

EOR Opinion

Bring back Bernard Manning

by Michael Rubenstein

For many years, the decision of the EAT in *Burton v De Vere Hotels* (EOR 70) provided a valuable framework for dealing with third party racial or sexual harassment. The case involved a claim by two black waitresses that they had experienced harassment as a result of working at a dinner addressed by Bernard Manning. They were not harassed either by a manager or by a fellow employee, so the traditional rules relating to employer liability for workplace discrimination did not apply. Nevertheless, the EAT held that the employer was legally liable.

It was clear that the two waitresses had been subjected to degrading treatment. The EAT set out the principle that an employer subjects an employee to the detriment of harassment if it permitted the harassment to occur in circumstances in which it could control whether it happens or not. This seemed an eminently sensible principle, even though it has been occasionally misused by tribunals.

It was the law until the decision of the House of Lords in *Pearce v Governing Body of Mayfield Secondary School* (EOR 120). The main holding in this case was that sexual orientation discrimination is not sex discrimination. However, the facts of the *Pearce* case concerned homophobic abuse of a lesbian teacher by pupils in the school. The employment tribunal held in the alternative that if the abuse of the applicant by school pupils had been on grounds of sex, the school would have been directly liable for the discrimination in accordance with the test laid down in the Bernard Manning case. When the case got to the House of Lords, it made a point of ruling that the Bernard Manning case was wrongly decided. This was because it was not sufficient to find that the waitresses had been racially abused. In order for the employer to be legally liable, the House of Lords said that it also had to be shown that the employer had put the waitresses in that position because of their race. Lord Nicholls explained that the manager's "failure to give any thought to what might happen to the waitresses that night was not connected with their ethnic origin. By implication, the tribunal thought the employer would have treated white waitresses in the same way....As I see it, these findings negated racial discrimination on the part of the employer."

Since the House of Lords' decision in *Pearce*, the law has been changed in that there is now a freestanding definition of unlawful harassment in the Race Relations Act and similar freestanding definitions are incorporated in the Sexual Orientation and Religion or Belief Regulations (EOR 118). This raises the important question as to

whether the new freestanding definition overrides the House of Lords' decision in this respect and provides an effective remedy against third party harassment. The answer, regrettably, is very complicated.

Let's take the facts of the *Pearce* case and the new Sexual Orientation Regulations. Regulation 5 provides as follows:

"(1) For the purposes of these Regulations, a person ('A') subjects another person ('B') to harassment where, on the grounds of sexual orientation, A engages in unwanted conduct which has the purpose or effect of -

(a) violating B's dignity, or

(b) creating an intimidating, hostile, degrading, humiliating or offensive environment for B."

It is clear that an employer is liable for employees who "subject" a colleague to harassment, since that fits right into the definition of harassment. But an employer who "allows" an employee to be harassed by a third party, such as by pupils in a school, is not "subjecting" them to harassment within the meaning of reg.5(1), since it is neither the employer, nor an employee for whom it is legally liable, that is engaging in the unwanted conduct that amounts to harassment.

Can the employee who is put in a position by their employer in which they are harassed merely rely on the argument that they were subjected to a "detriment" by the employer, contrary to reg.6(4), in the same way as was argued in the Bernard Manning case? At first sight, the answer is that they cannot make this claim because the definitions section in reg.2(2) explicitly states that "detriment" does not include harassment within the meaning of reg.5." This limitation is found in all the other regulations as well, and is presumably because the standard of proof is considerably lower under existing case law to establish a "detriment" than it is under the freestanding definition of harassment, where a number of ingredients have to be satisfied in order for a claim to be successful.

However, it is strongly arguable that this limitation does not apply to third party harassment because, by definition, third party harassment is not "harassment" within the meaning of reg.5, for the reasons that we explained above.

Even so, following *Pearce*, the employer can be liable for subjecting an employee to the detriment of being put in the position where they were harassed by a third party, only if it can be shown that the employer put them in that position because of their sexual orientation (or race, religion etc). This means that they have to show that if they were of a different sexual orientation and were harassed by a third party, they would have been treated more favourably, such as by preventative steps being taken. So if, for example, the employer treats third party sexual harassment of heterosexual women more seriously than sexual harassment of lesbians, there is less favourable treatment on grounds of sexual orientation. However, if the employer treats all third party

harassment in the same way, such as by ignoring it, there would appear to be no discrimination on grounds of sexual orientation if someone is subjected to homophobic abuse by someone for whom the employer is not legally responsible.

Third party harassment violates dignity and creates an intimidating, hostile, degrading, humiliating or offensive environment for those employees who are subjected to it. What those who are harassed by a customer, client or pupil because of their race, religion or sexual orientation want is for the employer to have rules providing for a sanction against the harasser and to have a procedure for making a complaint. The law should encourage, rather than discourage, such policies and procedures. If an employer knowingly puts an employee in a position in which they are going to be harassed, employees should have a remedy against the employer for being placed in that position. The Bernard Manning test provided the right standard.