

Research Report

Research Memorandum

Subject: Employer Liability For Workplace Harassment

Jurisdiction: England and Wales

Generated: 27 April 2026

Statutory Framework

The legal regime governing employer liability for workplace harassment in England and Wales is statutory in origin, supplemented by common-law principles of vicarious liability.

Equality Act 2010 is the principal statute:

- **Section 26** defines harassment in three forms: unwanted conduct related to a protected characteristic (s.26(1)), sexual harassment (s.26(2)), and less favourable treatment for rejecting or submitting to such conduct (s.26(3)). The conduct must have the purpose or effect of violating dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment.
- **Section 13** prohibits direct discrimination ("because of" a protected characteristic).
- **Section 109(1)–(2)** imposes vicarious liability on employers for acts of employees done "in the course of employment" and on principals for acts of agents done with authority.
- **Section 109(4)** provides the "reasonable steps" defence: an employer is not liable if it took all reasonable steps to prevent the employee from doing the act or anything of that description.
- **Section 110** imposes parallel personal liability on the employee/agent.
- **Section 136** governs the burden of proof.
- **Section 40(2)–(4)**, which formerly imposed liability for third-party harassment, was repealed by the Enterprise and Regulatory Reform Act 2013.

Protection from Harassment Act 1997 provides a parallel civil and criminal regime: s.1 prohibits a course of conduct amounting to harassment which the defendant knows or ought to know amounts to harassment; s.3 confers a civil right of action; s.7 defines "course of conduct".

Worker Protection (Amendment of Equality Act 2010) Act 2023 (in force October 2024) introduces a new s.40A imposing a positive duty on employers to take reasonable steps to prevent sexual harassment, enforceable by the EHRC and through a tribunal compensation uplift of up to 25%.

The **Health and Safety at Work etc. Act 1974** and the implied contractual duty of trust and confidence provide further routes (constructive dismissal under the Employment Rights Act 1996 s.95(1)(c) where harassment is a fundamental breach).

Leading Authorities

✓ **Barclays Bank plc v Various Claimants** [2020] UKSC 13 (Supreme Court) — the leading authority on stage one of vicarious liability. Lord Reed PSC and Lady Hale held at [1] that vicarious liability requires a qualifying relationship and a sufficient connection between the relationship and the wrong. At [27], the central question is "whether the tortfeasor is carrying on business on his own account or whether he is in a relationship akin to employment". At [24], the Court confirmed that the recent trilogy (*Christian Brothers*, *Cox*, *Armes*) had not eroded the classic distinction between employees/those akin to employment and independent contractors.

✓ **Unite the Union v Nailard** [2018] EWCA Civ 1203 (Court of Appeal) — the leading authority on the scope of employer liability for harassment under s.109 EA 2010 and on third-party harassment. Underhill LJ held at [42] that s.109(2) effectively equates principal liability with the "course of employment" test for employees, and at [98]–[99] that, following the repeal of s.40(2)–(4), the EA 2010 contains no provision making employers liable for failing to protect employees against third-party harassment "as such".

✓ **Royal Mail Group Ltd v Efobi** [2021] UKSC 33 (Supreme Court) — the leading authority on the burden of proof in discrimination and harassment claims. Lord Leggatt JSC held at [26] that s.136(2) did not effect a substantive change to the prior law, and at [30] that the claimant retains the initial burden of proving on the balance of probabilities facts from which an inference of discrimination could properly be drawn.

✓ **Ferguson v British Gas Trading Ltd** [2009] EWCA Civ 46 (Court of Appeal) (Note: distinguished by [2016] EWCA Crim 550 and [2009] EWCA Civ 613 — verify treatment for any criminal-law application) — leading authority on corporate liability under the Protection from Harassment Act 1997. Sedley LJ held at [14] that conduct must be sufficiently grave to sustain criminal liability under s.2, at [42] that a company is fixed with knowledge of conduct known to its employees even if senior management is unaware, and at [51] that incorporation does not shield a company from harassment liability that would attach to a natural person.

Legal Framework

The authorities establish a tripartite framework for employer liability for workplace harassment.

(1) Statutory liability under the Equality Act 2010 is the principal route where the harassment is "related to" a protected characteristic. *Nailard* at [42] establishes that the test under s.109(2) is functionally equivalent to the common-law "course of employment" test: a principal "will be liable wherever the agent discriminates in the course of carrying out the functions he is authorised to do". Critically, Underhill LJ at [43] rejected any limitation that the act must be directed at a third party — liability extends to discriminatory acts within the scope of authorised functions whether directed at outsiders or fellow employees.

(2) Common-law vicarious liability under *Barclays* applies for harassment torts not within the EA 2010 framework (notably claims under the PfHA 1997 or for personal injury arising from harassment). The two-stage test from *Barclays* at [1] requires (a) a qualifying relationship of employment or "akin to employment" and (b) a sufficient connection between that relationship and the wrong. At [20], a non-employment relationship qualifies where the tortfeasor's activities are "an integral part of the business activities" of the defendant and are not "entirely attributable to the conduct of a recognisably independent business". At [29], the common-law concept is not aligned with the statutory definition of "worker".

(3) Direct corporate liability under the PfHA 1997 is established by *Ferguson*. At [33], corporate attribution is "a question of construction rather than metaphysics", determined by reference to the statutory purpose. At [42], the company is deemed to have knowledge of conduct within the knowledge of its employees, even

where senior management is ignorant. At [44], the "ought to know" test under s.1(2) is objective: the reasonable person is given the entire course of conduct and the victim's responses.

These three regimes interact. *Nailard* at [42]–[43] makes clear that statutory liability under s.109 EA 2010 is broader in some respects than common-law vicarious liability, because it includes principal/agent relationships and is enacted with its own definitional architecture. Conversely, *Barclays* at [29] keeps the common-law concept doctrinally distinct from statutory employment categories.

Competing Positions in the Authorities

On third-party harassment. *Nailard* at [98] holds that the "related to" language in s.26 EA 2010 does not impose liability on an employer for failing to prevent third-party harassment unless the employer's own conduct is related to the protected characteristic. Underhill LJ explained at [100] that the explicit repeal of s.40(2)–(4) in 2013 indicates Parliament's intention not to retain an implied equivalent. There is therefore a clear statutory gap where the only liability route for failure to prevent third-party harassment is direct discrimination on proof that the employer's own motivation was discriminatory (*Nailard* at [104]). The Worker Protection (Amendment) Act 2023 partially addresses this gap for sexual harassment specifically, but does not create individual rights of action.

On the burden of proof. *Efobi* at [26]–[27] resolved earlier uncertainty about whether s.136(2) had altered the substantive law. The Court held it had not: the claimant must still prove, on the balance of probabilities, the primary facts from which discrimination could be inferred (*Efobi* at [30]). At [46], a mere difference in protected characteristic and treatment is insufficient without more — the *Madarassy* threshold remains.

On corporate attribution. *Ferguson* at [33] adopts a purposive, statute-specific approach to corporate liability, rejecting any rigid "directing mind" requirement. At [51], Sedley LJ held it would be "remarkable" if incorporation could shield a company from liabilities applicable to natural persons. This sits comfortably with *Nailard*'s "course of employment" approach to s.109 EA 2010 but is doctrinally different — it operates through statutory construction rather than vicarious imputation.

On stage one of vicarious liability. *Barclays* at [18] re-emphasises that the five "incidents" identified in *Christian Brothers* are not a rigid checklist but are policy reasons; the touchstone is whether the relationship is "akin to employment" judged by its detailed features. At [27], the five incidents may be "helpful in identifying a relationship which is sufficiently analogous to employment" only "in doubtful cases".

Areas of Uncertainty

Reasonable steps defence under s.109(4) EA 2010. None of the grounded authorities engages with the application of s.109(4). The interaction between the s.109(4) defence and the new s.40A "reasonable steps" duty under the Worker Protection Act 2023 is not addressed in the grounded material — whether the standards are coextensive remains unsettled.

Stage two ("close connection") of vicarious liability. *Barclays* at [1] identifies the second stage but the grounded extracts focus on stage one. The application of stage two to harassment torts (particularly intentional sexual misconduct) is not covered in the grounded authorities and requires separate research.

Liability of trade unions and associations as principals. *Nailard* concerned a trade union's liability for elected lay officials acting as agents. The boundary of "authorised functions" in non-traditional employment relationships (gig economy, platform work, voluntary roles) is not resolved by the grounded authorities.

Course-of-conduct threshold under PfHA 1997. *Ferguson* at [14] sets the bar at conduct "of an order which would sustain criminal liability under section 2". The application of this threshold to workplace conduct (where some unpleasantness is endemic) is fact-sensitive and the grounded extracts do not provide workplace-specific guidance.

Current Position

The law on employer liability for workplace harassment can be stated as follows. An employer is statutorily liable under s.109(2) EA 2010 for harassment under s.26 (and direct discrimination under s.13) committed by employees in the course of employment, or by agents in the course of authorised functions, subject to the s.109(4) "reasonable steps" defence. *Nailard* at [42] confirms that this liability extends to acts directed at fellow employees, not merely third parties.

For harassment at common law (e.g. PfHA 1997 claims), the employer may be vicariously liable under the *Barclays* two-stage framework: a qualifying employment-or-akin-to-employment relationship plus a sufficient connection. *Barclays* at [24]–[27] reasserts the classical distinction between employees/those akin to employment and independent contractors.

Direct corporate liability under the PfHA 1997 is available (*Ferguson* at [42], [51]); the company is deemed to know what its employees know, and incorporation provides no shield.

In a discrimination/harassment claim, the claimant retains the initial burden of proof under s.136(2) EA 2010 (*Efobi* at [30]); a difference in characteristic plus a difference in treatment is insufficient without more (*Efobi* at [46]).

There is no statutory cause of action against an employer for failure to prevent harassment by a third party as such (*Nailard* at [98]–[99]), although the Worker Protection Act 2023 introduces a regulatory positive duty in respect of sexual harassment.

Significance of the Authorities

The vicarious liability landscape narrowed following *Barclays*: the Supreme Court rejected the more expansive trajectory some had read into *Christian Brothers* and *Cox*, reinstating the centrality of the employee/independent contractor distinction at [24]. For workplace harassment, this reinforces that the *primary* route to employer liability remains the EA 2010, with common-law vicarious liability as a complement rather than a free-standing alternative.

The third-party harassment position established by *Nailard* at [98]–[100] left a recognised gap that Parliament has only partially addressed by the Worker Protection Act 2023 — and only for sexual harassment, and only as a regulatory duty rather than a private cause of action. Practitioners advising on third-party harassment scenarios accordingly face a fragmented framework.

The burden of proof analysis confirmed by *Efobi* at [26], [30] and [46] disposes of the argument that s.136(2) made it easier for claimants to shift the burden — the *Madarassy* gloss survives, and tribunals retain considerable discretion at the inferential stage.

The corporate attribution principles in *Ferguson* at [42] and [51] remain important where claims are framed under the PfHA 1997 — for example, in cases of automated or systematic harassment by corporate processes. A Case Report on *Nailard* and the post-2013 third-party harassment jurisprudence would assist further analysis, as would dedicated research on stage two of vicarious liability post-*Barclays*.

Scope & Limitations

This memorandum does not cover the following, which require independent research:

- **Stage two of vicarious liability** ("close connection" / "field of activities" test): not addressed in the grounded authorities, but directly relevant where the harassment is committed outside formal duties (see authorities such as *Mohamud v Wm Morrison Supermarkets plc* [2016] UKSC 11 and *WM Morrison Supermarkets plc v Various Claimants* [2020] UKSC 12, neither grounded here).
- **The Worker Protection (Amendment of Equality Act 2010) Act 2023**: the scope of the new s.40A preventative duty, the EHRC's enforcement code, and the operation of the compensation uplift require dedicated research; none of the grounded authorities post-dates this reform.
- **Quantification of harassment awards**: injury to feelings (*Vento* bands), aggravated damages, and personal injury awards for psychiatric injury are outside the scope of this memo on liability.
- **Procedural matters**: limitation under s.123 EA 2010 (3 months from the act, "just and equitable" extension), ACAS early conciliation, and PfHA limitation under s.6 (6 years for civil claims).
- **Intersecting regimes**: constructive dismissal claims, whistleblowing detriment claims, and Health and Safety at Work Act enforcement, all of which may run in parallel with harassment claims.
- **Factual dependencies**: whether a given act is "in the course of employment" (s.109(2) EA 2010), whether a relationship is "akin to employment" (*Barclays*), and whether reasonable steps were taken (s.109(4)) are intensely fact-specific and would require evidential analysis beyond the present memo.

Crown Copyright Acknowledgement

Crown copyright material reproduced by permission of The National Archives. The contents of the judgment can be used under the [Open Justice – Licence](#).

The case law available through this platform only partially represents the activities of the courts and tribunals of the United Kingdom.

Disclaimer

This document has been generated by automated research tools to assist in locating and organising relevant case law. It does not constitute legal advice and should not be relied upon as a basis for legal decisions without independent professional review.

The content reflects information extracted from published court judgments and tribunal decisions. All citations, legal propositions, and paragraph references should be independently verified against the original judgment text, which remains the sole authoritative record.

Statutory references are subject to amendment and should be checked against current legislation.

Use of this document is subject to the full terms of service at [searchthe.law/terms](#).

About This Document

This Research Report was generated by the Search the Law platform ([searchthe.law](#)), powered by Casebound AI. The platform provides legal research tools that locate, organise, and cross-reference published court judgments and tribunal decisions. All authorities cited in this document are grounded against verified judgment texts, with paragraph-level references linking to the original judgments where available on [caselaw.nationalarchives.gov.uk](#).

This document has been intentionally branded to ensure it cannot be mistaken for an official court document or legal opinion.