May 2011

Review

Employment

Employer liable to ex-employee for negligent email

It is well established that employers must be careful about what they say about ex-employees when giving references. But now the High Court has said in ***McKie v Swindon College*** that they need to exercise similar care in other communications also. A failure to do so could give rise to a claim for damages for negligent misstatement.

Mr McKie was employed by Swindon College. When he left in 2002 he was provided with a glowing reference. In 2008 he took up a role with the University of Bath which involved his visiting Further Education colleges, including his former employer, Swindon College. Within a few weeks of Mr McKie's starting work at the University, Swindon College's new HR Director sent an email to his opposite number at Bath saying that the College would be unable to allow Mr McKie on to its premises because it had "real safeguarding concerns" for its students and there had been "serious staff relationship problems" during Mr McKie's employment at the college. Following its receipt of this email, the University dismissed Mr McKie on the basis that he would be unable to carry out his role there if Swindon College did not want him on its premises or dealing with its students.

"The Court was prepared to extend the duty of care to other statements made by a former employer"

Mr McKie was left in something of a hole. He denied all of the allegations (indeed, was unclear even as to what he was said to have done), but was unable to bring unfair dismissal proceedings against Bath University because he had less than a year's service. He therefore sued Swindon College in the High Court instead, claiming that the email it sent to Bath University constituted a negligent misstatement. He pointed out that no "safeguarding concerns" had ever been raised with him during his time at the College and no disciplinary action had ever been taken (or indeed even threatened) against him. In his view Swindon was liable to pay him damages for the financial loss he had suffered as a result of losing his job at Bath.

In order to succeed in his claim Mr McKie had to show that (a) Swindon College owed him a duty of care, (b) it had breached that duty, (c) its breach had caused him to suffer loss, and (d) this loss was foreseeable.

He argued first that the email in question was effectively a reference, as it is well established that an employer owes a duty of care when providing references to prospective employers. The High Court disagreed - this was not a reference case, as the email had nothing to do with his appointment and Bath University had not relied on it when deciding whether to offer him a job. Nonetheless, the Court was prepared to extend the duty of care to other statements made by a former employer. The Court said that a duty of care had been triggered because:

(a) the damage which occurred was foreseeable – Swindon College accepted in evidence that it knew its email might (that's putting it mildly) have an impact upon Mr McKie's employment position at Bath University;

(b) there was a sufficiently proximate relationship between the parties – the High Court said that Swindon College had effectively brought about the relevant degree of proximity. It knew who it was dealing with, had referred to previous dealings with him and had chosen to communicate this information with a third party. The mere fact Mr McKie had left its employment some six years ago did not mean the relationship was no longer sufficiently close to give rise to any sort of duty of care; and

(c) anyway it was fair, just and reasonable in all the circumstances to impose such a duty.

Second, in relation to breach, was the information provided correct? Clearly High Court Judges must be appropriately measured in their language, but as an example of a party to a case being given both barrels by a Judge well beyond the point of mere loss of patience, this judgment has few equals. There was nothing but assumption and Chinese whispers to support the suggestion of misconduct on Mr McKie's part. The College would have seen the writing on the wall at the latest at the point where the Judge said in rejecting an allegation that Mr McKie had disliked his students: "I have no doubt that he expected high standards of his students. I am sufficiently old-fashioned not to find that to be a matter for criticism but rather to be lauded", and this would have been confirmed by the finding that a key point for the College was not just unproven (which would have been enough to dispose of it) but "completely and utterly unproven". Now there is a man enjoying his work.

The third and fourth hurdles were cleared by Swindon's own admission in evidence that the dismissal and consequent losses were foreseeable, so that was it and Mr McKie won his case.

Mr McKie's claim was a novel one, as his situation was not covered by previous case law. By upholding it, the High Court has effectively extended the existing boundaries of employer liability. This decision means that employers have to be careful about what they say about ex-employees not just in references but in all communications with third parties, for example a credit reference agency, the FSA or other regulatory body, a Court or similar. Any such statements should always be supportable by evidence. This decision therefore extends into the negligence arena procedures which employers should already have in place to protect against claims of post-employment discrimination or victimisation in the making of comments about former staff.

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