

## EDUCATION LEGAL UPDATE

Spring 2014

### **School owes non-delegable duty of care to pupil *Woodland v Essex County Council [2013]***

In a recent ground breaking case the highest court in England overturned the decision of the Court of Appeal finding that schools owe a non-delegable duty of care to their pupils when they arrange for a third party to perform functions which the school has a duty to perform.

#### **Facts**

A woman who was a 10 year old pupil at a maintained school at the time had suffered a severe brain injury during a swimming lesson organised by her school which took place during school hours as required by the National Curriculum but which was provided by a private contractor. Proceedings for negligence were issued against the local authority in the High Court. The appellant said that the duty to arrange and provide the swimming lessons was a non-delegable one. Both the High Court and Court of Appeal had found that no such duty existed, the school's duty was discharged when it entrusted its task to an apparently competent provider. An appeal was made to the Supreme Court which focussed on the issue of whether the local authority owed the child a non-delegable duty of care and be liable for the negligence of its contractors.

#### **Decision**

The appeal was successful.

For a duty to be non-delegable, and in the absence of vicarious liability, the duty had to be one where the claimant had some characteristics making them vulnerable and which required the defendant to retain control over them in order to perform the function for which it had taken responsibility. The scope of the respondent's duty to pupils in its care included performance of the functions entrusted to it by whomever it might get to perform them.

Non-delegable duties of care are inconsistent with the fault-based principles on which the law of negligence is based, and are therefore exceptional. Lord Sumption stated that it was "wholly reasonable that the school should be answerable for the careful exercise of its control by the delegate."

The LEA had an obligation to provide the swimming lessons, which it had delegated to an independent contractor. However, the LEA could not delegate its responsibility to its pupils by instructing contractors, and if the swimming teacher and lifeguard were negligent, the LEA remained primarily liable for the appellant's injuries.

The court held that it is fair, just and reasonable to impose such duties in order to protect those who are inherently vulnerable and subject to a significant degree of control.

The case was remitted to the High Court to decide whether such a duty was owed in this case and if so whether the defendants were in breach.

### **References – Key Points**

1. There is no duty to give a reference (although a reference should not be withheld for a reason connected with unlawful discrimination)
2. If a reference is given it should be truthful and balanced.
3. Care should be taken not to disclose confidential information in a reference without the employee's consent .e.g. details identifying an illness or condition from which the employee suffers.
4. If in doubt take legal advice or advice from your human resources department
5. Consequences of giving an untruthful or unbalanced reference
  - From the employee – claims for loss of earnings arising from negligent misstatement (i.e. where the employee cannot find alternative employment because of the reference); claims for compensation for unlawful discrimination and in severe cases even claims for damages arising from defamation or liable.
  - From a future employer – claims for losses arising from negligent misstatement relating to the employment of an employee who would not have been employed had a truthful and balanced reference been given.

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## Implications of the decision

Outsourcing of services is increasingly common, and this judgment makes it clear that **where there is a legal requirement to provide a service**, the duty cannot be delegated. In this case, the LEA will be liable if there is any proven negligence by the teacher or lifeguard.

There is a legal requirement to provide physical education, and the judgment seems to stop short of imposing a non-delegable duty where, for example, a school may organise excursions where they are under no legal obligation to do so. For example, they would not necessarily be liable if an independent contractor or third party is negligent at an outdoor activity centre chosen by the school, if it is not legally required to provide such activity.

It was also recognised in this case that the time where the existence of insurance to cover a potential liability should be ignored had long passed, the implication being that the LEA may have insurance or funds which were more comprehensive than the Swimming Teachers Association (in this case).

It is clear that the scope to delegate duties has been significantly reduced. This may place some financial burden on schools (even though the court was careful to recognise the importance of not imposing unreasonable financial burdens) if they are required to fulfil their responsibilities themselves. It would also mean recruiting qualified and experienced staff who could discharge those responsibilities during those specific activities reducing the risk of harm to pupils and thus any legal liability.

## Procurement for Academies

Academies are subject to the Public Contracts Regulations which for certain contracts means a prescribed process must be followed (and when the Regulations do not apply academies need to demonstrate they have been open, fair and transparent when purchasing goods and services). Ad hoc contracting systems are relatively common and can lead to expensive and unfavourable contracts. The DfE estimates that there can be as much as a 966% price variance for suppliers of IT equipment. If you are unsure about how to go about procuring goods and services seek advice, it could save you money in the long run.

### Points to consider

1. Do the Regulations apply?
2. Do you have an internal procurement procedure and has this been followed?
3. Are you clear about what your requirements are and have these all been clearly set out?
4. Have you identified the best value for money proposal?
5. Are there any frameworks available to you? This can be the most cost-effective method of procurement, particularly for smaller academies.
6. Consider negotiating supplier terms and conditions as these are unlikely to have been drafted in your favour.

## Employment Law and Tribunal Scheme launched

Our new fixed price scheme helps our clients avoid unbudgeted legal fees in the event of employment tribunal claims. An employment law hotline, free training, legal updates and an annual review meeting are also included. Contact [matthew.waterworth@kent.gov.uk](mailto:matthew.waterworth@kent.gov.uk) for further details.

## Multiple grievances and victimisation

Nothing outrages people more than being accused of racism. But what can you do when the accusation is made and is untrue? And what if an employee keeps on making such accusations?

This situation came before the Employment Appeal Tribunal (EAT) in the case of *Woodhouse v West Northwest Homes Leeds Ltd*. In the space of five years Mr West, who was black, brought ten grievances against his employer, all containing allegations of racism, and eight employment tribunal claims of race discrimination. All of the race discrimination allegations were rejected. Finally the employer had had enough and dismissed him, on the basis that there had been a breakdown of trust and confidence. Not surprisingly, Mr Woodhouse brought a further claim to the employment tribunal, but this time he was successful.

Under the Equality Act 2010 it is unlawful victimisation for an employer to dismiss an employee or subject them to any other detriment because of a protected act. Protected acts include bringing proceedings for, or alleging, unlawful discrimination. However, an act will not be protected if the allegation is made in bad faith, i.e., without a genuine belief that it is true.

In this case, the key issue was whether Mr Woodhouse had been dismissed because he had done a protected act, i.e., made an allegation of unlawful discrimination. The EAT was not concerned with whether the allegations had any substance to them; the question was whether Mr Woodhouse had made allegations of race discrimination in good faith and been dismissed as a result. The EAT found that this was the case: he genuinely believed he had been discriminated against.

Should an employer be faced with an employee who, like Mr Woodhouse, raises grievance after grievance alleging discrimination (and KCC's employment lawyers have dealt with a few), it is wise to tread carefully. Unless there is evidence that the employee is acting in bad faith and does not believe that the allegations are true, any disciplinary action is likely to be viewed as unlawful discrimination.