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# Third-party discrimination: why you still need to protect your staff

You have an independent contractor in your office doing some work for you. An employee of yours complains that this contractor made a racist comment. What should you do?

A recent case highlights that you should respond to the complaint in a reasonable way, otherwise the employee might bring a successful discrimination claim against your business. That probably should include investigating the event and taking steps to prevent the contractor working in the same place as the complainant.

Direct race discrimination is defined as treating someone less favourably than you would treat another person because of their race.

In this case, the claimant identified 10 things that his employer should have done but didn't. Most importantly, he alleged that his employer should have requested that the contractor stop working for them. He also alleged that the senior manager who made the relevant decisions made race-based assumptions and that there was a culture of racism in the office.

The employer's primary defence was that the contracting company investigated the incident and decided to take no action against the contractor (who was *their* employee). The claimant's employer therefore claimed that its hands were tied and that nothing could be done. So the primary questions were – could something have been done and did the employer act unlawfully for not doing that?

The Employment Tribunal decided that the employer could have barred the offending individual from the business, and indeed would have done so had the complainant not been of a particular race. That means he was treated worse than a comparable employee of another race, so that was race discrimination. Also, though the tribunal didn't find that there was a culture of racism at the business, it did find that at times they paid only lip service to its declared zero tolerance policy towards racism.

Finally, it seemed that the business's policy was to investigate racism only if the victim made a formal grievance – that means it would never be proactive in policing the policy.

The Employment Tribunal awarded the employee almost £25,000 in compensation.

**What this means for you**

You should have a policy that addresses the various types of discrimination, and you must apply that policy effectively, to avoid discriminating against your staff.

**How we can help**

Our **Employee handbook** includes a 'Harassment policy' that refers also to discrimination by a third party. It also includes an 'Equal opportunities' section that says employees may complain of unlawful discrimination and doesn't specify that it must be by another employee.

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# Don't wait 2 months to issue employment statements

You know that employees are entitled to a statement of particulars of employment, and that you've 2 months to provide this statement. As a rule you use the whole 2 months – after all, their employment might not last that long, in which case it would have a been a wasted effort. Is that sensible?

We'd suggest you provide the statement as soon as possible. Although the legislation gives you 2 months to provide the statement, the right arises after just one month. Accordingly, if the employment does end early, you could find yourself in breach of the legislation.

In a recent claim, a hotel employed some waiters and treated them dreadfully – in particular, they underpaid them, repeatedly swore at them and then summarily dismissed them when they complained. The hotel hadn't given them a written statement summarising the main terms and conditions of employment, as required by section 1 of the Employment Act 2002. One of the waiters had been employed for only 6 weeks.

The waiters brought a number of claims, including unlawful deductions from wages, holiday pay and race discrimination (they were Polish). In addition, they brought claims for failure to provide statements of terms and conditions of employment. This last claim cannot be brought by itself, but only as an additional claim if other claims are brought. In that situation, if the employer is found not to have provided the statement of terms and conditions by the time that their Employment Tribunal claim is issued, the employee is normally entitled to additional compensation of 2 or 4 weeks' pay. (For this purpose, weekly pay is capped like it is for many employment claims – currently it's £508.)

The Employment Tribunal didn't make the award for failure to provide the statement to the claimant who'd been employed for only 6 weeks. However, it turned out they'd overlooked one of the sections of the Employment Act 2002: it must be provided even if employment ends before 2 months (but not if it ends before one month). The Employment Appeal Tribunal corrected the original tribunal's error and also said that it's best practice to provide the statement as soon as possible.

**What this means for you**

It's advisable to provide the statement as soon as you can after employment begins. This statement, which is often referred to as a 'section 1 statement', must summarise the main elements of the employment relationship – the Employment Act 2002 defines what must be in it.

Don't confuse this statement with the employment contract. The contract is the agreement that the parties have reached about their respective rights and obligations. Normally that will be recorded in writing before the employment begins, and it normally includes everything required by a section 1 statement plus more.

If the contract does include everything required by the section 1 statement, you won't have to provide an additional section 1 statement. If there is any conflict between the contract and the statement, the contract overrides the statement – potentially even if the contract wasn't written down.

**How we can help**

Our **Employment agreement** contains everything required by a section 1 statement, as well as many other options to help define the employment. Alternatively, if you only need something simpler, our **Employment statement** will meet the section 1 requirements.

# Penalty contract clauses – enforceable or not?

You're negotiating a contract with a business who will supply a product. You really need it by a particular date to profit as much as you hope. So you suggest a 'penalty clause' – if they don't produce on time, they'll have to pay you £1,000 per day late. However, you've heard that penalty clauses aren't enforceable. Is that right?

As shown by a recent High Court case, as long as the penalty isn't out of all proportion to the loss you could suffer, it probably would be enforceable.

The courts distinguish between 'penalty' and 'liquidated damages' clauses. Both cover the possibility of a business breaching the contract, for example by missing a deadline. If that deadline is important, and you expect you'll suffer loss as a result of the delay, you might want to say in the contract how compensation would be calculated. If you don't do that, and the other party misses the deadline, you may have to issue a claim in court and argue about the loss suffered as a result of the breach. That could be a long, difficult and costly process.

That's why businesses use 'liquidated damages' clauses, which set out how compensation will be calculated in specified circumstances. You'll rarely know *exactly* how much loss will be caused by a specified breach. But if the liquidated damages clause protects a legitimate interest and isn't exorbitant and out of all proportion to the loss you might suffer, it will be enforceable. If the payment doesn't protect a valid interest or is exorbitant, it will be considered a 'penalty clause' and probably won't be enforceable.

It's worth bearing in mind that until 2015 the court applied a slightly different test: is the penalty a genuine pre-estimate of the loss? A 2015 case changed that to the current test (described above), which is broader, meaning more liquidated damages clauses became enforceable.

Confusingly, the most recent case refers to both tests. It doesn't acknowledge a conflict between the 2 or cast doubt on the 2015 case and so it probably doesn't change the law. But one interesting thing about the new case was that the court ruled the clause was enforceable, even though the contract itself described it as a 'penalty'. This is because the court agreed that, regardless of what it was called, it was actually a liquidated damages clause. This was based on all the circumstances, including that in construction contracts liquidated damages are common and the parties were equal in bargaining power, commercially experienced and able to assess the effect of the clause.

**What this means for you**

You can use liquidated damages clauses when negotiating contracts, but make sure the damages are proportionate and protect a legitimate interest. Although not strictly necessary, you'll be on even safer ground if you make the clause a genuine pre-estimate of your potential loss.

f the other side wishes to insert such a clause don't assume it won't be enforceable, even if it's referred to as a 'penalty' rather than as 'liquidated damages'.

**How we can help**

Several of our documents have a liquidated damages clause, including our **Agreement for the supply of goods (non-retail)**.

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# In brief:

- The Court of Appeal has dismissed Uber's appeal regarding worker status of 2 of its drivers – however, Lord Justice Underhill, who was President of the Employment Appeal

Tribunal, disagreed; he would have decided they were self-employed (as stated in their contracts) and should only be treated as working when actually on a job, not all times when their app is on. The court granted permission to appeal to the Supreme Court, and Underhill LJ's view may give Uber confidence and ammunition.

- The Information Commissioner's Office published this article about its first fines for non-payment of the data protection fee. If you control data and you're not exempt, it's likely you need to pay a fee of £40 or £60. Fines for non-payment start at £400.
- A ban on combustibles in external building walls came into force on 21 December 2018 and the Government has called for evidence for its technical review following the Grenfell disaster – their consultation can be viewed here, and you have until 1 March 2019 if you wish to respond.