Take care when giving information about ex-employees

When an ex-employer provides information to a third party about an ex-employee, that ex-employer owes a duty of care to the ex-employee regardless of whether or not the information is a formal reference. McKie v. Swindon College [2011] EWHC 469 (QB)

Facts

Mr McKie ("C") worked for Swindon College ("Swindon") as a senior lecturer and manager. He left that employment in 2002 (with glowing references). He worked for other academic institutions over the years, but took up employment with Bath University ("Bath") in May 2008 as Director of Studies in the Division of Lifelong Learning. That post necessitated his liaising with and visiting Swindon.

A few weeks after C started work for Bath, Swindon sent an email to Bath which said that Swindon would not accept C onto their premises due to issues which had arisen during C's employment with Swindon.

The judge found the allegations of such issues to be without foundation. The evidence satisfied him "not simply on the balance of probabilities, but so that I am sure, that during his time at [Swindon], the claimant was a well-regarded, highly respected member of staff." He was described as an "exemplary professional". The judge also found that the circumstances surrounding the sending of the email "flouted elementary standards of fairness, diligence, proper enquiry, natural justice":- there was no proper investigation of the assertions in the email before it was sent.

As a result of the email, Bath summarily dismissed C.

The approach to the case

C had no claim for unfair dismissal against Bath because he lacked qualifying service (although the judge found that the dismissal was unfair).

In a claim against Swindon in defamation, Swindon would have asserted that the email was covered by qualified privilege (which applies not only to formal references, but to any situation in which there is reciprocity of interest in the sending and receiving of information).

Accordingly the claim was brought in negligence, C alleging that there had been no proper investigation before the email was sent and that the lack of investigation and the falseness of the content of the email constituted a breach of Swindon's duty of care to him.

Law

Spring v. Guardian Assurance PLC & others [1995] 2 AC 296 established that an ex-employer owes a duty of care to an ex-employee in the provision of a reference to a new employer. Swindon's argument was that the email was not a reference and therefore no duty of care was owed. The judge accepted that the email was not a reference, so attention turned to whether or not a duty could be owed for information provided by an ex-employer to a new employer in these circumstances. Swindon's position was that the email was sent to set out their position vis-à-vis C. It was not solicited (by C or Bath) as a reference to determine whether or not C ought to be employed, and accordingly no duty ought to be owed for the pure economic loss suffered by C.

Foreseeability

The judge found that it was foreseeable that the email would cause C to lose his job. In the event this was not a difficult decision, the sender of the email accepting in cross-examination that it was inevitable that the sending of the email would impact on C's employment.

Proximity

Their Lordships in Spring did not face a problematic case on proximity. In that case the reference was given very shortly after the cessation of the employment relationship. Here, however, the judge was concerned with a 6 year gap. The speeches in Spring suggested that lapse of time reduced proximity. How was the judge to decide whether or not sufficient proximity continued to exist between Swindon and C? He accepted the argument that by providing information in relation to the ex-employee, Swindon effectively self-certified that a relationship of sufficient proximity continued to exist. A time must come when an employer is entitled to say "that employee left too long ago – I have nothing to say about him/her". If, however, an ex-employer chooses to give information which relates to an ex-employee, it should be remembered that that information is in the ex-employer's knowledge due to the previous employment relationship (which gives the ex-employer some special knowledge of the ex-employee).

Fair, just and reasonable

The judge was influenced by the fact that if he found that no duty was owed, a plainly wronged man would be left without a remedy.

Incremental approach

Whilst expressing caution over extending the ambit of the law of negligence, the judge determined that it was appropriate to do so.

Causation

As a side-note, Swindon also argued that even if the allegations in the email were false (which they were), it was true that Swindon would not allow C onto their premises, and it was that fact which led to C's dismissal by Bath. The judge rejected that argument, finding that the totality of the email drove Bath's decision.

Repercussions

It is important not to get carried away. This is not authority for the proposition that an employer owes a duty of care in relation to anything which (s)he says about an ex-employee to a third party. There are limits. The ambit of those limits will no doubt be tested in future cases. Some guidelines must include the following:-

- It is axiomatic that foreseeability of loss will always need to be established. That means that the information must be passed to someone whose actions might lead to loss to the subject of the information.
- The information should arise from special knowledge which the ex-employer has (or purports to have) about the ex-employee arising from the employment relationship.
- The information should not be provided in so casual a way as to negative the existence of a duty of care.

Employers should remember that they are in control of information. The duty is not onerous. It is simply that if an ex-employer is to provide information about an ex-employee to a third party (when getting it wrong might foreseeably cause loss to the ex-employee), the ex-employer must take reasonable care. That means simply that a reasonable enquiry must be made before information is sent, the employer taking reasonable care to ensure that it is accurate. An employer does not have to send information. Fear of claims has already led to the unfortunate position that many employers provide only minimal details about ex-employees as a matter of policy. It is open to an employer to say that too much time has passed for them to be able to comment. How long is "too long" is up to them.

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