Judgment in *Unite the Union v Nailard*

1. This short further submission has been prepared by Dr James Hand (Reader in Law) and Dr Panos Kapotas (Senior Lecturer), both at Portsmouth Law School, University of Portsmouth, following the judgment on 24 May 2018 in *Unite the Union v Nailard* [2018] EWCA Civ 1203 and focuses (as did Dr James Hand’s original submission) on the following issue identified in the Women and Equalities Committee’s call for written evidence in the light of that case:

- how workers can be better protected from sexual harassment by clients, customers and other third parties

2. The judgment in *Unite the Union v Nailard* states that “the availability of third party liability is a matter for Parliament, and the policy decision effected by the 2013 Act [the Enterprise and Regulatory Reform Act 2013] must be respected”.\(^1\) The reasoning behind this conclusion omits a number of points, which will be commented on briefly, before considering the effect of the conclusion.

3. Underhill LJ states that he does not “believe that Parliament can be treated as having introduced a careful and explicit scheme providing for third party liability notwithstanding that such liability was already implicitly provided for elsewhere.”\(^ii\) While it was an explicit scheme it does not appear, with respect, to have been careful and superfluity is not unknown.

4. As Underhill LJ notes, in *Equal Opportunities Commission v Secretary of State for Trade & Industry* [2007] EWHC 483 neither the EOC (ultimately) nor Burton J contended that the EC Directive imposed a requirement to make provision for third party liability and that both the EOC and the Government thought it desirable that there should be such liability does not “support the argument that there was an obligation to change the statutory language: if it was simply a matter of Government policy, it was a matter for the Government and not the Court to decide what should be done to implement it.”\(^iii\) However, the Transposition Note and Impact Assessment to the amending Regulations state that there was a requirement to allow third party liability as interpreted by the EOC case.\(^iv\)

5. Furthermore, as pointed out in the ILJ article “In a noteworthy foreshadowing of the alternative policy considerations in the Equality Bill, the section of the Impact Assessment, which requires detail of the various policy options considered and the justification of the preferred option, contains no mention of the third-party provision let alone any alternative
The Equality Bill Impact Assessment only considered three possibilities for the provision – leaving it as sex-specific provision, extending it across the protected characteristics and extending it to service providers. It did not consider the possibility of a fourth – i.e. deleting it as was later to happen – despite the Explanatory Memorandum to the 2008 Regulations stating that it had “always been the Government’s interpretation that such liability [i.e. employer liability for repeated harassment of an employee by third parties] was implicit in the existing legislative framework, as reflected in published guidance for employers and others” (a point also noted by the Government’s Counsel in EOC).vi

6. The confused origins of the third-party provision and the comparative lack of debate (not least due its original insertion through regulations) – and its unexplained highly restrictive nature – suggest that the third party provisions were not an example of a careful scheme. Furthermore, s.40(2)-(4) of the Equality Act 2010 imposed something akin to vicarious or secondary liability; the implicit protection is based, in contrast, on the employer’s action (or omission) in exposing to (and thus helping to create) the atmosphere and is thus a different sort of claim.

7. It would appear that Underhill LJ took the only interpretative tools available to him at this point as being those that will help to discover the true intent of Parliament. Regardless of what this true intent was (removing liability for third parties’ acts on the precise statutory scheme or removing the principle more widely including the distinct – and as argued above pre-existing liability – for exposing people to harm by third parties) we, in passing, would suggest such a restrictive interpretative approach is not necessary. It is, of course, true that Parliament has exercised its legislative authority very recently in this case and, as such, the weight attached to (and the judicial deference shown to) said authority should be significant. But this weight / deference cannot be extended to a point where such legislative authority is entirely unfettered. We would contend that such authority is constrained, both substantively and procedurally, for instance in cases where Parliament alters (amends or repeals) a lex specialis, in which case the exercise of that authority cannot automatically lead to the amendment of the underlying lex generalis. The same is true for cases where an amendment etc is contrary to norms of constitutional stature (as the HRA and, one might argue, the Equality Act). In this latter case, the judge would be well within her mandate - and, in fact, under obligation - to interpret the new legal landscape (post-amendment) in a way that compatibility with constitutional norms is ensured, even if that requires corrective action (through interpretation or, perhaps, through a declaration of incompatibility in cases of non-compliance with the HRA). In short, any assumption that a judge is effectively barred from considering other interpretative tools that may result in examining the consequences of the repeal systemically within a wider constitutional context is incorrect. It may be clearer for Parliament to amend legislation (as happened following the EOC case by regulations)vii rather than rely on interpretation but that is more likely to be preferable where a new principle is being inserted. Liability arising from exposure to third parties’
behaviour (as opposed to some sort of vicarious liability for third parties) is not, as argued, such a new principle.

8. With regard to superfluity, that is an element of the apparent lack of care. The explanatory memorandum makes clear that the Government thought such liability was implicit beforehand, notwithstanding any decision in EOC. Burton J thought that such liability would occur in the precipitating case (as did Dinah Rose, QC and Lord Pannick, QC). The government in justifying the restrictive nature of the combined discrimination provision (whereby intersectional discrimination was limited to two) claimed that additional claims could be brought in the alternative. Furthermore, the Equality Act 2010 explicitly rules out harassment sitting alongside discrimination by defining detriment as excluding conduct which amounts to harassment, and excludes direct sex discrimination where the special pregnancy/maternity provisions apply, and there is no express exclusion with regard to third parties.

9. Notwithstanding the apparent flaw in the premises behind the conclusion, the Court of Appeal has adopted the more restrictive line from Conteh v Parking Partners Ltd [2010] UKEAT 0288_10_1712 rather than the more liberal approach adopted by the then President of the EAT in Sheffield City Council v Norouzi [2011] IRLR 897. Accordingly, pending any appeal on that point to the Supreme Court, it may be necessary for Parliament to take the lead requested by Underhill LJ and seek to insert a provision to protect third parties where the harassment is related to a protected characteristic but the exposure to it is, under Nailard, not so related.

10. Such a provision should not take the form of s.40(2)-(4) of the Equality Act 2010 for the reasons given in the original submission (by Dr James Hand) but one which extends further, does not require two previous instances per claimant, but which protects employers who act reasonably through for example s.26(4) or amended provisions. Underhill P as he then was noted in Sheffield City Council v Norouzi [2011] UKEAT 049710/1406 that “There are environments—including prisons, homes such as we are concerned with in the present case, and, regrettably, some schools—where employees may be subjected to a level of harassment on a proscribed ground which cannot easily be prevented or eradicated. In such cases the employer should indeed not too readily be held liable for conduct by third parties which is in truth a hazard of the job...”. What is reasonable should be and is context specific. Underhill LJ states in Nailard that he would “be uneasy about a situation where such liability was incurred not only by the employer but also by any individual employee who might be implicated in the failure to afford adequate protection” and s.110 Equality Act may need to be amended to avoid such ‘negligent exposure’ to harassment being caught (whereas if there is discriminatory animus the employee should continue to be potentially liable).
11. Following *Nailard*, employers may continue to be liable where they discriminatorily expose their employees to harassment by third parties but not where their action or omission (untainted by discriminatory intent) exposes their employees to e.g. sexual or racial harassment by third parties. Rather than focus on the harm done and what (if anything) could have reasonably been done to prevent it, the test will be what was in the mind of the employer at the time. Subject to any appeal in *Nailard*, it has now fallen to Parliament to refocus that test.

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1 *Unite the Union v Nailard* [2018] EWCA Civ 1203, [101]
2 *Unite the Union v Nailard* [2018] EWCA Civ 1203, [100]
3 *Unite the Union v Nailard* [2018] EWCA Civ 1203, [96]
7 And, for example, following *Attridge Law LLP & Anor v Coleman* [2010] ICR 242 initially through judicial insertion in that case and then through the Equality Act 2010
8 E.g. para 37 of *Equal Opportunities Commission v Secretary of State for Trade & Industry* [2007] EWHC 483 citing para 70 of David Pannick’s skeleton
9 Equality Act 2010, s.212(1)