

Many a false word written in haste

Introduction

The case of *McKie v Swindon College* acts as a reminder of the dangers of email. In this case, careless and untrue remarks made in an email by Swindon College about an ex-employee, Mr McKie, had serious repercussions, for both parties.

Background

Following remarks in an email that gave Mr McKie's employer, the University of Bath, grounds to question his suitability for the role, he was dismissed. Not having the requisite length of service to bring a claim for unfair dismissal, he brought a claim against Swindon College, his ex-employer and the provider of the email, for negligence.

Facts

Mr McKie was employed by Swindon College from 1994 to 2002, following which he worked for another two educational institutions, before accepting a position at the University of Bath in 2008. That role involved him liaising with other further education colleges, including Swindon College. Around three weeks after Mr McKie had started work at the University of Bath, the Human Resources Manager at Swindon College, Mr Rowe, wrote to his counterpart at Bath University, advising that they would not allow Mr McKie on their premises due to "very real safeguarding concerns for [their] students." The email also referred to "serious staff relationship problems during his employment." Mr Rowe had not known Mr McKie while he worked at Swindon College and nor had the alleged sources of the criticisms. Following receipt of the email, the University of Bath dismissed Mr McKie. He issued proceedings against Swindon College.

Decision

During the trial, Swindon College was unable to put forward any evidence to challenge several glowing testimonials that were made by former colleagues of Mr McKie, and it emerged that he had never been the subject of disciplinary action (nor threatened disciplinary action) and had been promoted twice. In the circumstances, the Judge found that Mr McKie had been "an exemplary professional" and that the contents of the email were "largely fallacious and untrue."

The Judge also criticised the procedure that Swindon College had adopted, which had given rise to the sending of the email, which he described as slapdash, sloppy and "failing to comply with any sort of minimum standards of fairness", particularly given that Mr Rowe had no personal knowledge of Mr McKie.

The Judge went on to consider whether Swindon College was guilty of negligent misstatement. The essence of this type of claim is that where a special relationship exists, a person owes a duty of care not to make a negligent misstatement to another who may be reasonably expected to rely on it, to his/her detriment. The Judge found that this was not a typical negligent misstatement case since it was the University of Bath which had acted on the information supplied to it but it had not suffered any detriment. Nor was this a typical reference case since the email had not been solicited by or relied upon by Bath University and had nothing to do with Mr McKie's appointment. Despite there being no previous case-law precisely on this point, the Judge decided that it was appropriate to extend the principles of negligent misstatement to this case. However, in so doing, he had to establish that Swindon College owed Mr McKie a duty of care in relation to the information contained in the email.

He did this by answering the following questions:-

1. Was the damage caused to Mr McKie (i.e. the loss of his job) foreseeable?

Unsurprisingly, given that Mr Rowe himself accepted that it was blindingly obvious that the email that was sent would have an impact on the Claimant's employment, the Judge found that it was.

2. Was there sufficient proximity between Mr McKie and Swindon College?

Perhaps surprisingly, the Judge found that there was, despite the six years that elapsed between him leaving and the email being written. Swindon College knew who they were dealing with, they claimed to rely on historic evidence and they chose to communicate that information to a third party.

3. Had the damage suffered by the Claimant been caused by the Defendant.

Swindon College argued that the reason for the dismissal was not in fact the email but the fact that they would not allow Mr McKie onto their site. The Judge disagreed, finding that it was the whole of the email, not just the single line about banning him from the premises, which was the cause of the University of Bath sacking Mr McKie.

4. Was it fair, just and reasonable in the circumstances of this case to impose a duty of care?

Where Mr McKie had been clearly and obviously wronged, he should have a remedy, and therefore this test was satisfied.

Conclusion

Since the case of *Guardian v Spring Assurance*, it has been well established that ex-employers can be liable for damage caused by negligent references about their former employees. However, this case has extended that principle significantly and means that an employer may be liable to a former employee for damages for negligence when communicating about him/her in any form and in any context, even several years after the employee has left.

This case demonstrates that it is imperative that members of staff should be aware that they should never make comments (whether solicited or unsolicited) in relation to an ex-member of staff, to a third party, without checking with their HR department first that it is appropriate to do so.

The number of people authorised to make comments (and it follows, to provide references), should be limited. The content of any such comments should be carefully checked and should be capable of being backed up by evidence. The Judge in the McKie case stated that before the email was sent by Swindon College, there should have been a formal meeting, a formal discussion, a formal examination of the personnel record and a formal recording of the processes that led to the taking of the decision to send the email.

Although this case did not concern a reference, it is easy to see how a similar situation could arise where a reference is requested many years after an employee has left. Ideally, ex-employees should be told that if they want to apply for a reference, the request must be made of a particular person. This is particularly the case where a reference is agreed as part of a compromise agreement. It is advisable for the compromise agreement to state that, as a condition of any reference being given, the ex-employee makes the reference request of a specified person. That way the employer can retain some control over the reference process. If the employee chooses to make the reference request of someone other than that specified person, s/ he would then not have a claim for breach of contract. There may still be a valid claim for negligent misstatement, but a judge may have limited sympathy for an employee who has not followed the correct process when applying for a reference.

If you have any questions about any of the issues raised in this legal update, please contact:

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