Employers' duty of care in the conduct of litigation: James-Bowen and others v Commissioner of Police of the Metropolis [2018] UKSC 40

James Tunley

Employers do not have a duty to take reasonable care to protect employees from economic and reputational harm in the conduct of legal proceedings.

Four police officers alleged breach of contract and negligence arising out of the Commissioner's defence to a claim of assault during an arrest, which was settled with an admission of liability and an apology for "gratuitous violence". The officers argued there was a duty to take reasonable care to safeguard their safety, health, welfare and reputational interests, in the preparation, conduct and settlement of the assault claim.

The High Court struck out the claim for lack of prospects, but the Court of Appeal thought it arguable. The Supreme Court held that the imposition of the duty argued for was not fair, just and reasonable:

(1) A duty was not within the implied term of trust and confidence. It would go beyond the specific duties already established was too far removed from a duty to exercise care in the conduct of business;

(2) It was already established there was no duty of care to protect officers' economic and reputational interests in disciplinary proceedings (*Calveley* v *Chief Constable of the Merseyside Police* [1989] 1 AC 1228);

(3) Such a duty may give rise to conflicting interests. An employer, vicariously liable for its employees, must be able to investigate a claim, assess its strength and the prospects of defending or settling it. In contrast, the employee's main interest will be vindicating their reputation;

(4) Imposing the duty until an actual conflict arises is impracticable. Cases develop in unexpected ways and notifying an employee of the conflict would disrupt and prolong litigation;

(5) Parties should be free to resolve disputes without fear of incurring liability to third parties. The imposition of the duty of care would have "a chilling effect" on the defence of civil proceedings;

(6) It would also present a "fruitful" source of satellite litigation and collateral challenges to earlier proceedings;

(7) To defend a claim for breach of the duty, an employer would be compelled to waive privilege, which would undermine the conduct of the original litigation and inhibit frank discussions.

Fit and Proper Persons: King v Bar Standards Board (2018) QBD (Admin) 15/06/18

Joanna Kerr

Ex-barristers may apply to their Inn to be readmitted once a period of 5 years has elapsed, and ultimately an appeal from a decision of the Inn lies with the High Court. An applicant for readmission is faced with a dilemma - whether on the one hand to put the offending behaviour which led to disbarment into context, explaining why it happened so as to make the conduct understandable if not acceptable, or on the other to focus on their own remorse and current fitness of character. The case of *King v Bar Standards Board* (2018) QBD (Admin) 15/06/18 concerned the case of a barrister who had been convicted of a

serious criminal offence leading to a significant custodial sentence. Some 16 years had passed since the offence had been committed and there was no suggestion of a risk of re-offending. Moreover Mr. King had engaged in significant charitable works. However the High Court found that the Inns' Conduct Committee, in making their decision to refuse readmission, had been entitled to find that Mr. King lacked the proper insight into his offending because he maintained his deeply felt criticism of the conduct of the prosecution, the summing up remarks of the judge, and the decision of the jury. The case of *Yussuf v GMC* [2018] EWHC 13 concerned a similar case: a GP struck off when sexual misconduct and dishonesty offences were found proven by the GMC, but not accepted by Dr Yussuf. The High Court found then that it would in theory be possible to demonstrate the appropriate insight into the *nature* of offences of serious misconduct whilst not accepting the findings of the original tribunal. However in Mr. King's case the insight was not present because the way in which he had (albeit honestly and genuinely) framed his objection to the original conviction was viewed by the High Court as not demonstrating the respect and regard for the law which was fundamental to practice as a barrister. In putting the offending behaviour into the context of his own attitude towards it he had failed to appreciate its objective significance. That was relevant to whether or not he was a fit and proper person at the time of the readmission, regardless of the passage of time.

Property: Paragon Asra Housing Limited v James Neville [2018] EWCA 1712

Barbara Zeitler

In *Paragon Asra Housing Limited v James Neville* [2018] EWCA 1712, 26 July 2018, the Court of Appeal considered the application by a disabled tenant to suspend a warrant of eviction.

Under S. 15 Equality Act 2010 ('EqA') a person (A) discriminates against a disabled person (B) if (a) A treats B unfavourably because of something arising in consequence of B's disability and (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim. A person managing premises must not discriminate against a occupier by, among other matters, evicting him (S. 35 EqA). In *Aster Communities v Akerman-Livingstone* [2015] AC 1399 the Supreme Court considered the proportionality exercise under S. 15 in the context of possession proceedings.

Paragon Asra Housing ('Paragon') brought possession proceedings against Mr Neville for nuisance and harassment. Mr Neville admitted he had breached his obligations under his tenancy agreement, but asserted that the breaches arose in consequence of his disability in the form of personality and behavioural disorders and that the possession claim discriminated against him contrary to EqA. The parties agreed a suspended possession order. The order recorded that Paragon accepted that Mr Neville was disabled within the meaning of EqA and that the court found it reasonable to make an order for possession.
There were continuing complaints about Mr Neville's conduct and Paragon issued a warrant for possession. Mr Neville applied to suspend the warrant. The District Judge held that the proportionality issue under S. 15 EqA had already been considered at the time the possession order was made and, as there was no suggestion of any material change of circumstances, it was unnecessary for the court to consider whether the eviction would discriminate against Mr Neville on disability grounds. Mr Neville's appeal against the refusal to suspend the warrant was allowed on the basis that the EqA provisions had not been considered.

The Court of Appeal agreed with the District Judge, holding that the proportionality enquiry had already undertaken when making the possession order. Unless there was a material change of circumstances, the tenant had no right to require the court to reconsider this question at enforcement stage. The Court held: 'The recognition of such a right would be a recipe for repeated applications of a vexatious nature [para.

51]'. However, the Court acknowledged that, if at enforcement stage there had been a material change of circumstances, the proportionality enquiry under S. 15 EqA would have to be reconsidered.

[Disclaimer]