

# A statutory defence for discrimination: s.109(4) Equality Act 2010 *Allay (UK) Limited v Gehlen*

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## Summary

1. s.109(4) EA 2010 provides a statutory defence for an employer when discrimination has been found if they took “all reasonable steps” to prevent that or similar discrimination. It is a rarely used defence and it is even more rare to have an appellate case providing guidance, but [Allay \(UK\) Limited v Gehlen \[2021\] UKEAT 0031\\_20\\_0402](#) (Unreported, 4 February 2021) clarifies what is meant by “all reasonable steps”, exploring permissible and impermissible considerations to meet the high threshold set by s.109.
2. In summary:
  - a. Whether a step would have prevented discrimination is a relevant factor but not solely determinative.
  - b. The time, effort, expense and other practicalities required by taking a step can be considered as to whether a step is “reasonable”.
  - c. The quality of preventative measures is particularly significant. Training should not simply be a tick box exercise but thorough and refreshed when necessary.
  - d. What happens after the steps have been taken can determine reasonableness, such as whether there is discrimination and whether it is reported.
3. In this article, references in square parenthesis are to paragraphs of the *Gehlen* judgment.

## The Facts

4. The Tribunal found that the Claimant suffered harassment related to his race of “Indian origin” due to regular comments, including that he should work in a corner shop, references to his brown skin and “to the claimant driving a Mercedes car like all Indians and [asking] why the claimant was in the country” [7]. The perpetrator foolishly saw this as “racial banter” [7].
5. The Respondent relied upon s.109(4), which provides:

“(4) In proceedings against A’s employer (B) in respect of anything alleged to have been done by A in the course of A’s employment it is a defence for B to show that B took all reasonable steps to prevent A-

  - (a) from doing that thing, or
  - (b) from doing anything of that description.”
6. The Tribunal therefore had to consider what steps had been taken and in this case, the adequacy of previous training. They held that the training was old, “stale” and “patently needed to be refreshed and it would have been a reasonable step to do so”, therefore the defence failed. The employer appealed on the basis that “it was unlawful/perverse for the Tribunal to fail to properly engage with the statutory defence at section 109(4)” [16].

## What does “all reasonable steps” mean?

7. The starting point in the EAT’s analysis was that “it is for the employer to establish the defence; the burden of proof falls fairly and squarely on the employer” [21; 52].
8. The EAT first considered the EAT decision of *Canniffe v East Riding of Yorkshire Council*<sup>1</sup> and summarised the three stage test that should be applied:
  - “1) identify any steps that have been taken
  - 2) consider whether they were reasonable
  - 3) consider whether any other steps should reasonably have been taken” [25]

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<sup>1</sup> [\[2000\] IRLR 555](#)

9. A key issue discussed was the relevance of whether a step was effective:
- a. The appeal had wrongly suggested that “effectiveness must be irrelevant to the test of reasonableness”, described by the EAT as a “brave submission” [32]. To the extent *Canniffe* can be interpreted in support of the appeal’s submission, this is wrong.
  - b. Instead, the later CoA decision of *Croft v Royal Mail Group plc*<sup>2</sup> is to be preferred that made it clear that effectiveness of a step is a relevant factor. In a statement offering slight reprieve for an employer in this area, the CoA held “In considering what steps are reasonable in the circumstances, it is legitimate to consider the effect they are likely to have. Steps which require time, trouble and expense, and which may be counterproductive given an agreed low-key approach, may not be reasonable steps if, on an assessment, they are likely to achieve little or nothing.” [26]
  - c. The bar is not so high though to denote that only those with 50+% probability of being effective can be considered reasonable, as *Gehlen* summarises “While the likely effectiveness of the further steps is relevant, it certainly is not necessary to conclude that it would be more likely than not to prevent discrimination of the type being considered, although it is unlikely that a further step would be considered reasonable if it had no realistic prospect of preventing discrimination.” [39]
  - d. Effectiveness is not the sole determinative factor, per *Croft*: “I agree that a consideration of the likely effect, or lack of effect, of any action it was submitted the employers should have taken is not the sole criterion by which that action is to be judged in this context” [26].
  - e. Finally, the burden remains on the employer throughout and that includes on this point of effectiveness, “If an employer wishes to rely on the section 109(4) defence by contending that although further steps could have been taken, they were not reasonably required because they would have been bound, or very likely, to be ineffective; the burden would rest on the employer to establish that was the case, as the burden in establishing the defence rests firmly on the employer”. [52]
10. How are reasonable steps to be assessed:
- a. As ever, all cases are dependent on their own specific facts.

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<sup>2</sup> [\[2003\] ICR 1425](#)

- b. *Croft* reminds us that the vagueness of “reasonableness” is a concept that employment law is well used to tackling, “The concept of reasonable practicability is well known to the law and it does entitle the employer in this context to consider whether the time, effort and expense of the suggested measures are disproportionate to the result likely to be achieved.” [26]
- c. Cost and practicalities are relevant but the EAT’s emphasis that this is only “when appropriate” highlights that very often the low cost and disruption associated with training will not prevent such training being a reasonable step, per *Gehlen*, “The determination of whether further steps are reasonable may, when appropriate, include considerations such as the cost or practicality of taking the steps” [39].
- d. The length and thoroughness of any training is likely to be relevant, from *Gehlen*:
  - i. “Brief and superficial training is unlikely to have a substantial effect in preventing harassment. Such training is also unlikely to have long-lasting consequences. Thorough and forcefully presented training is more likely to be effective, and to last longer.” [35]
  - ii. “It is not sufficient merely to ask whether there has been training, consideration has to be given to the nature of the training and the extent to which it was likely to be effective. If training involved no more than gathering employees together and saying "here is your harassment training, don't harass people, now everyone back to work", it is unlikely to be effective, or to last.” [37]
- e. Whether discrimination later occurs is likely to be relevant as it may demonstrate the poor quality of the training that had previously been provided and this applies irrespective of whether managers are aware:
  - i. “The fact that employees have attended anti-harassment training but have not understood it, or have chosen to ignore it, may be relevant in determining whether all reasonable steps have been taken to prevent harassment.” [38]
  - ii. “Firstly, if management become aware that despite such training employees are continuing to engage in harassment, or demonstrating that they do not understand the importance of preventing it and reporting it to managers, this may serve as a notification to the employer that they need to renew or refresh the training.” [38]

- iii. “The fact that harassment takes place after such training, even if unknown by the management at the time, may provide some evidence that demonstrates the poor quality of the training that was provided, particularly if it is not only the alleged harasser who did not understand the training, or act on it, but that was also the case with other employees.” [38]
- f. If however a wayward employee receives adequate training but then nevertheless commits discrimination, there is a possibility that the defence can still be relied upon:
  - i. “There might be circumstances in which an employee has undergone training but is contemptuous of it and continues to harass. If the training was of a good standard and the employer was unaware of the continuing harassment, the defence might be made out.” [49]
- g. Finally, an employer must turn their mind to when refresher training and follow up action is needed:
  - i. “Where an Employment Tribunal considers training should have been refreshed it may be important to determine how regularly such refresher training should have been provided. However, if it is clear that training has not been effective, further action will be required, even if refresher training would not usually have been provided within such a timescale”. [46]

## The Result

11. Considering the facts of *Gehlen* and whether “all reasonable steps” had been taken, the EAT had no problem in dismissing the appeal and finding that all reasonable steps had not been taken. The specific facts relevant to this view were:
- a. “The equal opportunities policy does not make any reference to harassment. The anti-bullying and harassment procedure only refers to harassment in the title; the document thereafter only refers to bullying, and makes no mention of race”. [43]
  - b. “We were provided with the PowerPoint slides from the training that defined harassment as “behaviour which is intended to trouble or annoy someone, for example repeated attacks on them, or attempts to cause them problems” and which gave an example of harassment as “offensive

jokes, suggestive or degrading comments". There was no reference to race or racial stereotypes." [44]

- Practitioners will note of course that that the Equality Act does not define solely in relation to intention but also "effect".
- c. "Overall, the policies and training do not appear to have been very impressive, even for a relatively small employer". [44]
- d. "The training had been delivered around one year and eight months before the Claimant began his employment". [45]
- e. The failure of colleagues to report the discrimination once notified was evidence that the training had indeed been "stale" and ineffective, "The tribunal held that a colleague had heard Mr Pearson make a racist comment but did not report it to HR or management. David Armstrong, the Customer Services Manager, had been told by the Claimant that Mr Pearson had made racist remarks. Although he told Mr Pearson to report the matter to HR, he did not himself take any further action." [48]
- f. The very fact there had been harassment after the training demonstrated its ineffectiveness [49].
- g. On further steps, the Respondent was hung by its own rope because it had provided later training, "there was nothing in this case to suggest that further training of a good standard would not have had a good chance of being effective. Indeed the employer did provide Mr Pearson with further training after the event. They must have thought that it was likely to be effective. Further, there was no reason to consider that refresher training would not have been effective to prevent managers taking action when they were made aware that harassment was occurring" [52].

## Conclusion

12. An employer relying upon s.109(4) has to meet a "high threshold" [42]. It is not that simply some reasonable steps have to have been taken, but "all reasonable steps". *Gehlen* reinforces this high threshold and reminds us that the defence "is designed to encourage employers to take significant and effective action to combat discrimination".

13. Relevant factors as to whether steps are reasonable include:

- a. Effectiveness, but this is not the sole factor. Note though that a reasonable step is not only those that are more likely than not to prevent discrimination.
  - b. The time, effort, expense and other practicalities required.
  - c. The length and thoroughness of any training.
  - d. Whether discrimination occurs after the steps had been taken.
  - e. How employees react to reports of discrimination once raised.
  - f. Whether refresher training has been given and when this occurred.
14. An employer's primary aim in this field should be to prevent discrimination occurring in the first place. By implementing good quality, thorough training that is understood by staff and refreshed when needed, this will hopefully prevent discrimination. As a by-product, these steps will also assist employers if faced with a discrimination claim and seeking the protection of s.109(4).
15. An employer seeking to rely upon s.109(4) needs to of course consider the practical realities of such a line of defence. Notably, it may lead to a conflict between the employer and the alleged perpetrator and require separate representation in Tribunal.

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