Neutral Citation Number: [2008] EWHC 399 (QB)

Case No: IHJ/08/0081

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/03/2008

Before :

MR JUSTICE TUGENDHAT

- -

Between :

W	**Claimant**
- and -	
(1) J H (2) A COUNTY COUNCIL	**Defendants**

- -
- -

Mr Oliver Campbell (instructed by **Girlings**) for the Claimant
Mr Adam Wolanski (instructed by Berrymans Lace Mawer) for the Defendants

Hearing dates: 27 February 2008

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

....

MR JUSTICE TUGENDHAT

Mr Justice Tugendhat :

1. The Claimant is a qualified and registered social worker. Between 2000 and 2005 he had five short term contracts to work for a University ("the University") as a practice assessor and teacher for students studying for a degree in social work. In or about July 2005 the claimant agreed with the University that he would be a Teaching and Learning Co-ordinator and/or Practice Assessor for Year 2 degree students on placement. This was confirmed by a letter from the University dated 22nd July 2005. But by letter dated 14 September 2005 the University wrote to the claimant withdrawing their request that he act as practise assessor in the forthcoming round of placements. The reason given for this decision was that, following an event the previous week on 8th September, the writer, R, who was the Practise Learning Co-ordinator, had been contacted by another Practice assessor, who has since been identified as the First Defendant. R wrote that the First Defendant felt that the University should be appraised of the circumstances under which the Claimant left a County Council ("CC"), the Second Defendant.

2. The Claimant had been employed by CC from 1971, when he first qualified as a social worker, until he was made redundant on or about 30 November 1996. He was initially employed as a social worker. In 1976 he was promoted to the position of principal social worker and team leader within the social services department. From June 1995 he was a project manager.

3. The Claimant brings this action for slander against both Defendants, in respect of what the First Defendant said to R. It is admitted that on a date between 8 September and 14 September the First Defendant spoke to R, in relation to the termination of the Claimants employment with CC, the following words:

> "I am surprised that [W] is working as a practise assessor as he had been due to appear before a disciplinary hearing regarding an allegation of sexual harassment but had left in a hurry before the hearing".

4. The claimant alleges that those words in their natural and ordinary meaning, meant and were understood to mean:

> "a) the claimant quickly resigned from his job with the First Defendant when faced with disciplinary action against him for sexual harassment;
>
> b) the claimant had been guilty of sexual harassment while working for the First Defendant; and/or
>
> c) the claimant was not an appropriate person to work as a practise assessor for the University".

5. The basis of the claim against CC is that they are vicariously liable for the First Defendant's slander. This is not admitted by CC, but for the purposes of the matters I have to decide at this interlocutory hearing, it is accepted that I must assume that CC would be vicariously liable. The claim for damages includes aggravated damages, and special damages. The special damage claimed is the loss of work from the University

for the period offered to him in July 2005 and the loss of the opportunity to work for the University in the future. There are issues as to the meaning of the words complained of to which I shall return. There are defences of qualified privilege and justification.

6. Two issues that I have to decide arise out of an Application Notice dated 21st September 2007. The defendants applied, pursuant to CPR Part 24, for summary judgment for the defendants, on the basis that the publication complained of was on an occasion of qualified privilege and there is no pleaded case of malice. Secondly the Defendants applied, pursuant to CPR Part 53, for a ruling that the words complained of are incapable of bearing the meaning alleged at paragraph 5(a) of the Particulars of Claim, and that the meaning pleaded at paragraph 5(c) is not arguably defamatory of the Claimant.

SUMMARY JUDGMENT – QUALIFIED PRIVILEGE.

7. The basis of the plea of qualified privilege is said to be that the First Defendant had a social, legal and/or moral duty to publish the words complained of, and R had a corresponding and legitimate interest in receiving these words. That is said to arise out of matters pleaded in three sub-paragraphs of paragraph 9 of the defence as follows:

> "9.1. The First Defendant was at all material times a senior practitioner within the Second Defendant's adult services department. [R] was at all material times the Claimant's students' tutor at the University…
>
> 9.2. On 8 September 2005 the First Defendant attended a meeting of practise assessors at the University. She noticed that the claimant was present.
>
> 9.3. The First Defendant had concerns about the Claimant working as a practise assessor at the University. She decided to raise these concerns, initially with [her team leader at CC] and with [R]. She raised the concerns with [R] during a telephone conversation by means of an oral publication of the words complained of".

8. Following a request for Further Information the Defendants responded:

> "The First Defendant cannot recall the exact words she used during the conversation with [R]. To the best of her recollection, at the beginning of the conversation she did express surprise that the Claimant was a practise supervisor, though she did not say this directly before referring to the disciplinary proceedings. She recalls mentioning the fact that allegations of harassment had been made by female members of staff against the Claimant, though she does not recall using the word 'sexual'. She made clear to [R] that she did not know the details of the allegations nor the outcome of the proceedings against the Claimant. In response to a question from [R] about

> what could happen in [CC] when allegations of this sort are made, the First Defendant said that there were a number of different possible outcomes, including that the Claimant may have left. The First Defendant suggested to [R] "that [R] contact [CC] to discuss her concerns about the claimant and to find out what in fact happened".

9. In a Reply, the claimant did not admit that R had a legitimate interest in receiving the words, and he set out facts on the basis of which he contends that the First Defendant had no social, legal or moral duty to publish the words. These facts are not substantially in dispute (although their effect is). They are:

    1) The statement was volunteered by the First Defendant. She was not requested by the University to give a reference or comment about the Claimant.

    2) The First Defendant does not know the Claimant and as had no dealings with him.

    3) The First Defendant had no direct knowledge or involvement in the disciplinary proceedings taken by the Second Defendant against the Claimant in 1994 and 1995, or the complaints made by [the complainants]. Further the First Defendant knew she had no such knowledge or involvement.

    4) It was not part of the First Defendant's job description or role to pass onto the University information about disciplinary proceedings taken by the Second Defendant or complaints made to the Second Defendant.

    5) The information given by the First Defendant to the University was inaccurate, as the Second Defendant's insurers admitted in a letter to the Claimant's solicitors dated 6th June 2006.

    6) The First Defendant was acting officiously and without proper justification in publishing the words to R.

10. There is some measure of agreement between the parties as to what in fact happened in 1993 and 1994 when the Claimant was employed by CC. This emerges from the plea of justification, which is to the meaning pleaded at para 5(b), namely that the Claimant was guilty of sexual harassment while working for CC. For present purposes it is neither necessary nor desirable to set out matters of detail. I am not asked to make any decision on the plea of justification.

11. It is sufficient to say that certain allegations of sexual harassment were made by complainants who were working under the Claimant's management at the time. The Claimant admitted that some (but not all) of the events which formed the basis of the allegation had occurred, but he denied that they amounted to sexual harassment. There is no dispute that there were disciplinary proceedings.

12. The terms of the letter dated 13 September 1994 relating to the Disciplinary Hearing completed on 9 September 1994 are material. The letter records that the Claimant, in his final submission to the panel, admitted specific allegations. One, which he did not admit, the panel found proved. The panel took note of the character witnesses' submissions and the Claimant's long service before reaching their conclusion that the case was proved. After noting the Claimant's willingness to apologise, which the panel welcomed, it decided upon the following action.

> "1. This letter constitutes a final warning which will be placed on your personnel file in accordance with County Disciplinary Procedures. This will be reviewed for removal after a period of eighteen months.
>
> 2. You will be redeployed in a position that does not require you to manage or supervise staff.
>
> You have the right to appeal … Should your misconduct be repeated within the eighteen month period, it would be necessary to reconvene a Disciplinary Hearing and the likely consequence could include dismissal".

13. The Claimant exercised his right of appeal. CC decided to withdraw the sanction of redeployment. At a hearing on 18 April the written warning was upheld. The Claimant's case is that the disciplinary process was seriously flawed and its findings mistaken.

14. Arrangements were made to put the Claimant back to work as a group leader. Some of the employees who had been managed by the Claimant subsequently refused to work with him and he supervised a smaller team. He was offered voluntary redundancy in May 1995 which he refused. In June 1995 he was transferred to a Project Officer Post which the Claimant felt was below his capabilities. He raised a grievance. In August 1996 he was informed that he would be made redundant and his employment terminated at the end of November. He applied to the Industrial Tribunal claiming that he had been unfairly dismissed.

15. The Tribunal found that the Claimant was dismissed and that redundancy was the reason. The Tribunal's reasons included the following:

> "23 We find that the applicant was unfairly treated in 1995 by the respondent. The respondent withdrew the transfer imposed at the Disciplinary Hearing, but then when it transpired that it was not practical to put the Applicant back with his former team, they reintroduced the transfer through the back door by requiring the Applicant to take the Project Manager's position, with the termination of his employment as the only alternative. The Applicant chose, however, not to leave on the terms offered and to claim unfair dismissal then, but to continue in the respondent's employment.
>
> 24 Having decided to remain in the Respondent's employment, the Applicant cannot raise the earlier unfair treatment when he

> was subsequently made redundant from the post to which he was transferred in the summer of 1995".

16. The witness statements adduced in support of the Defendants' applications do not include one from the First Defendant. There is a witness statement for both Defendants made by their solicitor Mr Smith. He states that the First Defendant joined CC in 1994 as a Case Manager in the Physical Disability Team, a few weeks before the investigation into the allegations against the Claimant that led to the disciplinary proceedings. He states that she knew what was taking place, but only from talking to colleagues (who he does not identify), and she did not know the outcome of the proceedings.

17. Mr Smith states that when the First Defendant attended the meeting of practice assessors at the University on 8 September she noticed that the Claimant was present. He states:

> "She had concerns about the Claimant working as a practice assessor because she did not personally want to work with the Claimant. She was also concerned for potentially vulnerable female students".

18. It is not explained what those concerns were, or what working with the Claimant would actually have involved. For example, it is not said that the Claimant and the First Defendant would have had to come into contact, other than at meetings where others would be present, such as the one the First Defendant was attending, and if so, in what circumstances.

19. Mr Smith states that the First Defendant spoke to her line manager at CC, and following that conversation the First Defendant spoke to R. He states that R was the person responsible for dealing with assessors on the social work course and that she was the appropriate person for the First Defendant to raise concerns about another assessor with. He then sets out what his clients were told by unidentified representatives of the University about a meeting with the Claimant on 20 September.

20. At the hearing before me the Defendants sought to put in a further statement, dated the day before the hearing, from an employee of the University. This related to the meeting with the Claimant on 20 September. Mr Campbell objected that the witness statement was far too late, and that the Claimant would wish to, but had not had an opportunity to respond to it. I read the statement, but do not find it necessary to refer to it. I have been able to reach my conclusions without regard to it, and it would not have changed those conclusions if I had accepted it in evidence.

21. In response to Mr Smith's statement, the Claimant made a witness statement dated 13 December 2007. He exhibits his certificate of registration from the General Social Care Council ("GSCC"), certifying that he was admitted to the Council's register of social care workers on 17 March 2005. He repeats the denials of the allegations made in the particulars of justification, and of the allegations made in 1994, subject to admissions of particular matters, which he explains. He contends that what occurred did not amount to sexual harassment. He describes the disciplinary proceedings, his subsequent work with CC, his dismissal for redundancy and his complaint to the industrial tribunal, as summarised above. He states, as is now accepted, that he did not

leave CC in a hurry before the disciplinary hearing, but maintained his innocence and continued working for CC after the disciplinary proceedings had been completed.

22. It is right to record that he also states that he was devastated by the events in 1994, and by their being dragged up again in 2005. He states that there have been no other complaints about him whether before the complaints in 1994, or since.

23. The Claimant states, and it is not in dispute before me, that he did not know the First Defendant, and that she was not a witness to any of the matters which were the subject of complaints against him in 1994.

24. The Claimant describes the rigorous process for applying for registration with the GSCC, which involves checks as to whether the applicant is a fit and proper person. Applicants are, amongst other things, required to declare whether they have any unspent disciplinary sanctions. He has remained registered to this day. Complaints can be addressed to the GSCC. His case is that the First Defendant had no basis for any proper concern about him, but if she or the University had had such a concern, then that was a matter which should have been raised with the GSCC.

25. As to the First Defendant's alleged concerns, he states that practice assessors do not work with each other, and the First Defendant would have had no contact or dealings with himself. There has been no challenge to that.

26. CPR Part 24 provides:

> "24.2 The court may give summary judgment against a claimant... on the whole of a claim or on a particular issue if –
>
> (a) it considers that –
>
> (i) that claimant has no real prospect of succeeding on the claim or issue; ...; and
>
> (b) there is no other compelling reason why the case or issue should be disposed of at a trial."

Submissions for Defendants

27. Mr Wolanski submits that there is no material dispute as to the matters set out in Mr Smith's witness statement. He submits that on the basis of that material, and the other admissions made on the pleadings, and absent any plea of malice, the Claimant has no real prospect of defeating the defence of qualified privilege.

28. In his skeleton argument Mr Wolanski submits that the basis of the qualified privilege the Defendants rely on is the well known passage in *Adam v Ward* [1917] AC 209 at 234:

> "A privileged occasion is … an occasion where the person who makes a communication has an interest, or a duty, legal or moral, to make to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it. This reciprocity is essential."

29. He submits that the court must have regard to all the circumstances of publication in considering whether the occasion was one of privilege, but this case is akin to that of an employee reference, and one where there is a duty not only to respond to enquiries, but also to volunteer information. He cites Gatley on Libel and Slander 10th ed paras 14.8, 14.10, 14.22, 14.32 to 14.34.

30. In employee reference cases Mr Wolanski submits that the only test is honesty (so the defendant is not required to have made an adequate inquiry, or, he might have added, to have met any of the other criteria identified by Lord Nichols). Once it is recognised that that it falls within that category, then, as Lord Phillips MR (as he then was) said in *Loutchansky v Times Newspapers Ltd* [2001] EWCA Civ 1805; [2002] QB 783 at [36]:

> "a person giving a reference or reporting crime need not act responsibly: his communication will be privileged subject only to relevance and malice"

31. Mr Wolanski relied on *Coxhead -v- Richards* (1846) 2 CB 569, where Cresswell J said:

> "It is so manifestly for the advantage of society that that those who are about to employ a servant should be enable to learn what his previous conduct has been, that it may be well deemed the moral duty of the former employer to answer inquiries to the best of his belief".

32. As the editors of Gatley point out at para 14.22, after citing this passage, this principle does not insulate an employer from the tort of negligence: *Spring v Guardian Assurance plc* [1995] 2 AC 296. It may also follow that it does not insulate the employer from obligations arising out of assurances he has given to the employee, or out of his obligations under the Data Protection Act1998 ("the 1998 Act"). And it is not so clear that the test excludes a requirement of adequate inquiry in employee cases where the reference is not asked for, but is volunteered.

33. Mr Wolanski referred me (but not for support) to *Kearns & Ors v The General Council of the Bar* [2003] EWCA Civ 331; [2003] 1 WLR 1357, paras [24] and [34] in which Simon Brown LJ (as he then was) said in reference to *London Association for Protection of Trade -v- Greenlands Limited* [1916] 2 AC 15, 23:

> "… All that Lord Buckmaster was saying was that every circumstance has to be considered which bears on the question whether the necessary conditions for invoking privilege are satisfied. Where the communication is made within an established relationship and is relevant to it, the necessary conditions <u>are</u> satisfied. Lord Buckmaster was certainly not suggesting that verification is a relevant consideration in all qualified privilege cases; indeed, he was in part emphasising the importance of keeping distinct matters going to malice and those going to the existence of the privilege. That was a theme upon which Lord Diplock was later to expand in *Horrocks -v- Lowe* …" (emphasis original).

34. In *Kearns* the court was considering to what extent (if at all) Lord Nicholls' non-exclusive list of matters to be taken into account in media publications (*Reynolds -v- Times Newspapers Limited* [2001] 2 AC 127, 205) were relevant to whether qualified privilege attached in cases other than of the *Reynolds* type (as opposed to being relevant only to any later enquiry into a plea of actual malice): see para [3]. *Kearns* was a case of a communication made on behalf of the Bar Council, to members of the Bar, alleging that the claimants were not solicitors, when proper verification would have revealed that they were solicitors.

35. In that case Eady J's conclusion below ([2002] 4 All ER 1075, 1088 35) had been:

> "I am left in no doubt that this was a classic case of qualified privilege based upon an existing relationship, and on a common and corresponding interest in the subject matter of the letter."

36. In *Kearns* the submissions of the parties, and the court's view, were summarised at paras [28]-[30]:

> "28. Based on those and other such authorities it is Mr Caldecott's submission that common interest cases and duty-interest cases are quite distinct, communications in the former category attracting privilege on a wide and generous basis, communications in the latter category having to be much more closely scrutinised on the facts. Whereas attempts at verification and the like may well be relevant to the latter category of case, they will not, he submits, be relevant to the former unless and until the issue of malice is raised.
>
> 29. Mr Rampton submits on the contrary that there is no distinction between these various cases: one category shades into the other and the question whether qualified privilege attaches to any particular occasion or communication must always depend on the facts.
>
> 30. The argument, as it seems to me, has been much bedevilled by the use of the terms "common interest" and "duty-interest" for all the world as if these are clear-cut categories and any particular case is instantly recognisable as falling within one or other of them. It also seems to me surprising and unsatisfactory that privilege should be thought to attach more readily to communications made in the service of one's own interests than in the discharge of a duty - as at first blush this distinction would suggest. To my mind an altogether more helpful categorisation is to be found by distinguishing between on the one hand cases where the communicator and the communicatee are in an existing and established relationship (irrespective of whether within that relationship the communications between them relate to reciprocal interests or reciprocal duties or a mixture of both) and on the other hand cases where no such relationship has been established and the communication is between strangers (or at any rate is volunteered otherwise than

> by reference to their relationship). This distinction I can readily understand and it seems to me no less supportable on the authorities than that for which Mr Caldecott contends. Once the distinction is made in this way, moreover, it becomes to my mind understandable that the law should attach privilege more readily to communications within an existing relationship than to those between strangers. The latter present particular problems. I find it unsurprising that many of the cases where the court has been divided or where the defence has been held to fail have been cases of communications by strangers. *Coxhead -v- Richards* was just such a case. As Coltman J, one of those who held that privilege did not attach, observed:
>
> > "The duty of not slandering your neighbour on insufficient grounds, is so clear, that a violation of that duty ought not to be sanctioned *in the case of voluntary communications*, except under circumstances of great urgency and gravity." (emphasis added)"

37. Mr Wolanski accepted that that might appear to be against him, because in employee reference cases there is no established or existing relationship. This point is made by the editors of Gatley at para 14.8, explaining why they continue to adhere to the classification of duty and interest, and why they say that the *Kearns* classification has problems of its own.

38. As a fall back position, Mr Wolanski submits that the present case is one of existing or established relationship, in that the First Defendant was a practice assessor for the University, as was the Claimant.

39. As his final fall back position, Mr Wolanski submits that if the court does have to look at the facts (such as whether there was adequate verification, and the status or quality of the information) then the circumstances of this case do give rise to it being an occasion of qualified privilege. He refers to the fact that at the first disciplinary hearing there was a finding of harassment against the Claimant, and that some staff of CC did not want to work with the Claimant, and other matters.

Submissions for the Claimant

40. Mr Campbell refers to *Kearns* in support of the submission that this is not a case of an existing relationship, and so that there must be consideration of the circumstances in order to reach a conclusion whether the occasion was one of qualified privilege.

41. Mr Campbell submits that the following circumstances all point to the occasion not being one of qualified privilege; (1) the statement was volunteered; (2) the quality of the information was very poor; it is admitted that the First Defendant did not know the outcome of the disciplinary proceedings, or their course, and that can be inferred from the errors in the words complained of; and it is admitted that the First Defendant had no first hand (and possibly not even second hand) information about the allegations made in 1994; (3) the information was historic, going back to 1993 and 1994, some 11-12 years before the publication; (4) it was not part of the First Defendant's role or job at CC to give the University information from CC about former employees and

their disciplinary proceedings; (5) the First Defendant ought to have taken into consideration the fact that the Claimant was registered as a fit and proper person with GSCC; (6) the First Defendant's concerns about herself are unexplained and apparently irrational, since there was no prospect of them working together.

42. In relation to a number of these factors, Mr Campbell notes that the letter from CC of 13 September 1994 states that "This will be reviewed for removal after a period of eighteen months" – that is in March 1996 – and that it either was removed, or it ought to have been removed on that date. Mr Campbell submits that in the light of that, if CC had been asked for a reference by the University in 2005, CC could not have been under a duty to inform the University of the effect of the letter, but, on the contrary, would have been under a duty (given the promise of review) not to inform the University.

43. Further, Mr Campbell submits that by 2005 the 1998 Act was in force, and the question whether CC was lawfully entitled to keep records of the allegations made against the Claimant in 1994, and the separate question of what information (if they did keep such records) they had a right or duty to disclose to the University, would both fall to be considered by reference to the requirements of that Act. Two requirements are that personal data shall be processed fairly and lawfully (para 1 of Sch 1 to that Act) and that personal data processed for any purpose or purposes shall not be kept longer than is necessary for that purpose or those purposes (para 5 of Sch 1 to that Act). He also referred, by analogy, to the Rehabilitation of Offenders Act 1974, submitting that if the Claimant had been convicted of some offence in 1994 (as of course he was not) then whatever penalty might have been imposed, it would have been such that his conviction would have long been spent by 2005.

44. Mr Campbell submitted that the test set out in the authorities, in particular *Stuart -v- Bell* (1892) 2 QB 341 at 350 is whether:

> "all, or at all events, the great mass of right-minded men in the position of the defendant would have considered it their duty, under the circumstances, to inform Stanley of the suspicion which had fallen on the plaintiff."

Discussion

45. I cannot say in the present case that the relationship between the parties is such that it is clear that no investigation of the circumstances is required in order to determine whether this was an occasion of qualified privilege. This case seems to me to show that it may be no more clear cut whether there is an existing relationship than whether it is a case of "common interest" and "duty-interest" (*Kearns* [30]). In *Howe v Burden* [2004] EWHC 196 Eady J was also considering an application for summary judgment. He remarked at para [15] that *Kearns* was what he called an "off the peg" privilege, where the issue of whether it was privileged could be resolved simply by looking at the relationship between the parties and the subject matter of the relevant communication. In *Howe* (a case of communication between two employees on the subject of improprieties in their employees' conduct), he held that investigation of the particular circumstances may be required to establish whether the required legitimate interest existed.

46. The arguments for the Claimant, based on the eighteen month assurance in the letter of September 1994, and on the requirement under the 1998 Act to act fairly, are original, so far as I am aware, in relation to the duty and interest of a defendant relying on qualified privilege. None of the other recent cases shown to me involved personal information of a kind that would have been likely to found an argument based on the relationship between the rights and duties of an employer communicating a reference, and an employer's duties to his (ex) employee under an assurance given in a letter, or under the 1998 Act, (or, for that matter in the case of a public authority such as CC, any rights of the (ex) employee under Art 8 itself).

47. In *London Regional Transport & Anor v Mayor Of London & Anor* [2001] EWCA Civ 1491 Sedley LJ considered (in relation to breach of confidence) a test phrased in language similar to the test in *Stuart v Bell*: "the reasonable recipient's conscience". Sedley LJ held that in the light of the Human Rights Act 1998, there was a more certain guide to be had from consideration of Arts 8 and 10. There has been subsequent case law on the relationship between the two Articles. The Data Protection Act implements an EU Regulation which itself gives effect to Art 8. As observed in *Kearns* para [30], the existing test set out above (para 44) has led to many cases where the court has been divided.

48. In my judgment, where the information the subject of the communication might engage rights of an individual (the Claimant) under Art 8, or his rights under the 1998 Act, the Claimant should be afforded the opportunity to argue that there should reconsideration of the test by which to answer the question whether the defendant's right to freedom of expression (afforded in such a case by the defence of qualified privilege) prevails over the claimant's rights. It is for consideration whether the determination of such conflict between the rights of the parties may require the approach set out for resolving that conflict, in a different context, in *Re S (A Child)(Identification:Restrictions on Publication)* [2004] UKHL 47; [2005] 1 AC 593 at [17].

49. The values enshrined in Arts 8 and 10 of the Convention, reputation and freedom of speech, have (in this context) been recognised in England for centuries. In Chester Cathedral there is preserved a courtroom in which cases of slander were tried at a time when the jurisdiction was exercised by the ecclesiastical court. An audio recording is played to visitors illustrating examples of words complained of. The rule that protection of a reputation was outweighed by society's need for reliable references and the advantages of honest communication of opinion, has been traced back to the sixteenth century (RH Helmholz: The Oxford History of the Laws of England Vol 1 ch 11 p581). Professor Helmholz comments: "A certain class bias was undoubtedly present". On the other hand, the advantage of that rule is that it gives the certainty that the law also requires. As Eady J explained in *Kearns* [2002] 4 All ER 1075 [33] (quoted in para [38] of the judgment of the Court of Appeal:

> "Mr Price asks rhetorically why should one evaluate the quality of information for a social or moral duty case, as in *Reynolds* or *Stuart -v- Bell* for example, but not in cases of a common and corresponding interest? The answer to that question is, it seems to me, that it has long been the policy of the law to protect persons in certain kinds of relationship with one another, and indeed to encourage in such cases free and frank

> communications in what is perceived to be the general interest of society. In those cases, one does not need to assess the interest of society afresh in each case. We all need to know where we stand. In this area the law was thought to be settled, on the basis that the balance would fairly be struck if liability in such situations was confined to those cases where the occasion of communication was abused - in the sense that malice could be established. Nothing short of malice would undermine the law's protection. ”

50. Further, in my judgment, there is a real prospect of success in Mr Campbell’s argument that a defendant, who is an ex-employer of a claimant, may find it difficult to persuade the court that he had a duty or interest (such as to found a defence of qualified privilege) in the communication of information in respect of which he had given the employee an assurance. I refer to an assurance that information would not remain on his file, if no further misconduct occurred during a period of eighteen months which expired. So too with the argument to the same effect in respect of information which, the employer had kept longer than was necessary, or which he had otherwise kept or disclosed unfairly or unlawfully, in each case contrary to the Act 1998 Act.

51. In the present case, while it is accepted that the words complained of were not correct, if and in so far as they bear the meaning in para 5(a), nevertheless, the Defendants assert that the words contained sufficient truth (namely that there were complaints leading to a disciplinary hearing) not only to be defended by a plea of justification (with which I have not been concerned) but also to support the defence of qualified privilege, to the extent that that is a factor relevant to the question whether the occasion is one of qualified privilege.

52. Apart from any consideration of Art 8 or the 1998 Act, in this case the lapse of time between the date when the subject matter of the communication occurred, and the date of the communication, raises an issue which I cannot resolve summarily. None of the cases cited to me relate to the communication of such historic information.

53. After the argument I recalled one case in which the court had been concerned with a communication of information which the publisher might have had an interest or duty to communicate at an earlier date, but in which he no longer had an interest at the date of publication: *Ley v Hamilton* [1935] 153 LTR 384. The defence of qualified privilege failed at trial in the House of Lords on that account. But that case turned on the relationship of the parties having ended, rather than on the communication of historic information in an existing relationship.

54. In a different context, Parliament has recognised the effect that the passage of time may have in reducing the relevance of bad character: see the Criminal Justice Act 2003 ss.100(3)(b) and 101(4). This is consistent with the purposes of punishment, set out in s.142 of that Act, including reform and rehabilitation. It must be taken that these purposes are fulfilled, in that people do become reformed and rehabilitated, on some occasions.

MEANING

55. In the alternative, Mr Wolanski asks the court for a ruling that the words complained of are not capable of bearing the meaning pleaded in the Particulars of Claim at para 5(a), and that they are not capable of bearing the meaning pleaded in para 5(c) unless read conjunctively with the meaning pleaded at para 5(b).

56. The Practice Direction to CPR Part 53 includes:

> "4.1 At any time the court may decide –
> (1) whether a statement complained of is capable of having any meaning attributed to it in a statement of case;
> (2) whether the statement is capable of being defamatory of the claimant;
> (3) whether the statement is capable of bearing any other meaning defamatory of the claimant".

57. In relation to an application on meaning, the principles to be applied may be summarised as follows. The Court should give the article the natural and ordinary meaning which it would have conveyed to the ordinary reasonable hearer of the words in the context of the whole of what was said. The Court is cautioned against over-elaborate analysis of meaning, because the ordinary hearer would not analyse the words as a lawyer would; the Court should not take a too literal approach to its task in delimiting the range of available meanings (see generally *Skuse v Granada* [1996] EMLR 278 at 285-7 and *Gillick v Brook Advisory Centres* [2001] EWCA Civ 1263 at [7], where Lord Phillips MR approved the synthesis of Eady J below). The Court of Appeal stressed the high threshold of exclusion in the judgment of Simon Brown LJ in *Jameel v WSJE* [2004] EMLR 6 at [14]:

> "every time a meaning is shut out (including any holding that the words…either are, or are not, capable of bearing a defamatory meaning) it must be remembered that the judge is taking it upon himself to rule in effect that any jury would be perverse to take a different view on the question. It is a high threshold of exclusion. Ever since Fox's Act 1792 the meaning of words in civil as well as criminal libel proceedings has been constitutionally a matter for the jury. The judge's function is no more and no less than to pre-empt perversity."

58. This being a slander, and there being no transcript, there is a difficulty in this case that is not normally found in cases of libel. The Court does not have the evidence of context, except in so far as it is set out in the Further Information given above. But as Mr Campbell points out, there is sure information as to context in the fact admitted in the pleadings that the words were spoken "in relation to the termination of the Claimant's employment with the First Defendant".

59. Mr Wolanski submits that the words complained of do not allege explicitly or by implication that the Claimant resigned from his job. The statement that he "left in a hurry" would mean no more to the ordinary reasonable listener than that he physically left the building "in a hurry" before the hearing took place.

60. I have no hesitation in deciding that the words complained of are capable of bearing the meaning relied on in para 5(a).

61. So far as the objection to meaning (c) is concerned, it seems to me that little turns on it. Mr Wolanski submits that merely to say a person is not an appropriate person to work as a practice assessor for the University would be understood as defamatory only by the person avid for scandal whose views must be ignored. That may be so, but in the context which is known to me, it seems to me that meaning (c) is one that the words are capable of bearing, and which, in the context is capable of being defamatory.

CONCLUSION

62. Accordingly, the applications by the Defendants for summary judgment, and for rulings that the words complained of are not capable of bearing the meanings pleaded by the Claimant, are all dismissed.