



Insolvent Employer – Liability of Others

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Insolvent Employer – Liability of Others

Claims where Employing Company:

- has insufficient assets
- is insolvent
- is a shell

Or risk of above before/after award

Claimant should look at liability of other employees or agents of Employing Company

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Secondary Liability for persons who *knowingly aid* discrimination:

-sections 32 and 33 of the Race Relations Act 1976

-sections 41 and 42 of the Sex Discrimination Act 1975

-sections 57 and 58 of the Disability Discrimination Act 1995

-Regs 25 and 26 of the Age Regulations 2006

-Regs 22 and 23 of the Employment Equality (Religion or Belief) Regulations 2003

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42.- Aiding unlawful acts.

(1) A person who *knowingly aids* another person to do an act made unlawful by this Act shall be treated for the purposes of this Act as himself doing an unlawful act of the like description.

Compare Equality Act 2010

s. 112 Aiding contraventions.

(1) A person (A) must not knowingly help another (B) to do anything which contravenes

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- The word “aids” bears no technical or special meaning: “a person aids another if he helps or assists him”: [Anyanwu and Another v Southbank Students' Union and Southbank University \[2001\] IRLR 305](#)
- “knowingly”: the secondary party knows that the party from whom his liability is alleged to derive is treating, or is about to treat, or is contemplating treating, someone “less favourably” ...and, with that knowledge or knowing that such treatment would be the likely result of doing so, he provides him with aid.”: [Hallam v Avery \[2000\] ICR 583, CA](#), Judge LJ

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- “aids” suggests some act of another actor is necessary so as to be aided
- Not in fact so due to relationship of “knowingly aids” with agency principles and vicarious liability:
 - Individual commits act
 - Individual’s act creates vicarious liability of Employer/Principal: s.41
 - Individual is treated as “aiding” the vicarious liability of Employer/Principal which derives from that Individual’s own act
 - So Individual liable for “aiding” own act: s.42(2)
- AM-v-WC and SPV

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Statutory vicarious liability (1)

41.— Liability of employers and principals.

(1) Anything done by a person *in the course of his employment* shall be treated for the purposes of this Act as done by his employer as well as by him, whether or not it was done with the employer's knowledge or approval.

(Equality Act 2010, s.109 (1))

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- “in the course of his employment” is wider than common law ambit of vicarious liability: Jones-v-Tower Boot Co.
- “employment” is not confined to contract for service/apprenticeship but extends to ... a contract personally to execute any work or labour” : s. 82 (1)

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Statutory vicarious liability (2)

41 (2)

Anything done by a person *as agent* for another person with the *authority* (whether express or implied, and whether precedent or subsequent) of that other person shall be treated for the purposes of this Act as done by that other person as well as by him.

(Equality Act 2010, s.109 (2))

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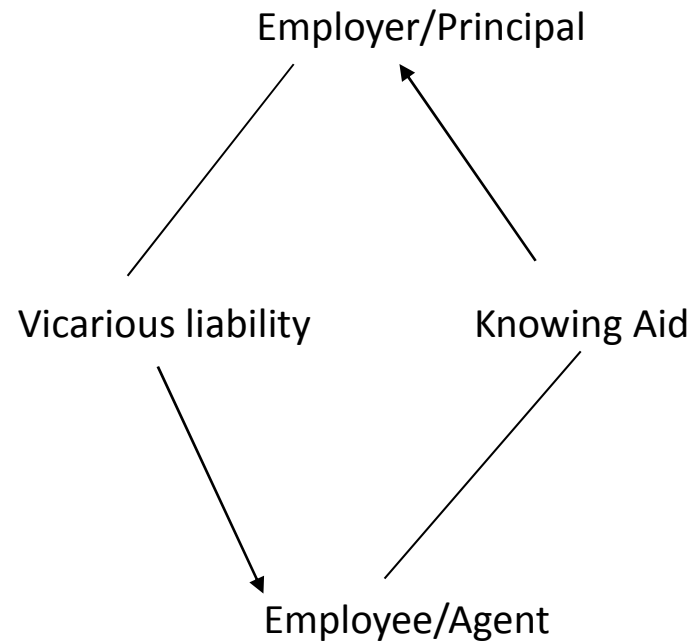
- the proper construction of [section 41\(2\)](#) is that the authority referred to must be the authority to do an act which is capable of being done in a discriminatory manner just as it is capable of being done in a lawful manner: Lana-v-Positive Action Training in Housing (London) Ltd
- The proper approach is to consider whether, when doing the discriminatory act, the discriminator was exercising authority conferred by the respondent.

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s. 42 (2) For the purposes of subsection (1) an employee or agent for whose act the employer or principal is liable under [section 41](#) ...shall be deemed to aid the doing of the act by the employer or principal.

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How Individual “aids” own acts of discrimination



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- Equality Act 2010, Part 8 –a more direct approach

110 Liability of employees and agents

(1) A person (A) contravenes this section if—

- (a) A is an employee or agent,
- (b) A does something which, by virtue of [section 109\(1\) or \(2\)](#), is treated as having been done by A's employer or principal (as the case may be), and
- (c) the doing of that thing by A amounts to a contravention of this Act by the employer or principal (as the case may be).

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- **Equality Act 2010**

111 Instructing, causing or inducing contraventions

- (1) A person (A) must not instruct another (B) to do in relation to a third person (C) anything which contravenes [Part 3, 4, 5, 6 or 7](#) or [section 108\(1\) or \(2\)](#) or [112\(1\)](#) (a basic contravention).
- (2) A person (A) must not cause another (B) to do in relation to a third person (C) anything which is a basic contravention.
- (3) A person (A) must not induce another (B) to do in relation to a third person (C) anything which is a basic contravention.
- (4) For the purposes of subsection (3), inducement may be direct or indirect.

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Joint and several liability

- Way-v-Crouch [2005] ICR 1632
- Miles-v-Gilbank [2006] ICR 12 (EAT) 1295 (CA)

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Way-v-Crouch (liability)

- Claimant was treated less favourably by Employer Respondent and Individual Respondent
- Individual Respondent dismissed her after she broke off her relationship with him
- Both Respondents therefore found liable for sex discrimination arising from dismissal
- Employer Respondent vicariously liable under s. 41
- Individual Respondent personally liable under s. 42(2) for his own acts on behalf of company

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Way-v-Crouch (damages)

- Tribunal made Individual Respondent jointly and severally liable
- Basis was that Individual Respondent was the MD and major shareholder in the Employer
- EAT confirmed power to make joint and several award
- EAT criticised Tribunal's reasoning
- Tribunal had failed to refer to the extent of the responsibility of each Respondent for the damage in question

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Way –v-Crouch (guidance)

- Factors to consider in making an award on a J&S basis:
 - J&S award unnecessary where Tribunal apportions liability between Respondents;
 - J&S award must only be made where the finding is that the Respondents are equally liable by reference to the extent of their responsibility for the damage in question
 - relative financial resources of Respondents is not a relevant factor

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Miles v Gilbank

- Claimant was subjected to detriment by Employer Respondent and Individual Respondent
- After becoming pregnant she was subjected to sustained campaign of discrimination and bullying
- Employer Respondent said to have been dissolved/struck off
- Individual Respondent was director and majority shareholder and directing manager
- Tribunal made joint and several award against Employer Respondent and Individual Respondent for injury to feelings
- EAT upheld the award on basis that Individual Respondent fostered culture of bullying targeted against Claimant and “made the company tick”
- CA upheld award

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Route to joint and several liability

Aider:

- is the controlling mind and will of the Employer
- is primarily responsible for the discriminatory conduct-his acts give rise to the vicarious liability of the Employer
- Same damage

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- **EQUALITY ACT 2010 Part 8 PROHIBITED CONDUCT: ANCILLARY**
- [s. 109](#) Liability of employers and principals
- [s. 110](#) Liability of employees and agents
- [s. 111](#) Instructing, causing or inducing contraventions
- [s. 112](#) Aiding contraventions

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Munchkins Restaurants-v-Karmazyn, UKEAT/0359/09/LA

- the Claimant, ...is entitled, if the award is joint and several, to receive the full extent of his award from any such of the Respondents as he chooses.
- As a matter of general approach, where there is more than one respondent to a claim we consider that a Tribunal will have to decide whether or not it is to make a joint and several award. In some cases the reason for it doing so will be obvious and need very little elaboration. This is one such case. Essentially Mr Moss was the company, so far as its behaviour towards these Claimants was concerned.