Neutral Citation Number: [2011] EWHC 3394 (QB)

Case No: HQ10D04550

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16 December 2011

Before :

THE HONOURABLE MR JUSTICE EADY

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Between :

JUSTIN OLIVER ZINDA **Claimant**

- and -

ARK ACADEMIES (SCHOOLS) **Defendant**

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- -

The Claimant appeared in person
Godwin Busuttil (instructed by **Lewis Silkin LLP**) for the **Defendant**

Hearing date: 2 December 2011

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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.

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THE HONOURABLE MR JUSTICE EADY

Mr Justice Eady :

1. The Claimant appeals against a decision of Master Eastman on 27 May of this year whereby he dismissed his claim for defamation against ARK Academies. The Master's decision was based on the fact that each of the publications complained of was statute barred. The order embodied the Master's conclusion that the claim also appeared to be "totally without merit", having regard to CPR 3.4(6). The Defendant, which is now known as ARK Schools, is a company limited by guarantee and a registered charity, which provides and operates independent academy schools for all age groups throughout the country. Academy schools are state funded under the Department for Education's academies programme and they are free from national and local government control.

2. The Claimant was employed from 29 August 2007 as a teacher at one of the Defendant's schools in White City, London, known as Burlington Danes Academy. He was dismissed on 8 July 2008 for alleged gross misconduct, relating to false accounting, and an internal appeal was dismissed following a hearing on 14 November 2008.

3. There were also proceedings brought by the Claimant in the Employment Tribunal based upon allegations of "discrimination and victimisation". A statutory compromise agreement was made in accordance with the provisions of s.203 of the Employment Rights Act 1996 which was duly signed on 19 February 2009. The Claimant had the benefit of advice in relation to the terms of the proposed compromise agreement from an independent adviser, who was a representative of the National Union of Teachers. Unfortunately, that did not bring the dispute to a conclusion.

4. Apart from the current defamation proceedings, begun in November 2010, the Claimant issued a claim for negligence against the Defendant's solicitors Lewis Silkin LLP (claim number HQ11X00506), based upon the proposition that the firm had owed him a duty of care, of which they were in breach, through acting for the Defendant in relation to the compromise agreement. That claim was struck out on the initiative of Master Eyre, on the basis that the allegations disclosed no cause of action. Costs were awarded in the Defendant's favour. On the Claimant's application, the Master refused to set aside the order. Permission to appeal was also refused, both on paper and at an oral hearing which took place on 7 July 2011 (before Burnett J).

5. There were also proceedings, issued on 10 February 2011, which alleged that the Defendant had breached the confidentiality and non-denigration provisions contained in clause 5 of the compromise agreement (claim number HQ11X00507).

6. There was then an application, on 29 July of this year, whereby the Claimant sought to join Lewis Silkin LLP as a co-defendant in the breach of contract action. This was based on allegations similar to those made in the (by then defunct) negligence proceedings.

7. The application to join the solicitors was dismissed at a hearing on 7 September of this year, Master Eastman once again recording that the application was totally without merit for the purposes of CPR 3.4(6). Accordingly, costs were ordered in the

solicitors' favour and summarily assessed at £3,728. Permission to appeal was refused on paper by Lang J on 6 October 2011.

8. In the meantime, the Defendant applied for summary judgment in respect of the breach of contract claim on 23 September 2011. Master Eastman granted that application on 11 November. He also ordered the Claimant to pay the costs of the action, summarily assed in the sum of £30,000, by 28 November 2011.

9. Against that background, I turn to consider the defamation proceedings now before the court. It is not entirely clear whether the proceedings were begun on 20 or 26 November 2010, but the particulars of claim were served on 7 February of this year and the claim form sealed on 10 February. On dismissing the claim, on 27 May of this year, Master Eastman ordered the Claimant to pay the Defendant's costs, which were summarily assessed in the sum of £18,962, by 10 June. The order remains unsatisfied.

10. Permission was given to appeal at an oral hearing on 10 October 2011 by Lloyd-Jones J, who took the view that there were points to be made in relation to s.32A of the Limitation Act 1980, which affords the court the discretionary power to disapply the provisions of the Act in certain circumstances (although this had not been argued before the Master). Mr Busuttil, appearing before me on the Defendant's behalf, suggested that the sensible course was that I should not only hear the appeal from the Master's order but also entertain an effectively *de novo* application under s.32A on its own merits. I acceded to this proposal.

11. Following the Claimant's dismissal in July 2008, the Defendant was obliged under s.15(2) of the Teaching and Higher Education Act 1998 to provide certain prescribed information about him to the Department of Children, Schools and Families ("DCSF") and, in the case of a registered teacher, to the General Teaching Council of England ("GTC"). The information required included the reasons for his dismissal. The Defendant believed at the material time that the Claimant was indeed duly registered with the GTC, and had originally employed him on that understanding.

12. On 17 July 2008, the Claimant was informed by the Defendant that, in order to comply with what it understood to be its legal obligations, it would need to inform the GTC, via the DCSF, of the decision to dismiss him from the school. Accordingly, a telephone call was made to Ms Tracy Broughton of the DCSF on that date. There was also an email confirming the position, together with certain attachments, on the following day. These communications were made on behalf of the Defendant by its Human Resources Manager, Ms Mhairi Miller, who had also informed Ms Broughton of the commencement of the Employment Tribunal proceedings. Ms Broughton, in the light of this information, instructed Ms Miller that the Defendant should confirm the position to the DCSF once those tribunal proceedings were concluded.

13. Although it is not entirely clear, it would appear that the Claimant is complaining in these defamation proceedings of the email communication to Ms Broughton on 18 July 2008. The Master recorded, in paragraph 2 of his judgment, that Mr Zinda had told him that he was not relying on that particular communication. On the other hand, in paragraph 18 of the particulars of claim, it is alleged that the Defendant sent a report to the GTC or the DCSF on 18 July 2008. He also made reference to the "ISA" or the Independent Safeguarding Authority, although that body did not become

relevant for reporting purposes until January 2009. According to the evidence of the Defendant's solicitor, Mr Nicholas Walker, nothing was sent, by way of a report, to anyone other than Ms Broughton of the DCSF. Accordingly, if the Claimant does rely upon a communication in July 2008, it can only be the email from Ms Miller.

14. Following the disposal of the Employment Tribunal proceedings, by way of the compromise agreement to which I have referred, Ms Miller confirmed the position to the DCSF on 24 April 2009 (in accordance with Ms Broughton's earlier instruction). On that occasion she telephoned the DCSF inspector, Mr Clive Webster. She also telephoned the GTC and the ISA (which had by then become a reporting body). Additionally, she communicated with the DCSF by email, also on 24 April 2009 at 10.56am. She then discovered, for the first time, that the Claimant had not in fact been registered with the GTC. There was an instruction from the DCSF to Ms Miller that the Defendant should notify the ISA of the Claimant's dismissal and the surrounding circumstances.

15. It was to Ms Janet Hammond of the ISA that Ms Miller spoke about the Claimant's dismissal on 24 April 2009. According to Ms Miller, she was asked to send Ms Hammond all correspondence and other relevant documents concerning the Claimant. On the same day, at 2.13pm, Ms Miller sent to Ms Hammond an email comprising her previous communications about him to the DCSF. She sent the same material by post. In due course a copy was disclosed by ISA to the Claimant pursuant to a "subject access request" under the Data Protection Act. He then disclosed it to the Defendant for the purposes of this litigation. It seems that the email Ms Miller attempted to send at 2.13pm on 24 April did not reach ISA, probably because the suffix ".UK" was omitted, but there is no doubt that the documents that were posted did reach ISA because there is a letter of 30 April, from a Mr Paul Porter, acknowledging receipt.

16. It seems that complaint is made in these proceedings of allegedly defamatory allegations contained in the material sent by Ms Miller on 24 April 2009 to Ms Hammond of ISA by email (although it appears that no such publication actually occurred). A claim is also made in relation to the telephone communications between Ms Miller and Ms Hammond on 24 April, although the words complained of are not specified (as they should be in relation to slander as well as libel). Finally, complaint is made of the letter sent by Ms Miller to ISA, enclosing a printout of her 24 April email, which was received by ISA on 27 April 2009.

17. Against this somewhat complex background, it is necessary to address the implications of the Limitation Act 1980. This is obviously not one of those cases in which the period of limitation does not begin to run until a later date by reason of fraud, concealment or mistake: see s.32(1) of the Limitation Act. A cause of action in relation to a publication on 18 July 2008 would thus have become time barred on 18 July 2009. Had the email of 24 April 2009 reached its destination (which it did not), the period of limitation would have expired on 24 April 2010. As for the allegedly slanderous telephone conversations, the limitation period would have expired on 24 April 2010. Finally, any cause of action arising from the written communication received by ISA on 27 April 2009 would have expired one year later.

18. As I have already recorded, these proceedings were not issued until months after the limitation periods expired (i.e. in November 2010). It is thus not surprising that the Master should have dismissed the claims on that basis.

19. It emerged during the course of the hearing on 27 May 2011 that the Claimant also wished to sue the Defendant in respect of an alleged republication by ISA. This possible claim was only identified in the skeleton argument produced by the Claimant for the purposes of the hearing before Master Eastman. It nevertheless remained unclear to whom the alleged "republication" was supposed to have been made and what the legal basis was for asserting legal responsibility on the part of the Defendant.

20. This point was developed, however, in a letter sent to the Master by email on 10 June of this year, whereby the Claimant was inviting him to set aside his order of 27 May. It is said to have been " … published in the form of archive or database accessible by many institutions and prospective employees so long as that record was available". He asserted that the record was destroyed in January 2011, but claimed that until this occurred "the publication was permanently there". He made the legal submission, incorrectly, that "publication is assumed so long as the material is available online". He was, on the other hand, unable to provide any evidence that such material had been accessed by anyone at all. Nor was any indication provided of why the Defendant should be held responsible for any such publication (assuming it to have occurred). It is not, for example, suggested that any such republication was authorised or intended. The only evidence before the court is to the effect that the Defendant was communicating the material concerned merely to the extent that it believed it had a statutory obligation to do so.

21. The evidence produced by the Claimant, intended to show a publication by ISA of information about him, consists in two documents from the Criminal Records Bureau of the Home Office. These are so-called "enhanced disclosure documents". The first was dated 31 July 2009 and was produced by the CRB at the request of the Claimant and Ms Nicola Laurence of Academics Limited of Ilford. This appears to have followed an application by the Claimant for a teaching post with Academics Limited. The second was produced by the CRB at the request of the Claimant and Mr Eamonn Burke of The Teaching Supply Agency of Bracknell in Berkshire. Once again, it seems that the Claimant had been applying for employment with the agency.

22. It is necessary to note, first, that these documents, being dated respectively 31 July and 10 September 2009, were communicated more than a year prior to the issue of the defamation proceedings. Secondly, there is no evidence that any of the information provided by the Defendant to ISA was republished to any third party. The only information supplied by ISA upon an application for enhanced disclosure is whether or not the individual concerned appears on a "Barred List". As far as this Claimant is concerned, the only information communicated was to the effect that he was *not* on such a List. Neither document, therefore, advances his claim at all.

23. The nature of the communications of which complaint is made in these proceedings is such that the Defendant would be likely to have a defence of qualified privilege, since it was at all times complying with a statutory obligation or, at least, believed that it was so doing. For present purposes, however, that is beside the point. The Master's decision was based simply on the expiry of the limitation period. His decision would thus appear to be unimpeachable.

24. I now turn to address the s.32A point (on the basis that it is an original application, rather than an appeal).

25. It is for the applicant to make out a case for the court to exercise its jurisdiction under s.32A, since Parliament decided in the Defamation Act 1996 that the limitation period for defamation claims should be reduced to twelve months (in accordance with the recommendation contained in the report of the Supreme Court Procedure Committee in July 1991, generally referred to as the "Neill Report"). There must, therefore, be some solid reason for overriding that legislative policy. The court is required to determine whether it would be "equitable" to extend the period. The court must have regard to all the circumstances of the case and, in particular, the following factors:

    (a) the length of, and the reasons for, the delay on the part of the claimant;

    (b) where the reason or one of the reasons for the delay was that all or any of the facts relevant to the cause of action did not become known to the Claimant until after the end of the period mentioned in section 4A of the 1980 Act (i.e. twelve months)

        (i) the date on which any such facts did become known to him or her, and

        (ii) the extent to which he or she acted promptly and reasonably once it was known whether or not the facts in question might be capable of giving rise to an action; and

    (c) the extent to which, having regard to the delay, relevant evidence is likely

        (i) to be unavailable, or

        (ii) to be less cogent than if the action had been brought within the period mentioned in section 4A.

26. Those provisions were considered by the Court of Appeal in *Steedman v British Broadcasting Corporation* [2002] EMLR 318 and, more recently, revisited in *Brady v Norman* [2011] EMLR 16. It was recognised that disapplying the limitation period would always prejudice a defendant, since he would lose his limitation defence: see e.g. *Thompson v Brown* [1981] 1 WLR 744, 750B, *per* Lord Diplock. Likewise, refusing to disapply the limitation period would always prejudice a claimant, because he would continue to be met with a complete statutory defence regardless of the merits. The balance between those two prejudices would vary according to the facts of the particular case.

27. Particular considerations come into play in defamation proceedings. It is necessary to take account particularly of Parliament's intention that a claimant should assert and pursue his perceived need for vindication speedily. As was pointed out by Tugendhat J in *Lonzim Plc v Sprague* [2009] EWHC 2838 (QB), one needs always to remember that the mere fact of being sued for defamation can itself be a serious interference with freedom of expression. That is plainly a factor to take into account when addressing where the balance of prejudice may lie in any given case.

28. In his witness statement, at paragraph 28, Mr Walker draws attention to a number of particular factors relevant to the balancing exercise in this case.

29. He points out that the proceedings were not begun until about seven months after the expiry of the limitation period in respect of the April 2009 publications. This was despite the fact that the Claimant knew all the facts he needed by 7 May 2009. He received a letter bearing that date from ISA notifying him that a report had been received from Ms Miller referring to his dismissal "for gross misconduct relating to false accounting". The Claimant was therefore in a position to issue defamation proceedings well before the deadline in April 2010. If he felt that he needed further information, he could have pursued enquiries with the Defendant and/or ISA. He only decided to contact Ms Ford of ISA on 1 July 2010 (she being the person who had sent the letter of 7 May 2009). No letter of claim was sent to the Defendant until 11 September of that year. I should perhaps add, for the sake of completeness, that the Claimant told me that he had written to ISA on 2 July and 8 August 2009, but without reply.

30. No explanation has been put forward by the Claimant for the delay between 7 May 2009 and 1 July 2010.

31. Secondly, Mr Walker points out that the balance of prejudice has to be judged in the light of the inherent weakness of the claims. There is clearly a strongly arguable defence of qualified privilege in the light of the statutory background and the common and corresponding interest in the subject-matter between the Defendant and those to whom the communications were published.

32. Although the Claimant has faintly suggested that such a defence could be defeated by proving malice, there is absolutely no evidence to support such a plea. The difficulties are conveniently summarised by the learned editors of *Duncan and Neill on Defamation* (3rd edn) at 18.21:

> "An allegation of malice is tantamount to an accusation of dishonesty and should not be lightly made. The court is often called upon to strike out pleas of malice which are vague or speculative. When considering such applications the court applies a test similar to that used in criminal cases in light of *R v Galbraith* [1981] 1 WLR 1039. The claimant must set out a case which raises a probability (rather than a mere possibility) of malice."

33. Reference was made also to the summary of the law in *Seray-Wurie v Charity Commission of England and Wales* [2008] EWHC 870 (QB) at [34]-[35]:

> "In order survive 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.

> It is necessary, in effect, for a claimant to demonstrate that the person alleged to have been malicious abused the occasion of privilege, for some purpose other than that for which public policy accords the defence. 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."

34. It is necessary also to remember that, where the defendant is a corporate entity, the claimant will need to plead and prove the relevant state of mind against a particular individual or individuals. It will not suffice to make vague allegations of malice against the corporate entity in general.

35. Finally, Mr Walker submits that it is necessary to take into account considerations of proportionality. It is difficult to see that the Claimant could gain anything worthwhile from pursuing proceedings over such limited publications, by way of compensation or vindication, when compared to the enormous inconvenience and expense to which the Defendant would be put (and indeed has already been put) through being sued. Leaving aside the costs owing in respect of the other litigation, the Claimant is already indebted to the Defendant by way of the Master's costs order.

36. It is worth noting also that there is no risk of further publication by the Defendant or, for that matter, by ISA which agreed in January 2011 to destroy the Claimant's case file. There is thus no need for injunctive relief.

37. In all the circumstances, I can see no reason to take the exceptional step of disapplying the limitation period and permitting Mr Zinda to pursue these weak claims against the Defendant in respect of minimal publication.