was decided that refresher training, given at more regular intervals, may have prevented the harassment taking place (in organisations in which I have previously worked, the employers have ensured that refresher training has been undertaken by all employees either annually or bi-annually). Furthermore, the quality of the training should be such that it leaves employees in no doubt as to what is, and is not, acceptable behaviour in the workplace. It should also emphasise the actions to be taken by line-management in the event of such behaviour occurring.