Neutral Citation Number: [2010] EWHC 1651 (QB)

Case No: HQ09X02345

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 5 July 2010

Before :

THE HONOURABLE MR JUSTICE EADY

- -

Between :

CLAIRE HENDERSON **Claimant**

- and -

(1) THE LONDON BOROUGH OF HACKNEY
(2) THE LEARNING TRUST **Defendants**

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- -

The Claimant in person
Victoria Jolliffe (instructed by **The Learning Trust**) for the **Second Defendant**

Hearing date: 24 June 2010

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Judgment

Mr Justice Eady :

1. In this action, Ms Claire Henderson claims damages for libel in respect of words contained in what is known as a referral letter sent by the Second Defendant on 3 June 2008 notifying a third party of Ms Henderson's dismissal from her employment in October 2007. (The claim against the First Defendant has been discontinued.)

2. The Second Defendant is a not for profit company limited by guarantee which provides educational services to the London Borough of Hackney. The letter was sent to a Tracy Broughton at the Independent Safeguarding Authority ('ISA') – which on 2 January 2008 took over responsibilities which had been discharged hitherto by the Teachers' Misconduct Team at the Department of Education and Science.

3. It is common ground that Ms Henderson had been employed at Haggerston School in the capacity of an "inclusion manager" (i.e. not a member of the teaching staff). It is not disputed that on or about 11 October 2007 she was dismissed for gross misconduct. It was found by the school's disciplinary panel that she had accessed and viewed emails with explicit pornographic content, consisting of still images and video clips, and that on one occasion she had used the school's computer system to send a pornographic email attachment to a colleague.

4. It is necessary to set out briefly the statutory background which led to Ms Cochrane, who was employed as Deputy Head of Human Resources, sending the letter complained of on behalf of the Second Defendant.

5. It is provided in Regulation 4 of the Education (Prohibition from Teaching or Working with Children) Regulations 2003 that:

> "(1) Where a relevant employer–
>
> (a) has ceased to use a person's services on a ground–
>
> (i) that the person is unsuitable to work with children;
>
> (ii) relating to the person's misconduct; or
>
> (iii) relating to the person's health where a relevant issue is raised, or
>
> (b) might have ceased to use a person's services on such a ground had the person not ceased to provide those services,
>
> the relevant employer shall report the facts of the case and provide all the information listed in Part 1 of Schedule 1 that is available to the relevant employer in relation to such person to the Secretary of State."

6. There is no dispute that the Second Defendant is a "relevant employer" for these purposes. The information, as listed in Part 1 of Schedule 1, would include "a statement of reasons for ceasing to use the person's services".

7. Statutory guidance in relation to these provisions came into effect on 1 January 2007 entitled *Safeguarding Children and Safer Recruitment in Education*. It was provided in paragraph 2.28 of this guidance that:

> "It is essential that cases are reported to the Secretary of State if a person ceases to work in an education setting and there are grounds for believing s/he may be unsuitable to work with children, or may have committed misconduct. The Secretary of State will consider whether to prohibit the person from working with children in the future or place restrictions on their employment in educational establishments. Local authorities, schools, FE colleges and other bodies all have a statutory duty to make reports, and to provide relevant information to the Secretary of State."

8. After Ms Henderson was dismissed, the evidence shows that the Teachers' Misconduct Team at the Department was contacted with a view to obtaining advice as to how the Second Defendant's responsibilities under the Regulations should be discharged with reference to her dismissal. It seems that the Department advised the

Second Defendant to wait until after an anticipated appeal by Ms Henderson from a decision of the school's disciplinary panel. In the event, Ms Henderson withdrew her proposed appeal. As I have already noted, the responsibilities of the Teachers' Misconduct Team were transferred on 2 January 2008 to the ISA. There was, however, no change in the duties owed by "relevant employers".

9. The matter was not pursued with the ISA until, in or about June 2008, it came to the Second Defendant's attention that Ms Henderson had been employed by another school, within the London Borough of Waltham Forest, in a post which also involved working with children. Yet this had come about without any reference being obtained from the Second Defendant.

10. These facts gave rise to concerns among the Second Defendant's staff as to how its responsibilities under Regulation 4 were to be discharged. It was against this background that the letter complained of, dated 3 June 2008, came to be written. It is the Second Defendant's case that the letter was sent pursuant to a statutory duty, in accordance with the Regulations, and/or pursuant to a social or moral duty independent of statute.

11. The letter complained of was sent to Ms Broughton and addressed, somewhat anachronistically, to the "Teachers' Misconduct Team" in Darlington. It was in these terms:

> "Dear Ms Broughton,
>
> | | |
> |---|---|
> | NAME: | CLAIRE HENDERSON |
> | DATE OF BIRTH: | 17TH JULY 1973 |
> | NI NUMBER: | NZ 66 36 93 B |
>
> I refer to the above named who was employed at Haggerston School as Inclusion Manager. Ms Henderson was *not* a teacher.
>
> Ms Henderson was dismissed on the 11th October 2007 for gross misconduct in employment involving sexual harassment through the possession and display of explicit pornographic works at school. Although she was a member of the support staff, I understand that I should report this to you.
>
> Given the nature of her dismissal, I was disturbed to learn that Ms Henderson is currently working at another school. Once I have confirmed this to be true and know her place of employ, I shall forward this information to you.
>
> Enclosed you will find all documents relevant to the disciplinary procedure against Ms Henderson (see chronology). Please feel free to contact me if you require anything further.
>
> Yours sincerely,

(Signed)

Olly Cochrane
Deputy Head of HR"

12. It is pleaded in the particulars of claim, dated 2 June 2009, that the words complained of bore the following natural and ordinary meaning, namely that:

> " … the Claimant was involved in the sexual harassment of an individual or individuals."

It is claimed that the publication of the letter led to Ms Henderson being subjected to a lengthy investigation by the Secretary of State under s.142 of the Education Act 2002 regarding her suitability to work with children and/or vulnerable people. So far as I am aware, there is no reason to suppose that any such investigation was prompted, or in any way affected, by the inclusion in the letter of the words "sexual harassment" – as opposed to the substantive and unchallenged allegation about pornography. Moreover, as the letter recorded, all relevant papers were sent to the recipient. It would thus be apparent exactly what had been alleged, and what had not, at the time of the disciplinary hearing.

13. In its amended defence of 26 October 2009, the Second Defendant relies primarily upon a defence of qualified privilege. It was confirmed during the course of the hearing before me that Ms Henderson does not dispute that the publication took place on an occasion of qualified privilege. She seeks to defeat this, however, by reason of alleged malice.

14. There is also a defence of justification by reference to the following *Lucas-Box* meaning:

> " … the Claimant had been involved in sexual harassment in that she possessed and displayed explicit pornographic works during her employment at a school."

15. The particulars of justification are brief and to the point:

> "7.1 The viewing and forwarding of pornographic and/or sexually explicit images in the workplace is capable of being an act amounting to sexual harassment.
>
> 7.2 Between 4 May 2007 and 25 May 2007 the Claimant accessed and viewed emails containing explicit pornographic content whilst employed at Haggerston School for Girls (' the School').
>
> 7.3 On the 6 September 2006 the Claimant during school hours used the School's computer system to send an email to a colleague. The email contained six sexually explicit images of naked women exposing their vaginas.

> 7.4 On 5 October 2007 the Claimant was summarily dismissed for gross misconduct relating to the incidents set out in sub-paragraphs 7.2 and 7.3 above. The Claimant subsequently brought Employment Tribunal proceedings in respect of her dismissal. The Claimant's Employment Tribunal claim was dismissed. As part of those proceedings the Claimant admitted the conduct set out at sub-paragraphs 7.2 and 7.3 above."

16. It seems that the gravamen of Ms Henderson's complaint is that it was defamatory and untrue to allege of her that she was involved in sexual harassment, since none of her activities involved unwilling third parties who felt harassed or offended by what she was doing.

17. Although for some reason not mentioned in the defence itself, there is evidence in the witness statement of Ms Cochrane dated 23 April 2010 to the following effect:

> "The whole case was triggered when a Muslim agency worker in the school made a complaint to the school's business manager that three members of staff had been viewing inappropriate pornographic material on a school computer in an office behind the reception area that was accessible to all members of staff."

18. There is also exhibited a note made by Mr Ian Gurman on 23 May 2007, he being described as the Deputy Headteacher. It contained the following passages:

> "Following a report of inappropriate use of school ICT equipment being brought to the attention of the Headteacher, she asked me to meet with the person concerned.
>
> I met with the person in my office and explained that their verbal account had been passed on to me in confidence. I asked if the person would like to write an account of what happened, but they said that they would rather go over the account for me to write down.
>
> They stated that one lunchtime of the previous week, three members of staff – Lora Tardelli and two temporary employees (Ronae Duro and Person X) – were in the rear office of the Reception suite looking at and laughing at images on the screen of Ronae's computer. The person stated that they would describe the image as pornographic and that they found it offensive. They also stated that the same people had gathered in this office on previous occasions reading messages and looking at images, but that it had never been clear exactly what was on the screen. … "

19. The matter came before an employment tribunal in November 2008 and there was a reserved judgment. It contained the following passages:

"12. On the 23 May 2007 Mr Gurman took a statement from the staff member who had complained. The member of staff said they found the image pornographic and they found it offensive. The member of staff also stated the same people had gathered in this office on previous occasions reading messages and looking at images but that it had never been exactly clear what was on the screen.

13. Thereafter the Respondent carried out an investigation. First of all it explored a chain of current emails to determine which staff members may have been involved in receiving, sending and/or forwarding inappropriate emails. This stage included holding preliminary discussions with staff to get their side of the story. The complainant had identified three members of staff, Laura Tardelli, and two temporary employees Rona Eguro and one other. The second stage involved the Third Respondents IT department checking certain staff members school computers to determine whether any inappropriate images had been accessed. The third stage involved meeting those members of staff where inappropriate images were found to inform them of the outcome of the results and in some cases to proceed with disciplinary action under the schools disciplinary procedures. In the course of the investigation the Head Teacher discovered that six members of staff, three of whom were agency workers, were involved in a chain of email correspondence attaching sexually explicit images and videos. These workers potentially sent and received sexually explicit emails using school computers during school hours. One of the members of staff was the Claimant. The schools investigations into the Clamant's conduct revealed that she had emailed to another member of staff a sexually explicit email on the 6 September 2006 and the email contained attachments of naked women exposing their vaginas. The Head Teacher decided to suspend the Claimant pending a thorough investigation into her involvement in sending sexually explicit emails to staff during school hours.

…

15. A member of the Third Respondents IT department removed the hard drive from the school computer used by the Claimant and was able to access images opened on the computer and recover files on the hard drive that had been opened and deleted. The Respondent did not at any stage access the Claimant's personal email

> account. In the course of the investigation, and having accessed by consent a work colleague's personal email account the Respondent discovered the Claimant had on 6 September 2006 forwarded to that colleague six separate images of naked women exposing their vaginas, and that the email was forwarded on the schools computer system during school hours while students were on site. The Respondent also discovered that on the following dates and times in May 2007 the Claimant had opened and viewed inappropriate emails and video clips on her school computer during school hours …
>
> 16. The 8 emails opened by the Claimant contained 25 different sexually explicit and/or inappropriate images, and two sexually explicit and inappropriate video clips. One video was from a website called 'SecurityCamsFuck.com'. It was 37 seconds long and was of a naked man and woman having sex in a car park in a number of different positions. The other video was taken from an NBC program, was 22 seconds long and showed a kangaroo masturbating."

20. Thus, although not pleaded, it appears that an argument would be available to the Second Defendant to the effect that the Muslim agency worker was offended by what she had seen and that this *might* give rise to a case of sexual harassment.

21. On 24 June 2010 two applications were argued before the court. I permitted Ms Henderson's friend, Mr Owugah, to represent her interests (as he had earlier done before the employment tribunal). Although not legally qualified, he produced shortly before the hearing a concise and helpful skeleton argument and presented her case in a focused and economic way. I am grateful to him for his assistance.

22. Ms Henderson's application notice was dated 30 March 2010 and sought:

    i) rulings on meaning pursuant to CPR Part 53 PD 4.1 and a consequential order to the effect that the particulars of justification should be struck out pursuant to CPR 3.4; or

    ii) an order that the particulars of justification be struck out pursuant to CPR 3.4(2)(a); or

    iii) an order for summary judgment pursuant to CPR Part 24 on the issue of justification; or

    iv) an order that the particulars of justification be struck out on the ground that it gave rise to issue estoppel or an abuse of process.

23. The Second Defendant's application notice was dated 26 April 2010 and sought:

i) a ruling that the words complained of were published on an occasion of qualified privilege (which was conceded at the hearing);

ii) an order for summary judgment pursuant to CPR Part 24, in respect of the whole claim, on the basis that there was no realistic prospect of Ms Henderson defeating the Second Defendant's defence of qualified privilege, having regard to her pleaded case of malice; or

iii) an order that Ms Henderson's plea of malice be struck out pursuant to CPR 3.4(2)(a).

24. I turn first to Ms Henderson's application in relation to the plea of justification. Mr Owugah's principal submission was that there was nothing available, either in the pleading or by way of evidence, to support the proposition that Ms Henderson was guilty of sexual harassment. He argued that the mere accessing and viewing of pornographic material, or indeed the forwarding of it on to a willing recipient, could not in itself amount to sexual harassment. There was nothing pleaded to suggest that any one who received pornographic material, or viewed it, at the instance of Ms Henderson, was in any way offended or harassed by her activity. Nor was there any other reason to suppose that she was guilty of sexual harassment.

25. As Ms Jolliffe, representing the Second Defendant, conceded during the course of the hearing, once cannot "harass" in isolation: there needs to be one or more persons who have been harassed. There has to be a victim or object of the harassment.

26. I came to the conclusion that it would be inappropriate to strike out the defence of justification and for two principal reasons. First, it seemed to me that it would be possible by way of amendment to introduce a "victim" of sexual harassment by reference to the unidentified Muslim agency worker referred to above. According to the evidence, she was offended by what she saw in the workplace while going about her duties. Whether that argument would succeed at trial is another question. At this preliminary stage, I am only concerned with whether it can be said already that the defence of justification has no chance of success.

27. Secondly, I raised in the course of the hearing the issue of s.5 of the Defamation Act 1952, which is in these terms:

> "In an action for libel or slander in respect of words containing two or more distinct charges against the plaintiff, a defence of justification shall not fail by reason only that the truth of every charge is not proved if the words not proved to be true do not materially injure the plaintiff's reputation having regard to the truth of the remaining charges."

It had occurred to me that there was an argument available to the Second Defendant to the effect that, if Ms Henderson was accused of sexual harassment *and* downloading and communicating pornographic material, the statutory provision might provide a defence in the sense that, having regard to the truth of the undisputed allegations concerning pornography, an unproved allegation of sexual harassment would not materially add to the injury to Ms Henderson's reputation.

28. I invited the parties to comment on this potential defence. Mr Owugah took time to consider the matter and made the brief and cogent submission that the letter complained of ran the two allegations together; so that "sexual harassment" was defined solely by reference to the pornographic activities. Thus, he submitted, there was one charge rather than two. Ms Jolliffe chose not to deal with the point at all.

29. Mr Owugah's submission was somewhat double edged. If the allegation complained of was indeed understood as a single "charge", for the purposes of s.5, it would be apparent to the reader that Ms Cochrane was, rightly or wrongly, characterising the pornography allegations as sexual harassment. It would thus add nothing to the defamatory sting. If, on the other hand, the letter could be read as adding an additional sting of sexual harassment, over and above the "possession and display", then it would appear that a s.5 argument could be raised.

30. It seems to me that the Second Defendant should not be deprived of the opportunity of arguing a s.5 defence at trial, on the basis that the reference to "sexual harassment" could be said to add a separate and distinct sting to the allegations. How significant it is in relation to the pornography allegations would be a matter for a jury to resolve at trial.

31. I should add that Mr Owugah, very wisely, said nothing by way of developing Ms Henderson's suggestion in her application notice that there was "issue estoppel or abuse of process". This seems to have been based on the findings of the employment tribunal, but there is nothing in the point.

32. I turn next to the Second Defendant's application. Since it is conceded that the publication of the letter complained of took place on an occasion of qualified privilege, as it plainly did, the only issue outstanding is whether or not Ms Henderson has a realistic prospect of establishing malice so as to defeat that *prima facie* defence.

33. It has been confirmed by the Court of Appeal in *Telnikoff v Matusevitch* [1991] 1 QB 102 and in *Alexander v Arts Council of Wales* [2001] 1 WLR 1840 that, in order for a claimant to succeed in proving malice, it is necessary both to plead and prove facts which are more consistent with the presence of malice than with its absence. This is one of the reasons why, in practice, findings of malice are extremely rare.

34. It is thus reasonably clear, as a matter of pleading practice, that allegations of malice must go beyond that which is equivocal or merely neutral. There must be something from which a jury, ultimately, could rationally infer malice; in the sense that the relevant person was either dishonest in making the defamatory communication or had a dominant motive to injure the claimant. Mere assertion will not do. A claimant may not proceed simply in the hope that something will turn up if the defendant chooses to go into the witness box, or that he will make an admission in cross-examination: see *Duncan and Neill on Defamation* at para 18.21.

35. It is not appropriate merely to plead (say) absence of honest belief, recklessness or a dominant motive on the defendant's part to injure the claimant. Unsupported by relevant factual averments, those are merely formulaic assertions. It is certainly not right that a judge should presume such assertions to be provable at trial. Otherwise, every plea of malice, however vague or optimistic, would survive to trial. It would be plainly inappropriate to move towards such an unbalanced regime, since it would tend

to undermine the rights of defendants protected under Article 10 of the European Convention on Human Rights.

36. It is necessary also to remember, in a case where malice is alleged against a corporate entity, that in order to fix it with the necessary state of mind, the individual person or persons acting on its behalf, and who are said to have been malicious as individuals, must be clearly identified. The only relevant candidate here would appear to be Ms Cochrane.

37. The particulars of malice relied upon in this case are to be found in paragraphs 3 to 6 of Ms Henderson's reply dated 21 March 2010. It is perhaps fair to say that the ground on which Mr Owugah placed most reliance, for the purpose of showing that Ms Cochrane knew the words complained of to be untrue, and/or was indifferent to their truth or falsity, is to be found in paragraph 4A:

> "Olly Cochrane and/or the Defendant did not have a shred of evidence for the very serious and grave allegation it made that the Claimant was dismissed for conduct 'involving sexual harassment through the possession and display of explicit pornographic works at school'."

38. I suspect that the main problem in this case is that Ms Cochrane and her colleagues had a somewhat insecure grasp of the law (not surprisingly) and, for that reason, were keen to consult and obtain advice as to how the Second Defendant should proceed in the troubling circumstances confronting them. She was aware that in some circumstances pornography in the workplace *could* give rise to sexual harassment and appears to have concluded, rightly or wrongly, that what took place at the Haggerston School for that reason constituted sexual harassment.

39. It would be quite unrealistic to suggest that the facts here are more consistent with malice than with its absence. Especially having regard to Ms Cochrane's imperfect grasp of the law, as a lay person, and her awareness of the complaint initially made by the Muslim agency worker, it seems to me that the facts point away from a probability of malice rather towards it.

40. Another argument raised by Mr Owugah was that Ms Cochrane had a dominant motive to give vent to her personal spite and ill will towards the Claimant. I can see no solid basis for pleading that at all. Mr Owugah suggests that the matter should be looked into at trial, where Ms Cochrane's motives could be tested, and that further light could be thrown on this issue by disclosure of documents. That is not, however, an appropriate way to approach a plea of malice. As has been said on numerous occasions, such a plea is tantamount to one of fraud or dishonesty and must be pleaded with scrupulous care and specificity. As I have already noted, it is quite inappropriate to proceed on the basis that something may turn up (whether on disclosure of documents or at trial). The mere fact that Ms Cochrane contacted the ISA, or its predecessor, on a number of occasions is entirely consistent with her seeking guidance and an assurance that the Second Defendant was complying with its statutory obligations. It is no basis on which to infer the probability of malice.

41. I am satisfied on this pleading that there is no realistic prospect of defeating the defence of qualified privilege. Accordingly, the particulars of claim should be struck out and the action dismissed.

42. This is one of those cases in which one might have expected to see an application founded on abuse of process in the light of the Court of Appeal decision in *Jameel (Yousef) v Dow Jones & Co Inc* [2005] QB 946. This would be on the basis, as it was put, that "the game was not worth the candle". It could have been argued, in view of the very limited publication and the uncontested facts, that the action could hardly be expected to achieve any tangible advantage for Ms Henderson by way of vindication. But no such application was made and, in the circumstances, there is no need to say anything further about it.