public matters newsletter

September 2015

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public sector lawyers

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There has long been a debate to the extent of a public authority's power to correct mistakes in their decision. One school of thought suggests that a public authority has no power to correct mistakes other than minor slips and omissions[1]. The other school of thought suggests that even where powers to correct mistakes are not expressly conferred statutory tribunals (and other public authorities) have the power to correct slips and set aside judgments obtained by fraud or based on a fundamental mistake of fact[2].

Quite why the question as to the ability of a public authority to correct a decision based on a fundamental mistake of fact has endured for so long remains one of life's many mysteries. I accept that calling it one of life's mysteries may be something of an overstatement but it certainly is one of many legal mysteries. As long ago as 1972 Lord Denning MR addressed the issue of the broad corrective principle in his decision in Secretary of State for Employment v ASLEF (No2)[3] when he said the court could intervene if a minister *"plainly misdirects himself in fact or in law"*. Since Lord Denning MR's decision in 1972 there has been a plethora of case law which has supported this position[4]. Nonetheless the conflict endured and each school of thought has maintained their respective position.

The issue of a public authority's broad corrective principle was recently considered by the Administrative Court in the case of R (Chaudhuri) v General Medical Council[5]. The facts of Dr Chaudhuri's case in brief are as follows. The General Medical Council ('GMC') were investigating two separate complaints about treatment provided by Dr Chaudhuri to his patients. The GMC is precluded from investigating a complaint where more than five years have elapsed since the most recent events giving rise to the allegation, unless the Registrar[6] considers that it is in the public interest or there are exceptional circumstances of the case which make it appropriate for the investigation to proceed. This rule is commonly referred to as the five year rule. The complaint which gave rise to the judicial review proceedings alleged that Dr Chaudhuri had failed to provide appropriate treatment to his patient in April, June and August 2008.

On receipt of the original complaint, the Assistant Registrar determined that as there had been less than five years since the most recent event giving rise to the allegation the five year rule was not engaged and proceeded to consider the complaint. Dr Chaudhuri was duly notified that the complaint was being considered and in accordance with the GMC's procedure Dr Chaudhuri was asked to provide his comments on

[1] See Akewushola v Secretary of State for the Home Department [2000] 1 WLR 2295 and R (oao Secretary of State for the Home Department) –v Immigration Appeal Tribunal [2001] QB 1224
[2] See Porteous v West Dorset District Council [2004] EWCA Civ 244 and Jenkinson v NMC [2009] EWHC 1111
[3] [1972] QB 455
[4] See Hollis v Secretary of State for the Environment (1982) 47 P & CR 31 and Haringey LBC v Secretary of State for Communities and Local Government [2008] EWHC 1201 (Admin)
[5] [2015] EWHC 6621
[6] The Head of the General Medical Council

the allegations. Solicitors acting for Dr Chaudhuri contacted the GMC and highlighted that the consultations which gave rise to the complaint in fact took place twice in April and once in May 2008 and not in April, June and August 2008 as asserted by the complainant. The solicitors argued that as more than five years had elapsed since the most recent events giving rise to the allegation, the five year rule was engaged and as such an investigation into the complaint should not proceed. The Assistant Registrar refused to revisit the decision to proceed with the investigation on the basis that at the time the allegation was received by the GMC, it was correctly determined [by the Assistant Registrar] that the five year rule was not engaged i.e. because the complaint mistakenly cited August 2008 as the last date of treatment and the Registrar had no power or obligation to reconsider a decision in the absence of a court order.

Dr Chaudhuri's representatives challenged the Assistant Registrar's decision not to reconsider the decision in light of the factual error brought to her attention. The court granted Dr Chaudhuri's application and quashed the GMC's decision. Judgment was delivered by Haddon-Cave J who found that the five year rule raised an objective question of jurisdictional fact. The error in the original complaint (stating the date of treatment as August 2008 instead of May 2008) caused the Registrar to fall into error in determining that the five year rule did not apply. When the error was pointed out, the GMC should have corrected the original decision but did not do so. For those reasons the court quashed the decision and remitted it back to the GMC for reconsideration.

In delivering his judgment Haddon-Cave J adopted the analysis of Keith J in another GMC case[7] who himself had adopted the court's analysis in Porteous[8] which held that a local authority had a power to revisit and rescind [emphasis added] an earlier decision based on a fundamental mistake of fact. Haddon-Cave J found that public bodies had an inherent jurisdiction to revisit previous decisions and that jurisdiction was not limited to correcting slips or minor errors which did not substantially affect the rights of the parties or the decision taken. On the contrary Haddon-Cave J found that public bodies have an implied power to revisit and revoke any decision vitiated by a fundamental mistake as to the underlying facts upon which the decision in question was predicated.

Haddon-Cave J further found that any suggestion that a public authority did not have the ability to correct a decision based on a fundamental mistake of fact would be to allow process to triumph over common sense, that such a broad corrective principle was consonant with the principles of proportionality and utility and importantly not having broad corrective principle would be inimical to good administration.

Most notably in Haddon-Cave's J judgment was a comment that there is no sense in requiring wasteful resort to the courts to correct obvious mistakes.

[7] Fajemisin –v- General Medical Council [2013] EWHC 3501 (Admin)
[8] Ibid footnote 2

There is no indication that the GMC intends to appeal this decision. So for the moment it appears common sense has led over process and public authorities can indeed correct decisions premised on a fundamental mistake of fact.

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changes to help small businesses and apprentices

On the 12 August 2015, the Crown Commercial Service (CCS) released further guidance on the Public Contracts Regulations (PCRs) 2015, which came into force on 26 February 2015. The PCR 2015 was introduced to implement EU Directive 2014/24 on public procurement, updating the old PCRs 2006. This guidance note specifically discusses the impact on small and medium-sized enterprises (SMEs) with regards to bidding for public sector contracts, highlighting the provisions that they have changed and how they hope this will assist the smaller businesses.

The Department for Business, Innovation and Skills (BIS) also announced a new procurement requirement that strongly encourages bidders for public sector contracts to show dedication to apprenticeships. This was announced on the 21 August 2015 and should be implemented from 1 September 2015. These changes are intended to enhance and increase the number of apprenticeships and improve the quality of the training. The Prime Minister, David Cameron, has revealed these plans alongside launching a consultation on the implementation of an apprenticeship levy and introducing 'industry standards', developed by Trailblazer groups, to outline the skills an apprentice must achieve to meet the needs of employers.

Key provisions

The main regulations within the PCRs that have been highlighted as provisions to encourage small businesses to bid for public contracts are:

- dividing contracts into lots will be encouraged. Whilst this is still at the discretion of the authority, if they decide not to divide the contract they must provide a written explanation as to why they decided not to under regulation 46

- the exclusion and selection requirements have been reorganised to make it more efficient. Suppliers are able to self-certify, using a standardised form, that they meet the selection criteria, and only the winning bid has to supply evidence. The minimum turnover cap, if there is one, has been limited to be no more than twice the contract value unless duly justified. This should prevent the exclusion of smaller providers

- minimum process timescales for suppliers to respond to adverts and submit tenders have been introduced. Separate guidance has been issued on actual timescales but it is clear that these timescales will have a greater impact on smaller and simpler procurements which will attract small businesses

- the introduction of PINs (prior information notices), instead of using contract notices, will provide suppliers with early notice of an opportunity they may want to bid for and provided they can show their interest to the authority they will be invite to tender at the appropriate time. It will reduce the level of administration and help the business plan ahead which is an attractive policy for small businesses However, where PINs are used in this way the authority will need to be mindful of the growth of the market. In particular, new start-ups (who commence work after the issue of a PIN used as the only call for competition) may not be alerted to the existence of opportunities in the same way that the issue of a contract notice would have done

- the Dynamic Purchasing System (DPS) has been simplified and enhanced. The DPS can now be divided into categories and suppliers can join the DPS at any time in its subsistence. It is compulsory to admit into the DPS, and invite to bid, all suppliers who meet the selection criteria and, once admitted, will not be required to repeat these stages for every contract awarded under that DPS. This will attract small businesses as it is cheaper and less onerous than the previous procedure

- electronic communication requirements, which become compulsory in 2017, will mean that costs and the time involved in handling documents are significantly reduced when submitting tenders. Procurement documents are already required to be available electronically and free of charge from the date the contract notice was published. The E-Certis database should assist small businesses with cross-border bids across the EU as it contains all of the information they need on exclusion and selection evidence in other member states

- innovation partnerships have been enabled for companies who intend to create a partnership to develop a new product, service or work to assist with the public sector. The authority runs phases in which targets of the partnership must be met. Small businesses with limited resources will now have the opportunity to create or improve a service, make a product or complete works in the public sector without the need for funding or having a particular customer in place

- a group of suppliers is allowed to participate in public procurement tender without being in a specified legal form until it becomes a winning bid, in which case the authority can require the suppliers to be in a specific form if it is required for performance of the contract. Suppliers are also allowed to rely on other entities which, for small businesses that do not have the resources to fulfil the contract themselves, can benefit from to make a successful tender

The provisions regarding apprenticeships in public sector procurement include:

- any bidder for a government contract worth more than £10 million must show commitment to apprenticeships

- the bids will be reviewed, along with the proposals of their contract, according to how many apprentices they anticipate they will maintain

- the successful bidder will enter into a contract regarding the agreed apprenticeship numbers which will be monitored and action taken if targets and numbers are not met

- it will apply to procurement contracts with central government departments, their executive agencies and non-departmental public bodies.

Why?

A number of PCR provisions have been clarified in the Guidance Policy to remove potential barriers and deterrents, and thereby encourage small companies to partake in public procurement. The support for the involvement of smaller businesses comes from an expectation of increased competition which has a direct effect on receiving value for money in its procurement for both the public body and the local community. With more firms tendering for bids it encourages lower prices but hopefully maintains a high standard of work, service or produce. It also assists the general economic growth and encourages innovation in that market while different businesses attempt to make their company stand out from the others. However, these provisions do not have the intention of giving smaller businesses preferential treatment. This would have a potentially negative impact on competition and would, in fact, be contrary to EU Treaty principles. They are merely a lean towards helping smaller companies have a greater opportunity of making a successful, but fair, tender on a public sector contract.

Lord Young's report, 'Growing Your Business', published in May 2013, had a significant impact on this part of the PCR and his intention was to ensure that SMEs were given a fair chance to win public sector contract bids. His report and suggested actions intended to get rid of the so-called red tape preventing small businesses from achieving government contracts. Separate guidance was issued on these changes in the CCS's Procurement Policy Note, 'Reforms to make Public Procurement more Accessible to SMEs' in February 2015.

The apprenticeship requirements are to assist the government's pledge to introduce 3 million new apprenticeships by 2020 and improve the standards of training. It is hoped that these requirements for public sector contracts will widen the range of businesses offering apprentices, and increase the number of apprentices in businesses already providing them, by offering advantageous positioning in public sector tendering. The CCS is yet to release guidance on all of these provisions but it is expectedly shortly.

Impact?

It is the intention that these parts of the PCRs encourage small businesses to tender for public sector contracts. This is expected to be accomplished through encouragement of dividing contracts into lots to allow smaller firms to work together on the same contract, reducing costs and the time taken when tendering by exchanging documents through electronic communication requirements, and simplifying the tender bidding process. The ability of smaller firms to be able to work with other businesses, for example as an innovation partnership or as a group of suppliers, may increase their chances of a successful tender bid by being able to take advantage of resources they would not normally have access to.

Of course, many of these PCR provisions will also have a positive impact on the tenders of larger competitors. This is not necessarily a negative side-effect of the PCR (as the authority cannot give smaller businesses preferential treatment) but if it removes the intended support for the smaller suppliers it may counter-act the SME-friendly policies. It appears that the hope is to place businesses of all sizes on a level footing at the application stage by removing the expenses and extensive administration that deters smaller businesses from bidding for large public sector contracts but it remains to be seen whether these changes will be successful in that endeavour.

The apprenticeship requirements implemented on government contracts should have a significant effect on businesses supporting apprentices, especially regarding those in industries that do not normally offer apprenticeships, as it will give them a boost in the bidding race in comparison to other competitors. With more than £50 billion every year being spent on procurement in the public sector it will certainly be a consideration for those wanting to gain an advantage in the tendering process. It may, however, have a negative impact on SMEs, contradicting the above provisions, by excluding smaller businesses that cannot afford to either run apprenticeships or increase the number that they already provide. The minimum contract amount may assist on this as only major contracts are affected but it still appears to put them at a disadvantage.

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Are your records up to date?

On 22 July 2015 the Chancery Division of the High Court delivered its judgment in the case of Chesterton Commercial (Oxon) Limited v Oxfordshire County Council. The claimant brought a claim against Oxfordshire County Council (the 'Council') for damages caused by incorrect information being provided in replies to a local authority search raised by the claimant during the course of a property purchase. The allegation was that the Council had failed to keep its records up-to-date regarding whether part of a site the claimant was purchasing formed part of the public highway or was private land.

The search results provided by the Council did not disclose that the Council had been investigating whether or not part of the site being purchased by the claimant was in fact part of the highway maintainable at public expense.

The court held in favour of the claimant stating that the Council was in breach of its statutory duty under Section 36 of the Highways Act 1980 as it did not make correct and up-to-date information available to the claimant when it conducted its searches. The Council also owed the claimant a duty of care at common law with respect to its enquiries as the search results amounted to a statement that the land was not highway maintainable at public expense but was instead private land capable of being used and sold on as such.

The court awarded the claimant £240,000 in damages plus £150,000 to cover professional fees incurred by the claimant in trying to mitigate its losses. This case serves as a useful reminder to all local authorities of the importance of keeping its records up-to-date and the potential costs implications if they fail to do so.

Summary

This dispute centred on the circumstances surrounding the claimant's acquisition of 94 and 96 Bell Street and 2a Bell Lane in Henley-on-Thames. The title to these properties included some land fronting 94 to 102 Bell Street that comprised a footway, a driveway, a triangular area of land containing trees and some car parking spaces that became the focus of the dispute ('the Parking Spaces').

A local group called the Henley Society wrote to the Council to raise the issue of whether The Parking Spaces, together with some other land, actually comprised a highway maintainable at public expense. They raised the principle that 'once a highway always a highway' as they believed that the Parking Spaces had historically been part of the highway maintainable at public expense, and so they always would be. The court decided that by October 2006 the Council was *"definitely"* aware of the risk that their highways plan was inaccurate, as evidenced by its letter to local residents. The letter informed them that the Council was aware its search results revealed the Parking Spaces to be private land but this could be *"overturned"* and

that material evidence of the fact that the Parking Spaces could be public highway had been provided but that there was a degree of doubt. It began to investigate the situation but did not update its plan or replies to any enquiries to refer to such an investigation, although it had done so on at least one other site where an investigation was taking place.

In 5 June 2007 the claimant raised enquiries of South Oxford District Council ('SODC') on form CON 29 Part 1 Standard Enquiries of Local Authority (2002 edition). SODC acted as agent for the Council in providing replies to the enquiries on the CON 29 relating to highways as the Council was acting in its role as local highway authority. The replies to those enquiries provided on 16 June 2007 did not reveal any ongoing investigation or dispute concerning the status of the Parking Spaces. On 23 August 2007 the Council updated its records to show that there was an investigation underway into the status of the Parking Spaces. However, the claimant had exchanged contracts for the purchase of the property, including the Parking Spaces, on 3 August 2007, before then completing that purchase on 14 September 2007.

It was in April 2009 when the claimant was negotiating the sale of 94 Bell Street that the prospective purchaser raised the fact of the ongoing investigation following receipt of its own enquiries of the Council. As a result of this the sales of 94 and 96 Bell Street by the claimant completed without their expected parts of the Parking Spaces. The claimant sought to mitigate its losses by applying for a stopping up order but this failed when on 8 January 2013 the Department of Transport published its decision refusing the stopping up order. Claims were later brought against the claimant by owners of 98 Bell Street and 76 Bell Street, who had bought parts of the Parking Spaces from the claimant, to recover the price paid.

As a result of this the claimant bought proceedings against the Council citing a loss of £400,000 of reduced prices and lost profits as well as £150,000 in professional fees spent attempting to mitigate its loss by applying for the stopping up order.

The background law

The following legislation and case law was relevant to this case:

- Section 36(6) of the Highways Act 1980 states that *"the Council of every County……shall cause to be made, and shall keep corrected up to date, a list of the streets within their areas which are highways maintainable at the public expense."* The Council was therefore under a statutory duty to keep its highways records up to date at all times

- Gooden v Northamptonshire County Council [2001] EWCA CIV 1744: in this case the court held that a local authority owed a duty of care in respect of incorrect answers given in replies to enquiries, including a county council when stating that certain land was maintainable as a highway at public expense. This case also went onto decide that a local authority was not expected to know for what

purpose a particular enquiry is made when enquiries about the highways plan are raised unless the intention is bought to their attention. This point is relevant when considering damages later on.

The decision

The court held that the Council was in breach of its statutory duty under section 36 of the Highways Act 1980 as it had not made correct and updated information available to the claimant when it conducted its searches. The Council held that by October 2006 at the latest (the case history shows that the Land and Highways Officer was alerted to this issue in 2004) the Council was aware that its records may not be up to date but it was not until 23 August 2007 that any investigation was referred to on its records and it was only in 2010 that the Council came to the decision that actually the parking spaces were part of the highways maintainable at public expense.

The court then went on to state that the Council owed the claimant a duty of care at common law with respect to the answers provided to these enquiries. The statement that the parking spaces did not form part of the highway maintainable at public expense was a breach of that duty of care and also created the conditions for liability for miss-statement. The court regarded that it was entirely foreseeable by the Council that if the result of the search was wrong the claimant might go ahead and purchase the property at a price which was higher than if an accurate response had been given.

Attention then turns to the extent of damages. The claimant had brought a claim for £400,000 in damages as a result of losses that included loss of development value. However, the Council had not been told by the claimant that they were buying the property to redevelop and then sell on so the court found that any measure of loss which would import a loss of development profit was too remote to be recoverable. This follows the decision-making in Gooden v Northamptonshire County Council regarding what a local authority should be expected to know about the reason for enquiries being raised and therefore losses were limited to the diminution in value of the property as at the date that the claimant purchased the property.

The court awarded the claimant £240,000 in damages after hearing expert evidence regarding the extent of the overpayment by the claimant for the property and also allowed them their claim for £150,000 in professional expenses because it was *"clearly foreseeable that the Claimant would seek to mitigate its losses and the most obvious way of doing so would be to apply for a stopping up order"*. The court also allowed the claimant's claim for increased costs of funding the purchase given that they overpaid for the property. No figure has yet been put on this head of loss and that will be decided at a later date.

Points to note

Firstly, where a local authority is under a statutory duty to keep its public records up to date then it should do so.

Secondly, local authorities should ensure that its publicly available records are as detailed as possible. So for instance if there is any ongoing dispute as to the status of a highway then this should be disclosed, even if no decision has been reached.

Thirdly, if the local authority is informed that the property is being purchased for development purposes then be aware that this opens up the possibility of greater damages if a claim is brought. The local authority could be liable for loss of development profits as well as loss of value of the property being purchased.

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defamation claims: a narrowing scope

The Defamation Act 2013 made significant reforms to the law of defamation, including by way of the introduction of a 'serious harm' requirement for claimants and the introduction of a public interest defence. The serious harm test recently been considered for the first time by the High Court in the case of Cooke and another v MGN Ltd and another [2014] EWHC 2831 (QB).

The claimants in Cooke were a housing association and its Chief Executive. The defendants had published articles under the headline 'Millionaire Tory cashes in on TV Benefits Street'. The articles suggested that a landlord was making large profits by renting out poor quality accommodation to those on social security benefits and made reference to the fact that the housing association owned three houses on the street and that its Chief Executive earned a six-figure salary and lived in a large house. The claimants argued that these statements, whilst true, were defamatory when considered in the context in which they had been put – the article suggested that the housing association was one of the disreputable landlords referred to in the remainder of the article who made large amounts of profit by letting out sub-standard accommodation to those on benefits.

The matter was before the court for the trial of two preliminary issues: whether the article could bear the meanings argued for by the claimants, and whether both or either of the publications of the article had caused or was likely to have caused serious harm to the reputations of either of the claimants.

Section 1 of the Defamation Act 2013 provides that a statement is not defamatory unless its publication has caused or is likely to cause serious harm to the reputation of the claimant. The judge noted that the effect of the requirement for serious harm was greater than that of substantial harm (that had originally been proposed) and raised the bar over which a claimant would have to jump to bring defamation proceedings. He held that in all but the most obvious cases (giving the example of widely circulated publications that accused a claimant of terrorism or child abuse) a claimant will have to adduce evidence as to actual or likely harm, taking the date of issue the claim as the reference point. Generally, it was not sufficient to demonstrate serious distress or injury to feelings and that nature and effect of any apology was a factor to be considered in assessing whether such serious harm was likely to be caused.

In the present case the judge attached significance to the fact that an apology had been issued and internet copies of the articles had been taken down, and held that the apology was sufficient to eradicate or at least minimise any unfavourable impression created by the original article in the mind of the hypothetical reasonable reader. In those circumstances, and in the absence of any evidence of actual or likely harm, he found that the serious harm test was not satisfied. Further this was not a case in which he was prepared to infer such harm.

The case is useful in demonstrating the court's interpretation of the serious harm test as involving a significant raising of the bar for the bringing of defamation claims, requiring evidence and more than either substantial harm or serious distress or injury to feelings. It means that very few claimants will be able to meet the test, particularly where a prompt and effective apology has been given. The case is also helpful in identifying that only in the most egregious cases will the court be prepared to infer serious harm – in all other cases evidence will be required.

Even if a claimant could satisfy the serious harm test, Section 4 of the Defamation Act 2013 provides that it is a defence to any claim for defamation for the defendant to show that a) the statement complained of was, or formed part of, a statement on a matter of public interest and b) the defendant reasonably believed that publishing the statement complained of was in the public interest. In deciding whether the defence is made out, the court will have regard to all the circumstances of the case.

The Section 4 defence, when taken with the robust approach to serious harm adopted by the court in Cooke, should give public authorities threatened with defamation proceedings significant comfort as to the hurdles that any such claimants would have to overcome and as to the safeguards now available to ensure that only serious cases are brought to court and that statements made in the public interest should be protected from successful claims.

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redeployment pools and agency workers

Do the Agency Workers Regulations 2010 (the Regulations) and Articles 5 and 6 of the Temporary Agency Worker Directive (2008/14/EC) (the Directive) require agency workers to be given the same opportunities to apply for vacancies as existing 'at risk' permanent employees placed within a redeployment pool?

A recent Employment Appeal Tribunal case has examined the rights granted by both the Regulations and the Directive and concluded that they do not.

Mr Coles v Ministry of Defence UKEAT/0403/14/RN

The claimant was an agency worker engaged to provide services relating to estates management for RAF service personnel and service families' domestic accommodation for the Defence Housing Executive (in effect, the Ministry of Defence). In 2013, the DHE undertook a substantial restructure and 530 employees were placed into a redeployment pool as a result. Those employees were to be given priority consideration for vacancies in the Ministry of Defence at their existing grade (under what is known as Stage 1 of the National Vacancy Filling Scheme).

A post of Service Family Accommodation Estate Manager was advertised. This was, in effect, the post that the claimant had been filling. This advertisement would have been visible to any internal candidate, including the claimant, had he chosen to look for it.

The claimant did not apply. Another employee from the redeployment pool did apply and was appointed under Stage 1. A consequence of her appointment was that DHE no longer had need for the claimant's services and he was given notice.

The claimant brought a claim under both the Regulations and the Directive, arguing that the Ministry had failed to allow him access to details of the vacancy of his position and had denied him the opportunity to apply for his position.

What rights are protected?

The EAT considered the extent to which agency workers were entitled to equal treatment. It concluded that, under the Directive, this was limited to working hours and pay; there was no general right for a temporary agency worker to be treated no less favourably than a direct employee.

The parties in this case sought to compare the Directive to the directive concerning fixed term work. However, the EAT held that rights conveyed by the directive relating to fixed term work (and hence the Fixed-Term Employees (Prevention of Less Favourable Treatment) Regulations 2002) were of an entirely

different character – they conferred a general right not to be treated in a less favourable manner simply because the person concerned is a fixed-term worker and therefore included a much broader concept of equal treatment than under the Directive or Regulations.

The claimant argued that the right to have information about vacancies required corresponding rights to apply for those vacancies and to have any such applications considered on an equal footing with those of permanent employees. The EAT disagreed. Equal provision of information was what was stressed by the Directive and Regulations, rather than equality in the job application process. The right to information was a meaningful right in itself but this was limited to ensuring that information was provided to agency workers in as useful a form and at as convenient a time as it was to employees within the organisation.

"The purpose of the Directive is to give temporary agency workers the same chance as other workers in the undertaking of the end user to find permanent employment with that end user. It has nothing to say about the terms upon which there should be recruitment for any post. If an employer wishes to give preference to those being redeployed, perhaps to satisfy his obligations to them as his permanent employees, he is entitled to do so, and will not in doing so break any duty imposed by the Regulations or the Directive."
the Honourable Mr Justice Langstaff

Is a comparator required?

The Regulations provide that agency workers must be given the same opportunity as a *"comparable worker"* to find permanent employment with the organisation. The test for assessing comparability is whether the individuals are engaged in the *"same or broadly similar work"* (and not whether they have the same or broadly similar qualifications and skills). However, it is worth noting that under the Directive, there is not so clearly a requirement for a comparison – the Directive refers to agency workers being informed of any vacant posts to give them the same opportunity as *"other workers"*.

As the Directive is directly effective against emanations of the state, public authorities should ensure that equal information is given to all employees and workers, including agency workers.

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Avoiding the wrongful trading trap

The increase in number of arms-length local authority trading companies (LATCs) brings with it new responsibilities for those involved. Councillors and officers serving as directors of LATCs assume personal responsibilities under the Companies Act 2006. They owe a duty to shareholders and creditors of the company and may be personally liable if the company engages in wrongful trading or any other offence.

Wrongful trading occurs where directors of a company allow it to continue to trade, in circumstances where they knew, or should have known, that there was no reasonable prospect of the company avoiding insolvent liquidation, and the company then goes into liquidation.

The recent case of Philip Anthony Brooks and Julie Elizabeth Willetts (Joint Liquidators of Robin Hood Centre Plc – in liquidation) [2015] EWHC 2289 (Ch) provides a salutary lesson to the directors of all companies, including LATCs. Here, the High Court held that the respondent directors knew or ought to have known that there was no reasonable prospect of the company avoiding insolvent liquidation following certain events, such as a letter from HMRC confirming a VAT liability and an increase in the rent and service charge. At that point, the directors should have taken steps to minimise the losses to the creditors as a whole and the directors were ordered to pay compensation based on a deficiency comparison based on the difference between the date of a hypothetical liquidation and the actual date of liquidation.

The background

The application was brought by the liquidators of Robin Hood Centre Plc ('the Company') against the directors under s214 of the Insolvency Act 1986 ('IA 1986') for contribution by the directors to the assets of the Company in respect of wrongful trading and for an order for compensation under s212 IA 1986 for breach of duty.

The liquidators claimed that there were a number of events which the meant that the directors knew or ought to have concluded that there was no reasonable prospect of the Company avoiding insolvent liquidation. The events were:

1. the year-end accounts for 2005 and 2006
2. the receipt of professional advice in October 2006 about a large VAT liability, in respect of which the directors had sought a review
3. the year-end accounts for January 2007, which showed a loss and did not include the VAT liability or an increase in rent expected from a pending rent review

4. a letter from Revenue and Customs on 3 May 2007 stating that the VAT liability had been confirmed on review.

The legal issues

The principal legal issues which the Registrar addressed were:

- whether the directors had wrongfully traded which involves essentially three elements under s214(2) IA 1986:
    - the company went into insolvent liquidation at a time when its assets were insufficient for the payment of its debts, liabilities and the expenses of the winding up ('the Insolvency Element')
    - at some point before the commencement of the winding up, that person knew or ought to have concluded there was no reasonable prospect that the company would avoid going into insolvent liquidation ('the Knowledge Element'), and
    - that the person was a director (including shadow director) of the company at that time.
- which party had the burden of proof in the defence under s214(3) IA 1986 that every step was taken to minimise the losses to the creditors and whether the directors had actually taken those steps, and
- whether one of the directors should be judged by a higher standard than a "reasonable director" given his experience.

The other issues that were also considered were the interpretation of company financial statements for the purpose of knowledge and the calculation of compensation.

The main legal arguments

The main arguments submitted by the liquidators were that applying the Eurosail test (whether a company has sufficient assets to meet all of its liabilities), the Company was balance sheet insolvent and that the Knowledge Element was satisfied as the financial statements showed a trading loss for the previous 12 financial years. The liquidators relied upon these events as key when assessing the extent of the directors' knowledge.

The directors alleged that they took all reasonable steps by trading to the end of January 2009 as they took steps to sell the business, obtained professional advice and at the same time kept creditors informed of the position. The VAT liability was subject to an appeal and the increase in the rent was only relevant to their knowledge at the end of January 2009, when steps were taken to place the Company into creditors' voluntary liquidation.

Judgment

The Registrar found that s214 IA 1986 did not require proof of insolvency at the date of knowledge, but the liquidators did have to prove knowledge at some time before the commencement of the winding-up, rather than at a particular date. Knowledge should not be approached with hindsight and the fact that a decision proved to be wrong did not amount to failing to act as a reasonable director. Whilst one of the directors had more experience as a director, it was in the retail field and did not lead to a higher standard being applied.

Therefore, following the VAT advice in October 2006, the directors had been entitled to investigate what to do rather than be criticised for acting too precipitously. However, acting reasonably and with the general knowledge, skill and experience reasonably expected, the directors knew or ought to have known by January 2007 that the Company could not afford and therefore make a time-to-pay arrangement with HMRC and that the Company had no reasonable prospect of avoiding insolvent liquidation.

The Registrar found that once it had been established that a director knew or ought to have concluded that there was no reasonable prospect that the Company would avoid going into insolvent liquidation, the onus was on the director to establish that he had taken every step to minimise the potential loss (Re Idessa (UK) Ltd (In Liquidation)).

The Registrar applied the reasonably diligent director test under s214(4) IA 1986 and found that when balancing the adverse consequences of liquidation against the potential benefits of trading meant that the directors had taken the right steps by continuing to trade from February 2007. However, circumstances changed following receipt of the letter from HMRC on 3 May 2007 confirming the VAT liability. Further, it was (or ought to have been foreseeable) that the Company would be unable to make the next rent payment.

The requirement for the directors to take every step to minimise loss was loss to the body of creditors as a whole. Therefore, as the directors had paid the trade creditors, but not the VAT and rent liabilities, such a requirement was not met as it merely increased the liabilities to creditors as a class.

The Registrar finally held that the discretion to order compensation under s214 IA 1986 was unfettered and its purpose was to compensate and not to act as a penalty. There had to be more than a 'but for' nexus between the wrongful trading and the loss and that the compensation based on the difference between a hypothetical liquidation on 3 May 2007 and the actual liquidation should take account of the impact of continuing to trade. Such facts included that the continued trading did not cause the VAT liability but it did increase the interest and penalties plus the debt to the landlord, it benefitted trade creditors and reduced the bank overdraft. Further, the directors had not taken the decision to continue trading for dishonest reasons.

Conclusion

This case highlights the need for directors to tread carefully when a company is on the brink of insolvency and ensure that every step taken to minimise the losses to the creditors is for the creditors as a whole, not just particular creditors.

Directors should have up to date financial information and seek to address and, if necessary, revise plans in light of changes in the company's circumstances. LATCs should ensure that directors are fully aware of the extent of the obligations upon them, and that the right questions are being asked.

It is not sufficient to solely rely on professional advice to highlight possible options because, as stated by Registrar Jones, *"that does not relieve them of their ability and obligation to take "every" step when reaching their decisions based upon the financial position which was or ought to have been known to them".*

talk to us...

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