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Deck the Halls with Disciplinaries



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Agenda

- Potential Mishaps
 - Legal Status
 - Who gets to go
 - Vicarious Liability
 - Case Law
 - Vicarious Liability in discrimination cases
 - Helpful Hints
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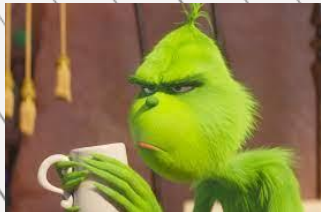
Potential Mishaps

- **Off the premises** - Employees may assume that if an event is being held away from the workplace, the normal rules of behaviour do not apply.
- **Drunkenness** - Inevitably, most issues that arise involve employees becoming more drunk than their employer feels is acceptable and the behaviour that stems from that.
- **Violence and Fighting** - If drunkenness spills over into actual violence, the situation is much more clear cut.



Potential Mishaps

- **Harassment** - Ensure that you have adequate anti-bullying and harassment policies in place, and that employees are aware of them.
- **Absence** - Your organisation will need to determine whether any leeway is given to staff at this time of year.



What is the legal status of a work Christmas Party?

- Extension of employment/workplace
 - Bellman v Northampton Recruitment Limited
 - Shelbourne v Cancer Research UK
- Health & Safety
 - Venue and event is safe and appropriate
 - Same rules for carrying out risk assessments
- Misconduct





Who gets to go?

- Operational considerations
- Inclusivity
- Reluctant staff
- Up to the employee to decide
- Offer an alternative





Vicarious Liability

- What is vicarious liability & what are the implications?
- When will vicarious liability apply?
- What is the scope of vicarious liability?
- What can an employer do to limit the risk of being held vicariously liable?





What is vicarious liability?

- The employer is held liable for the wrongs committed by an employee
- Sufficient connection required between the conduct committed and the employment
- It is fair to hold the employer liable for the conduct committed
- Doesn't matter that the employer itself hasn't done anything wrong





What is the rationale for vicarious liability?

- Policy driven
- Employers have deeper pockets
- Financial loss can be more widely spread
- Maintain standards of “good practice”
- Covers the risk of employees misusing their position





When will vicarious liability apply?

- Two stage test
- Both stages must be satisfied

Stage 1

Is there a relationship between the wrongdoer and the employer which is capable of giving rise to vicarious liability?

- Employees/workers
- Others where the relationship is sufficiently akin to employment





When will vicarious liability apply?

Stage 2

Is the connection between the employee and their employment sufficient to make it just and reasonable to hold the employer responsible?

- The close connection test:
 - What “field of activities” has been entrusted to the employee?
 - Was there a sufficient connection between the position in which the employee was employed and the wrongful conduct?





Graham v Commercial Bodyworks Ltd (2015)

- Court of Appeal decision
- Employer was not vicariously liable
 - “frolicsome but reckless conduct” not in the course of employment
 - The task of the employee was not sufficiently closely connected to their highly reckless acts
 - Nature of the wrongdoing may be relevant





Vaickuviene v Sainsbury Plc (2013)

- Court of Session
- Employer was not vicariously liable
- No connection between what the employee was engaged to do and the wrongdoing





Mohamud v WM Morrison Supermarkets Plc (2016)

- Supreme Court
- Employer was vicariously liable
 - Broad interpretation of the “field of activities” entrusted to the employee
 - Part of the employee’s job to attend to customers
 - He had not metaphorically “taken off his uniform” to pursue a personal matter





WM Morrison Supermarkets Plc v Various Claimants (2020)

- UKSC
- Employer not vicariously liable
 - Disclosure of data did not form part of the employee's functions or field of activities
 - Close link but didn't satisfy the close connection test
 - Employee's reasons are relevant



Conclusions from case law



- Each case is fact specific
- The close connection test (i.e. what is considered to be within the employee's "field of activities" and the connection with the wrongful act) should be considered broadly
- Trend towards expanding what is considered to be sufficiently closely connected?



Vicarious liability in discrimination cases

- Anything done by a person in the course of their employment must be treated as also done by the employer
- It does not matter whether that thing is done with the employer's knowledge or approval

Section 109 Equality Act 2010





Reasonable steps defence

- In proceedings against an employer in respect of anything done by an employee, in the course of their employment, it will be a defence for the employer to show that they took all reasonable steps to prevent the employee:
 - From doing that thing, or
 - From doing anything of that description



Reasonable steps defence

- Equality Act 2010 Code of Practice on Employment
 - Equality policy
 - Ensuring workers are aware of the policy
 - Providing equal opportunities training
 - Reviewing and updating the policy as appropriate; and
 - Dealing effectively with employee complaints



Helpful Hints



- Make sure your employees know what is expected of them in advance, and everyone knows what standards of behaviour are acceptable.
- If an incident happens, don't jump to conclusions – remember to follow your disciplinary procedures carefully including conducting a thorough investigation.
- If you don't want an employee back at work after an incident, consider whether or not you are justified in suspending them.
- Dismissal is more likely to be justified if the incident involves violence or harassment – dismissal for drunkenness alone is unlikely to be fair unless it is in front of clients.
- Get advice – it is far better to spend some time talking through the incident and what to do before taking the decision to dismiss.



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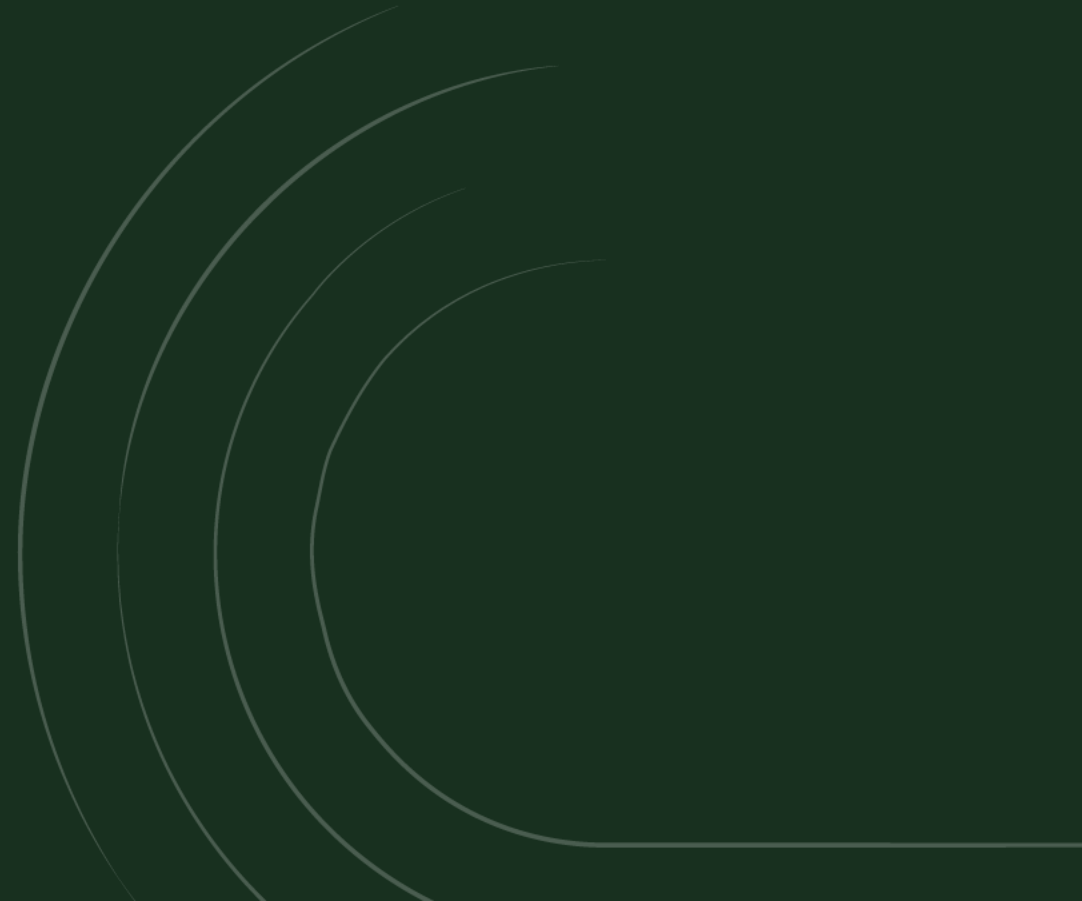


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Thank You

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