1989

Partial Performance of Employment Contracts

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COMMENTARY

See PDF pages 3, 4, and 5 for Commentary by Geoffrey J. Bennett.

Dismissing dissentient governors: the governors strike back

R v. Haberdashers' Aske's Hatcham School Governors, ex parte Inner London Education Authority
R v. Inner London Education Authority, ex parte Brunyate and Hunt (Lexis; Times Law Reports, 7.3.89)

The nature and limits of the powers of those persons entrusted with the appointment of school governors has been the focus of recent actions in the High Court and Court of Appeal. Both cases concern applications for judicial review of decisions of the respective appointing bodies to dismiss individual governors.

In *R v. Trustee of the Roman Catholic Diocese for Westminster, ex parte Mars & Another* (1988) 86 LGR 507[1] the High Court refused to quash a decision taken by the trustees of a voluntary aided school to dismiss two foundation governors who had voted against the trustees' proposals to alter the age range of pupils attending the school. As the trustees honestly believed that their proposal (which did not contravene the terms of the trust deed) would benefit the school, the judge was unable to find any legal restriction, express or implied, to interfere with the exercise of the trustees' powers under s. 8 (5) of the Education Act 1986 to dismiss the governors.

This decision has been interpreted as granting the governor-appointing body effective control over the development of the school notwithstanding the fact the 1944 and 1980 Education Acts state that the responsibility for determining the character of a school rests solely with its governors.[2]

However, the Court of Appeal's decision in *R v. Haberdashers' Aske's Hatcham School Governors, ex parte Inner London Education Authority* and *R v. Inner London Education Authority, ex parte Brunyate and Hunt* means that *ex parte Mars* can no longer be considered good authority.[3]

In *R v. Inner London Education Authority, ex parte Brunyate and Hunt* the Court of Appeal considered the legality of the Inner London Educational Authority's actions (the appointing body, hereafter ILEA) in dismissing two governors who refused to give ILEA assurances that they would cast their votes in accordance with ILEA policy at a meeting to decide the future of two schools. ILEA, a Labour controlled local education authority, took the view that the schools should remain local authority maintained after 1990 whilst the two dissentient governors (who represented Conservative interests among ILEA appointed governors) were sympathetic to the idea that the schools should become a 'City Technology College'.

Section 21 of the Education Act 1944 provides that, 'Any governor ... appointed by a local education authority ... shall be removable by the authority by whom he was appointed'. Counsel for ILEA pointed to the absence of qualifying words in s. 21 and argued that any judicial review of the decision to dismiss could only be undertaken if ILEA had (i) acted irrationally, or (ii) taken irrelevant factors into consideration.

This argument was successful at first instance where the Queen's Bench Division held that ILEA was entitled to have a policy about the schools' future and that it had not been shown to have acted irrationally or after having taken irrelevant matters into consideration. Lord Justice Glidewell giving leading judgement (Justice Pill concurring), declared himself to be in agreement with the outcome and reasoning in *ex parte Mars*.

On appeal, counsel for the governors contended that, if the statutory powers of gover-

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nors were to mean anything, a limitation must be read into the power of dismissal enjoyed by the appointing body under s. 21. Failure to do so would effectively permit the appointing body to exercise control over matters within the statutory competence of the governors alone.

By a majority of 2 to 1 (Lord Justices Woolf and Kerr, Lord Justice Balcombe dissenting) the court ruled that the exercise of power under s. 21 was subject to the limitation that it must only be used in accordance with the policy of the statute. Section 21 could not be used to thwart or run counter to a clear legislative intent.[4] Since the policy of the 1944 Act was to entrust the governors and the appointing body with independent spheres of responsibility, it followed that ILEA could not use s. 21 to interfere with the governors' statutory powers to formulate policy.

Whilst agreeing with the majority's comment that the power in s. 21 to dismiss could only be used in accordance with the policy of the 1944 Act, BALCOMBE LJ was unable to agree that the notion of separate spheres of responsibility was the sole policy behind the Act. He discerned another and potentially conflicting policy based upon the idea that the board of governors should ensure the representation of constituent parties' views (teachers and parents). The conflict arose when a governor no longer represented his constituency on a major issue of policy, such as the schools' future (as opposed to matters of day to day management). In those circumstances, unless the power to dismiss had been used irrationally or after irrelevant factors had been taken into consideration, the courts should not intervene. On the present facts ILEA's decision to dismiss could not be attacked. ILEA was entitled to have a policy about the schools' future and to take it into consideration when exercising its powers of dismissal.

Several points emerge in the light of the majority's decision. The first is that the decision does not prevent the appointing body having a policy in relation to the school. Secondly, the appointing body is still at liberty to select in future only those persons whom, as governors, it believes will further that policy. It follows that the appointing body could lawfully refuse to renew the appointment of a governor with whom it disagreed. Finally, it should be noted that nothing in the instant case affects the power to dismiss where a governor is in breach of his duties.

Nevertheless, the clear effect of *ex parte Brunyate and Hunt* is to assert the governors' freedom of action in a way which was threatened by the decision in *ex parte Mars* and, to the extent that the 1986 Education Act reflects a similar legislative policy, the Court of Appeal's decision must raise serious doubts about the correctness of the decision in *ex parte Mars*. A final comment on the action will need to be reserved however as ILEA's application for leave to appeal to the House of Lords was granted.

Endnotes

1. See Education and the Law, 1988 **1**:1.
2. See s. 114 (1) Education Act 1944 and s. 13 (1) Education Act 1980.
3. The first named case concerned an action by ILEA for judicial review of decisions by the governors: (i) not to extend a consultation period for the purposes of deciding whether the schools should become 'City Technology Colleges', and (ii) not to amend their inaccurate statements about the funding of such moves. Both actions were dismissed by a unanimous court.
4. Drawing upon the remarks of Lord Reid in *Padfield* v. *Ministry of Agriculture Fisheries and Food* [1968] AC 997 at 1030.

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Governors and disabling pecuniary interest

Bostock and others v. *Kay and others (Lexis; The Independent, 18.4.89)*

In separate litigation to arise from the moves to convert Haberdashers' Aske's Hatcham Schools from voluntary controlled schools into a 'City Technology

College' (CTC), the issue in *Bostock and others* v. *Kay and others* was whether teacher governors could be said to have a disabling 'pecuniary interest' in the decision to change status.

The Court of Appeal unanimously agreed that the teacher governors' interests in: (i) being offered more highly remunerated employment in any future CTC; or, in the alternative of not obtaining a post, (ii) receiving a redundancy payment, were not too remote to constitute a 'pecuniary interest' under The Education (School Government) Regulations 1987 Schedule 2 (S.I. 1988/1359). The teacher governors were thus prevented from participating in the discussion of, and voting upon any proposal relating to the conversion.

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Partial performance of employment contracts

Wiluszynski v. *Tower Hamlets London Borough Council (The Times, 28.4.89)*

The decision in *Wiluszynski* v. *Tower Hamlets London Borough Council* has a relevance to all those employed in the field of education which may not at first be obvious from its factual setting.

Mr Wiluszynski was employed in the housing department of the council as an Estate Officer. One of the duties of his employment was to answer inquiries from councillors ('members inquiries') as to estate matters of which he received an average of two or three a week. The employee's branch of NALGO, as part of an industrial dispute, subsequently passed a resolution boycotting the handling of such inquiries. The employers then wrote to their employees in terms which included the statement that:

> 'You will not be allowed to pick and choose which duties you perform and if you are not prepared to work normally, you will be sent off the premises. You will only be paid your salary if you continue to work normally in accordance with the requirements of your post'.

On being questioned by his employers Mr Wiluszynski indicated that he was not prepared to deal with members' inquiries. The council thereupon ceased to pay him and informed the plaintiff that:

> 'Your presence on the authority's premises, as an employee, is not required until you are prepared to resume normal working. If ... you should attend for work and attempt to undertake limited work ... such work will be regarded as unauthorized ... and in a purely voluntary capacity ... and you will not receive pay for the same'.

The plaintiff nevertheless continued to work normally except for his failure to deal with members' inquiries. When the dispute ended it took him only some two to three hours to answer all those he had by then received. The employers then refused to pay any of the employee's salary during the period he was refusing to respond to members' inquiries, so Mr Wiluszynski sued the council for his salary. At first instance the judge held he was entitled to succeed on the basis that, even during the dispute, he had substantially performed his contract. Higher management was aware of that, acquiesced and took the benefit of the work. The Court of Appeal reversed the trial judge and held that, in the circumstances of the employee's failure to carry out all of his contractual duties and the employer's statements in their letters, the council was entitled to withhold the whole of the employee's remuneration for the period of the dispute.

Although it is not expressly mentioned in the brief *Times* report, the facts of the present case bore comparison with the earlier decision in *Simm* v. *Rotherham Metropolitan Borough Council* [1986] 3 All ER 387. This case was probably most newsworthy at the time for SCOTT J's holding that covering for absent colleagues could be regarded as part of a teacher's normal contractual duties even though standard contracts of service made no provision for this. Nevertheless, much of the

legal argument in the case was concerned with the employer's right to withhold a proportion of salary by way of equitable set-off. In effect, the court decided that it was lawful for the employer to deduct from a teacher's salary an amount equal to the agreed damages for the employee's breach of contract. The result of this decision was not doubted by any of the House of Lords in *Miles* v. *Wakefield Metropolitan District Council* [1987] 1 All ER 1089 which raised a slightly different point. What was being sought was not, as in *Sim*, a declaration that the employer had no right to make such a deduction but rather recovery of unpaid wages. In *Miles* a superintendent registrar was under a duty to work 37 hours a week, three of them on a Saturday morning. As part of industrial action he refused to conduct marriages on Saturday mornings although he carried out his other duties on those mornings. After warning him that the council would not pay for work on Saturday unless he was prepared to undertake the full range of his duties they withheld $\frac{3}{37}$ of his salary. The House of Lords upheld the council's action.

Both these cases obviously differ from the council's response in *Wiluszynski* which was to withhold all, not just a part, of the employee's salary. Nevertheless the results of these earlier cases, if not the reasoning in *Miles* v. *Wakefield Metropolitan District Council*, might have induced a belief that an employer's legal recourse in an industrial dispute of this kind was only to make a reduction in wages, not to withhold them altogether. This latest holding of the Court of Appeal has shown such a belief to be entirely wrong. The aphorism which characterizes the decision might be said to be 'no work, no pay', or perhaps more exactly, 'some work, no pay'. The legal principle laid down by the case is therefore that before an employee can recover remuneration under a contract of employment he must be able to prove that he was ready and willing to discharge his own obligations under the contract. If he tenders only partial performance this may not be sufficient.

Two of the arguments of the plaintiff which the court rejected are also worthy of note. Even though the amount of work involved was comparatively small and difficult to assess in terms of money, it was regarded as 'of considerable importance' to councillors and the employee's breach of contract could therefore be regarded as substantial. The truth which this part of the court's judgment suggests is that no industrial action is ever likely to be both effective in putting pressure upon an employer and at the same time able to avail an employee of a defence under the *de minimis* rule. Secondly, the court rejected the notion that the council had accepted or acquiesced in the partial performance of the plaintiff's duties. To be sure, the employers could not give an employee directions to work and then refuse to pay him but this was not what had happened here. The employer could not be expected to take action to prevent employees entering the premises or institute a lock out especially when some of the staff were working normally. If an employee like Mr Wiluszynski continues to work and, so to speak, forces a benefit upon his employer that will be regarded as a purely voluntary service. Clearly this aspect of the case is relevant to any other undertaking such as a large school or university where similar considerations might apply.

The decision in *Wiluszynski* v. *Tower Hamlets London Borough Council* might conceivably have significant consequences in a dispute of the kind that has arisen over university lecturers' refusal to mark student examinations. It could not be argued that the setting and marking of examinations was other than a contractual duty imposed upon university teachers. Equally, it would be impossible to claim that the effect of this breach of contract was other than substantial. One option open to a university might be to dismiss the employee altogether. If, however, an employer declined to take this draconian action another possibility now presents itself. If the employer were to issue statements along the lines of those found in *Wiluszynski* to members of staff taking such industrial action it seems that a university could legally withhold an employee's entire remuneration pending settlement of the action. It is difficult to believe that such a consideration will not

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have an impact on the conduct of this and similar disputes.

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Personal injury and insurance

Van Oppen v. *Bedford Charity Trustees* [1989] 1 All ER 273

All of us have at some time probably wished that we had bought adequate insurance cover before some misfortune befell us. With hindsight the decision to insure seems obvious but at the time there is often either a feeling that the chances of such an eventuality do not justify the expenditure on premiums or, as is perhaps more likely, a failure even to appreciate that insurance might be a good idea. It usually takes a tragic accident to shake our complacency and realise the desirability of first-party insurance.

The school which Simon Van Oppen attended was well aware of these considerations, especially in respect of accidents on the rugby field, and were considering the various alternatives available for providing some sort of cover for its pupils. After a long campaign by the headmaster, in the face of a somewhat apathetic response by parents, a scheme of compulsory accident insurance for pupils financed from an additional payment in tuition fees was eventually introduced. Unfortunately for Mr Van Oppen all this came too late. Some eighteen months earlier he had been severely injured whilst tackling another boy in a rugby game at the school. If the scheme had been in operation at the time of his accident he would have received over £55,000 in compensation; as it was, he was left with nothing. He brought an action against the school in negligence in respect of his injuries, claiming damages totalling £98,000. His statement of claim alleged negligence in three different respects: first, a failure by the school to instruct him in proper tackling techniques; second, a failure to ensure that he was insured against accidental injury; and third, a failure to advise the plaintiff's father of either the need for accident insurance or the fact that the school did not itself carry such insurance.

In the course of a closely reasoned judgment BOREHAM J dismissed the plaintiff's action. The first head of claim presented no difficulty and his lordship simply found, on the facts, that the standard of instruction at the school was high. There was thus no breach of any duty of care in this respect. The two other allegations, of a breach of a duty to insure and a breach of a duty to warn, were, his lordship thought, entirely novel. Consequently the argument centred more on whether such duties existed than on whether they had been breached. Counsel for the plaintiff argued that the duty he contended for was not a *general* duty to protect the plaintiff from economic loss. The duty of care, he said, was more specific. It operated on two levels. At the first level the school, by virtue of its position *in loco parentis*, was under a duty to take such care as, in all the circumstances, a reasonably prudent parent would have taken for the plaintiff's economic welfare. Secondly, a more extensive duty could arise if in fact the school had assumed responsibility for a particular area of a child's economic welfare beyond that which would be included in the 'prudent parent' duty. In such a case there would then be an additional duty to act with reasonable care in that sphere and the school would be liable for any loss which they ought to have foreseen would be consequent on their careless acts or omissions.

As to the first contention, his lordship held that even though the parties were in a relationship of 'proximity' (which word he nowhere defined) it would not, applying the test in *Peabody* v. *Sir Lindsay Parkinson* [1985] AC 210, be 'just and reasonable' to impose on the school an obligation to insure the plaintiff on the basis of it being *in loco parentis*. A number of reasons were given in support of this conclusion. First, the obligation undertaken by the school was to educate and care for its pupils. The duties imposed on the school should, said his lordship, bear a fair and reasonable relationship to those activities, which were not designed nor intended to promote or protect a pupil's economic

welfare. Since a duty to insure was not a necessary adjunct to the school's primary obligation to educate it would not be just and reasonable to impose one on it. Secondly, since the basis for the imposition of this duty was the fact that the school was *in loco parentis*, it was necessary to look to the responsibilities of parents towards their children. The law placed no obligation on a parent to insure its child against accidental injury and in his lordship's view it would not be 'just and reasonable' to place a wider duty on the school than was imposed on the parent.

Even if there was no duty to insure, it was argued that the school was, nevertheless, under a duty to warn parents of the dangers involved in playing rugby and of the advisability of insurance cover. Although his lordship accepted that in certain circumstances a duty to warn could arise – for example, where a chemistry master allowed a pupil to conduct experiments at home the school would be obliged to give advice on safety precautions – that duty arose as part of the school's duty to protect its pupils from (physical?) harm. No such duty arose here because, again, it was not a duty that was necessary in order for the school to discharge its general duty to protect its pupils from harm. In addition, it would be necessary for the father to show that he relied on the school to give him such advice since otherwise there would be no causal link between the breach and the damage. BOREHAM J held that since the question of insurance had never occurred to the father such reliance was not shown to be present.

His lordship then dealt with the plaintiff's second line of argument based on an actual assumption of responsibility imposing duties beyond those comprised in the 'prudent parent' test. This arose from an end-of-term letter sent by the headmaster to all parents prior to the accident advising them of the school's insurance cover and of the lack of cover for personal accident which the plaintiff argued made certain representations. These were threefold: that if accident insurance was necessary then the school would effect it; that if it was not effected then it was not necessary; and that if parents were not informed that insurance had been effected, it was either unnecessary or they could assume that it had been obtained. The effect of these representations, the plaintiff argued, was that the school assumed a responsibility, as in *Wilkinson* v. *Coverdale* (1793) 1 Esp 75, to effect personal accident insurance. On the facts his lordship not surprisingly held that no such representations had been made and, therefore, no responsibility to insure had been assumed. In any case many details – for instance, the level of cover to be taken – had still not been agreed at the date of the accident. It was only at some date after the accident that the school could be said to have undertaken a responsibility to insure. More interestingly, however, BOREHAM J held that even if such a responsibility had been assumed, the plaintiff's argument would nevertheless fail for two reasons: first, because a person who undertakes to perform a voluntary act is or may be liable if he performs it improperly but not if he neglects to perform it at all; and second, that such a responsibility to insure did not give rise to any *legal* obligation to do so because there was no evidence of reliance by the father nor did the school hold itself out as having the expertise to advise on or deal with insurance.

From a legal point of view the decision presents no surprises and is in line with the current trend towards restricting, rather than enlarging, the scope of the duty of care in negligence, especially in actions which concern claims for the recovery of pure economic loss. There remain, however, a number of loose ends, foremost among which is that the decision does not sit happily with a number of recent cases, most significantly *Smith* v. *Littlewoods Corporation* [1987] 1 All ER 710 (House of Lords) and *Brown* v. *Heathcote CC* [1987] 1 NZLR 720 (Privy Council), in which the higher courts have been prepared to countenance the existence of positive duties to confer benefits on others in certain limited circumstances. Whilst the exact boundaries of such affirmative duties have yet to be determined it is unfortunate that this line of authority was not referred to in the judgment. It should not be assumed, therefore, that this decision resolves the issue once and for all. Future litigation may still arise. If schools wish to avoid liability the safest course of action,

though it is by no means guaranteed, would be to expressly disclaim all responsibility for insurance. This would have the dual effect of negating the existence of any duty of care and rendering any reliance on the school to insure unreasonable. Otherwise those schools which do have an active concern for their pupils' economic welfare run the risk of engendering some expectation of action on their part and finding themselves vulnerable to *litigation*. We could reach the absurd position of the law of tort acting as a deterrent rather than a spur to careful action if such schools found themselves in a less favourable position than others which took no interest in the matter at all.

The decision also highlights the desirability of first-party insurance. We operate in a legal system where recovery of compensation, over and above that provided by the state in the form of sickness benefits and free (for how much longer?) health care, depends on proof that *someone else* was at fault. This has the consequence that self-inflicted injuries or those which occur without any blame attaching to the person causing it go uncompensated. Add to that the risk that even if a blameworthy defendant can be found he might not have the wherewithal to meet a hefty damages award and it becomes obvious that we should all carry personal accident insurance cover. Unfortunately, it takes a tragic accident like that of Simon Van Oppen's to remind us of this all too apparent truth. The one good thing to come of his injuries was the introduction of a compulsory scheme so that no present or future pupils, at his school at least, will suffer the same fate. This is a lesson from which we all might learn.

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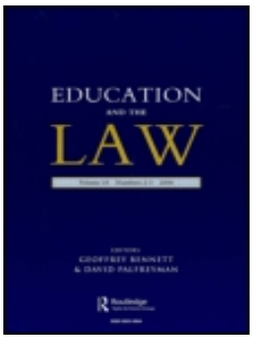

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