

Employment

Gone but not forgotten

Do employers owe a duty of care to ex-employees, ask **Michael Salter & Chris Bryden**



IN BRIEF

- *McKie v Swindon College* has extended the obligations owed by an ex-employer to an ex-employee when commenting on his performance.
- Ex-employers should review the way that they communicate with those that employ ex-employees.

Implied into every contract of employment is a mutual duty of trust and confidence between the employer and the employee. One aspect of this duty is that where an employer agrees to provide a reference for their employee such reference will be fair and reasonable. A breach of the duty of mutual trust and confidence will entitle that employee to resign and claim constructive dismissal.

Obligations to ex-employees

The ending of an employment relationship does not necessarily mean that the ex-employer's obligations to their ex-employee have ended. For instance an ex-employer is likewise not obliged to give a reference for an ex-employee. However in many situations, one will be provided. There are risks however in so doing, even after the ending of the employment relationship. Readers will be familiar with the House of Lords' decision in *Spring v Guardian Assurance plc* [1994] 3 All ER 129, [1994] ICR 596, where their lordships, in a majority decision (Lord Keith dissenting), held that an employer owes a duty of care to an employee for whom he writes a reference. This duty subsists even after the relationship of employment has come to an end. A breach of this duty can give rise to a claim in damages. Alternatively claims of malicious falsehood or libel may

in certain circumstances arise (provided that the claimant can establish malice, and get around the obvious defence of qualified privilege).

The obligations owed by the ex-employer to the ex-employee in respect of references may have been extended somewhat by the decision in *McKie v Swindon College* [2011] EWHC 469 (QB), [2011] All ER (D) 128 (May) on 11 February 2011. His Honour Judge Denyer QC in the Bristol District Registry of the High Court addressed a situation that was not covered by existing authority; namely where an ex-employer imparts information, other than by way of a reference, to a present employer, what duty, if any, does the ex-employer owe to the ex-employee?

McKie v Swindon College

The case involved McKie and his ex-employer Swindon College. McKie had left Swindon's employment in 2002. He left on good terms, in fact receiving a glowing reference from his head of department, amongst other people. Witness evidence satisfied the learned judge not just on the balance of probabilities but so that he was sure, that, during his time at Swindon College, McKie "was a well-regarded, highly respected member of staff. There were no complaints about him. No student

complained about him. There were no disciplinary matters referable to him at all. In a word [sic], an exemplary professional" [para 10].

In 2008 McKie had just commenced new employment at the University of Bath. This role would involve McKie attending Swindon College's premises. The head of human resources of the defendant sent the University of Bath an e-mail that indicated they had "very real safeguarding concerns for our students and there were serious staff relationship problems during his employment at this College. No formal action was taken against Mr McKie because he left our employment before this was instigated". [para 15]. The e-mail went on to state that Swindon believed that similar problems had occurred at Bath College, McKie's next employer. The learned judge found these allegations to be "largely fallacious and untrue". [para 16].

As a result of this e-mail the claimant was dismissed. He did not have sufficient continuous employment in which to present a claim of unfair dismissal against the University of Bath.

What cause of action?

One issue to consider was what cause of action could McKie rely upon to found his claim. The dissemination of the information in the e-mail was not a reference, and so did not fall within the category of claim identified in *Spring*. The judge also rejected the attempt to amend the claim to one of breach of an implied term of the contract of employment between Swindon College and McKie, and while Swindon College clearly owed the university a duty of care under the principles established by the House of

Lords in *Hedley Byrne v Heller* [1964] AC 465, [1963] 2 All ER 575, the university did not commence litigation; indeed one would wonder why, in such circumstances they would seek to do so.

Having considered what he termed “a bit of basic law” [para 38] the judge turned to the leading case of *Caparo Industries Plc v Dickman & Ors* [1990] 2 AC 605, [1990] 1 All ER 568. He found that there was foreseeability of damage; that there existed between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of “proximity” or “neighbourhood”; and that the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope upon the one party for the benefit of the other. Here the claimant lost his job and the salary that went with it; the evidence from Swindon College was that they realised the e-mail may have an impact upon his employment, and so the foreseeability of harm was established, and that while some six years had passed since McKie was employed by them the mere fact of that passage of time was not enough to defeat an argument that the two parties were still in a proximate relationship. Finally the judge

found that it was fair, just and reasonable to impose this obligation on Swindon College.

Liability under PHA 1997?

Widening the scope of obligations on employers in this way may only be the start of a move towards imposition of liability in wider circumstances. While this communication was in writing, there is nothing preventing the same principles applying to verbal communications. Further, the authors cannot see why, if the ex-employer repeats the communication they could not be in breach of the Protection from Harassment Act 1997 (PHA 1997), which requires a course of conduct that causes harassment, alarm or distress and, since *Veakins v Kier Islington* [2009] EWCA Civ 1288, [2009] All ER (D) 34 (Dec), focuses on the purposive intention of PHA 1997 and away from the belief that in order to trigger liability under the Act the actions alleged to be a breach of PHA 1997 had to be worthy of criminal prosecution. Post-*Veakins* the quality of the conduct does not have to reach such a high standard, and must merely be oppressive and unreasonable.

Indeed, the authors have previously argued that damages for breach of PHA 1997 should

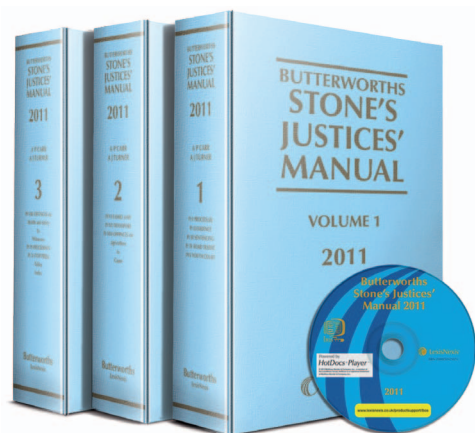
include those for injured feelings akin to those awarded by the employment tribunal in cases of discrimination, and which can (in appropriate cases) give rise to awards of up to £30,000 (158 NLJ 7320, p 652). In the absence of any personal injury such losses would be extremely difficult to claim under normal negligence principles. Until there is any authority on just how to assess non-personal injury damages under PHA 1997 those advising claimants might wish to consider bringing claims under the Act in the alternative to those claims under the principle identified in *McKie*.

One waits to see if Swindon College will appeal this decision. If they do not, or the appeal is unsuccessful, the decision does give fresh impetus for employers to review their policies governing communications (e-mail, computer, telephone etc) as well as disciplinary codes, as careless, informal talk certainly could cost the employer money if their staff make unwise or incorrect statements about ex-colleagues. NLJ

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