

Employment / Public

In Shoemsmith's shadow

Anna Thomas analyses the key issues in Sharon Shoemsmith's claim for judicial review



IN BRIEF

- Secretary of state's direction to remove Shoemsmith from office ruled unlawful.
- Shoemsmith crosses the line from private to public rights against employer Haringey following subsequent dismissal.
- Appeal to Supreme Court anticipated.

In the latest instalment of the Baby P cases, the secretary of state and Haringey have filed applications for permission to appeal the Court of Appeal's decision in *R (on the application of Sharon Shoemsmith) v Ofsted & Ors* [2011] EWCA Civ 642, [2011] All ER (D) 293 (May) allowing Ms Shoemsmith's claims for judicial review of decisions relating to her summary dismissal.

In the judgment handed down on 27 May 2011 Maurice Kay LJ, Stanley Burton LJ and the Master of the Rolls unanimously dismissed Shoemsmith's appeal against Ofsted but allowed her claims against the secretary of state and Haringey. The court was divided on one point: the consequence of their subsequent finding that the secretary of state's direction to Haringey to replace Shoemsmith as director of children's services (DCS) was unlawful; this did not affect the outcome for the appellant. The saga continues.

This article examines key issues arising in the judicial review proceedings brought by Shoemsmith. It analyses the court's consideration of Shoemsmith's accountability as DCS, the relationship between her office and employment and her rights and remedies against her employer in both

the administrative court and employment tribunal. In doing so, it analyses those parts of the Court of Appeal judgment which are most likely to be subject to appeal.

Crossing the line

The case considers inter alia the boundaries between public and private law rights in the context of a public employer exercising an ordinary employment function in relation to an employee who is (or has been) the holder of an office created and defined by statute; and (in a further line crossed) the public employer is itself subject to statutory direction by the secretary of state. In considering these boundaries, the Court of Appeal examines the factors to be taken into consideration in determining the most appropriate forum for public sector employment disputes. It follows that it has particular interest for employment as well as public lawyers.

Direction to Ofsted

The facts of the case are well known, at least in outline. The day after the conviction of Baby P's mother and partner for causing or allowing his death under Domestic Violence Crime and

Victims Act 2004, s 5, the secretary of state, Ed Balls, requested Ofsted to produce an urgent report into child safeguarding arrangements within Haringey (a joint area review or JAR). The request was made pursuant to the Children Act 2004, s 20. In accordance with usual practice, the JAR concerned how the system worked as a whole (social care, health and police) in the light of the fact that the Baby P had been on Haringey's child protection register. It did not seek to make or test allegations against any individual. The JAR was incorrectly regarded as interim by the inspection team, who omitted the feedback stage in order to complete the report within record time as directed; this was not in accordance with usual practice.

The JAR was completed on 30 November 2008 and was highly critical of local services. Although no individual was named, criticisms included the strategic leadership and management of those services.

Direction to Haringey

The following day the secretary of state made a direction under Education Act 1996, s 497A appointing a new DCS, the statutory post ultimately accountable for the education, social work and other services referable to children in Haringey. This was the post which had been occupied by Shoemsmith, Haringey's first and only DCS until the direction of 1 December. By this direction, Shoemsmith was removed from her statutory office by

the secretary of state. The same day, she was suspended.

Procedural fairness & Ofsted

The requirements of procedural fairness are variable and case-specific. Ofsted's duty of fairness derived solely from a common law duty to carry out a bona fide and open minded inspection and report accordingly. In this case, having regard to: (i) the origin of Ofsted's duty of fairness; (ii) the general purpose of the JAR together with its procedural arrangements; and (iii) the unique circumstances and timescale in which the JAR had been directed, the Court of Appeal found that Shoesmith's appeal against Ofsted should be dismissed. The core of Shoesmith's case concerned the way in which the JAR had been used, not the way in which Ofsted had complied with the secretary of state's direction. Shoesmith has not sought to appeal the dismissal of her claim against Ofsted.

Accountability...is not synonymous with 'heads will roll'

Accountability & the secretary of state

Office-holders have long been accorded some procedural protection whether or not they are also employees: *Ridge v Baldwin* [1964] AC 40. The decision of the secretary of state to appoint a new DCS to replace the appellant was done without any elementary procedural fairness and, on that basis alone, it was unlawful. Shoesmith's statutory accountability did not disentitle her to procedural fairness: on the contrary, since accountability requires that the accountable person explains the state of affairs to which it attaches, Shoesmith ought to have been afforded an opportunity to so account. Accountability, said Maurice Kay LJ, is not synonymous with "heads must roll."

Another perspective demands the same conclusion: when an effective decision maker is empowered to give directions to the employer the requirement of procedural fairness on the part of the employer of the office holder must apply to the effective decision maker too. In this case, the secretary of state knew that his direction would have the immediate effect of not only removing Shoesmith from office but also her dismissal from Haringey. Haringey's duty to carry out a fair procedure as Shoesmith's employer was

(or ought to have been) imported into the secretary of state's decision-making under the Education Act 1996, s 497A.

The fall out and Haringey

The case against Shoesmith's employer Haringey is more difficult. It is also the most interesting. On facts, Haringey had little, if any, room for manoeuvre following the secretary of state's direction that a third person assumed the statutory office occupied by Shoesmith. This was something the parties, the administrative court and the Court of Appeal all recognised would result in her dismissal as a Haringey employee too. Shoesmith's dismissal not only looked predetermined; it was predetermined. What could Haringey do in these circumstances? What was the impact of Shoesmith being stripped of the statutory duties of her public position by the (unlawful) direction of the secretary of state on the private law

(or other) obligations between Haringey and Shoesmith arising from her distinct (but related) contract of employment? And what were Shoesmith's options in private or public law if she sought to challenge her employer's decision to dismiss her?

It is against this background that a number of legal issues of general importance arise:

(i) Amenity

Is Haringey's decision to dismiss amenable to judicial review? Whereas the sources of Ofsted and the secretary of state's powers make their decisions plainly amenable to judicial review by Shoesmith, it is less clear that judicial review is available as a remedy against her employer. The court noted that it was the existence of the particular statutory provisions relating to public office of DCS—rather than her employment per se—which injects the element of public law necessary to attract the remedies of administrative law. In other words, it is the "statutory underpinning" of the employment which is key.

The theory does not apply comfortably to the facts of the Shoesmith case for two reasons. First, Shoesmith was removed from office by a third party in advance of Haringey's decision to dismiss so

there was no statutory underpinning at the time Haringey took the decision to dismiss her. Second, the relevant statutory underpinning did not bear directly on the employer's power to dismiss. Whether or not these matters put enough distance between Shoesmith's public office and employment so as to remove the protection of the administrative court available to her as an office-holder is not clear. It is suggested, however, that the judgment may be open to challenge by Haringey on this point.

(ii) Alternative remedy

What is the impact of the alternative remedy of unfair dismissal? In this case "protective" proceedings for unfair dismissal, breach of contract and sex discrimination had been issued in the employment tribunal (ET) and then stayed pending determination of the application for judicial review. The existence of the stayed claims is central to Foskett J's judgment in Haringey's favour at first instance, the judge noting that the alternative remedy in the ET was not exhausted and should prevail: "The ET is the right place for this dispute."

The Court of Appeal identified a number of factors which point to amenability notwithstanding the alternative remedy:

- (i) remedy sought outside the jurisdiction of the ET;
- (ii) statutory cap;
- (iii) significant issues outside inquiry which could take place in ET; and
- (iv) availability of costs in the administrative court.

In overruling Foskett J, the focus of the court was on remedy including the fact that Shoesmith sought to quash the decision to dismiss her. Alternative remedy would have to be "equally convenient and effective" to prevail; in this case it was not. The court overturned Foskett J's judgment that Haringey's decision to dismiss was private, contractual and not amenable to judicial review.

It may be that the focus on remedies in the Court of Appeal suggests that there has been some blurring of rights and remedies. However, if the decision to dismiss is prima facie amenable to judicial review, the conclusion of Court of Appeal that proceedings in the ET would not be as effective for Shoesmith may be harder to challenge.

(iii) Trust & confidence

Can Haringey rely on breach of implied term of trust and confidence? Employment lawyers will not be surprised Haringey argued that there was “some other substantial reason” for the dismissal under the Employment Rights Act, s 98 which were, alternatively: (i) the direction made to Haringey by the secretary of state; and (ii) the JAR (or rather Shoesmith’s accountability/actions as DCS at the relevant time) which undermined the relationship of trust and confidence she had with her employer. What may surprise employment lawyers is that the Court of Appeal has found—as part of the judicial review—that Haringey is not entitled to rely on the implied term as a matter of contract law. How the implied term would apply on the facts is another matter, but rationale behind the ban on using the implied term in the course of judicial review proceedings to determine the fairness of the decision to dismiss is not obvious or supported by any authority. It is suggested that this part of the judgment may be open to challenge.

(iv) Unlawfulness of direction

The case asks the following question in an acute form: to what extent can a public body rely (or continue to rely) on the decision of another public body subsequently found to be unlawful? If so, is its own subsequent act, ie dismissal, necessarily void?

On this point, left open by Lord Phillips in *Mossell v Office of Utilities* [2010] UKPC 1, Maurice Kay LJ found that act of a public authority done in good faith on the reasonably assumed legal validity of the act of another public authority would not ipso facto be vitiated by a later finding that the earlier act was unlawful. The Master of the Rolls and Stanley Burnton LJ were prepared to accept (without deciding) this proposition but did not accept that it was open to Haringey to rely on the proposition once Shoesmith had put her employer on notice that she regarded the secretary of state’s direction on which it was relying as unlawful.

In Maurice Kay LJ’s words, the circumstances in which the second public authority could rely on an act subsequently found to be unlawful are “ill-defined”. The finding that it was not open to Haringey to rely on the proposition (if it is right) where

Shoesmith was represented by lawyers who were asserting unlawfulness—but had not yet taken any action to challenge the direction—is unattractive where Haringey was itself obliged to accept it. The Court of Appeal was split on this point of general importance and it is suggested that the judgment is likely to be open to challenge here too.

Conclusion

Although the Court of Appeal was at pains to distinguish between public and private law obligations in principle, the case of *R v Ofsted & Ors* is a good example of how difficult it can be to apply the theory to the facts. Shoesmith was undoubtedly entitled to be treated fairly, seen to be treated fairly and not “summarily scapegoated” because she had been the office holder responsible for children’s services at the time of Baby P’s death. She was also entitled to seek redress in the administrative court. Nonetheless, it is respectfully suggested that the Court of Appeal judgment is indeed open to challenge. NLJ

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