

LEGAL UPDATE

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EMPLOYER GIVES NEGATIVE BUT TRUTHFUL REFERENCE

The Ontario Superior Court of Justice recently found an employee's defamation claim against his previous employer for an unfavourable reference could not succeed because the reference was justified and fell "within the range of qualified privilege".

THE FACTS

In *Papp v. Stokes et al*, 2017 ONSC 2357 the Ontario Superior Court of Justice considered a claim brought by a terminated employee, Adam Papp, for wrongful dismissal and defamation against his former employer, Stokes Economic Consulting Inc., and Ernest Stokes, the president of the company. Papp claimed for \$65,000 in damages for wrongful dismissal, as well as \$500,000 in damages for defamation; \$200,000 in punitive, exemplary, and aggravated damages; and \$30,000 in damages for intentional infliction of mental suffering.

Papp worked for the company as a staff economist for two and one-half years when his employment was terminated without cause in December 2013. Following his termination, Papp asked Stokes, the president of the company, if he would act as a reference for a job application and Stokes agreed.

In May 2014, Papp applied for a job as a statistician with the Yukon Government. Papp was told that he was the top ranked candidate for the job at the conclusion of the interview process. The interviewer then told Papp that she needed to check his references and Papp encouraged her to contact Stokes.

The interviewer spoke with Stokes. In response to the interviewer's specific questions, Stokes stated that Papp had strengths in computing, did not get along well in a team setting, had a chip on his shoulder, and there was "no way" that Stokes would re-hire Papp. Papp was not offered the position with the Yukon Government as a result of the negative reference provided by Stokes.

At trial, Papp alleged that the negative reference was defamatory.

THE DECISION

The court found that the reference provided by Stokes was defamatory because (i) it tended to lower Papp's reputation in the eyes of the perspective employer; (ii) the words in fact referred to Papp; and (iii) the words were published (e.g. communicated to the prospective employer). However, the defendants argued both that the negative reference was justified and that it fell within the defense of "qualified privilege". They were successful in both arguments and fully defended the claim of defamation.

In respect of the justification defense, the defendants called evidence to prove that Papp was difficult, that his co-workers felt he conveyed a "feeling of superiority", they did not perceive him to be a team player, and that his co-workers believed he had a poor work ethic. Based on the evidence, the Court accepted that Stokes' reference was substantially true, and the negative reference was therefore justified.

Although the justification defense alone would have been sufficient to dispose of the defamation claim, the Court also found that the defense of qualified privilege applied. Qualified privilege will defeat a claim for defamation where it is shown that the impugned comments reflect an honestly-held belief and the statements are not motivated by malice or a reckless disregard for the truth.

The Court found Stokes provided a reference that he genuinely believed to be true and took steps to verify information from various individuals in the workplace. He also attempted to discuss Papp's positive traits with the prospective employer. As Papp failed to establish malice or recklessness on the part of the defendants, his defamation claim failed.

Papp was awarded damages of four months in lieu of reasonable notice of termination, but the rest of his claim was dismissed

WHAT THIS MEANS FOR EMPLOYERS

This decision confirms that employers can provide truthful references without being liable for defamation. A defence of justification applies when the employer can prove that the negative reference is substantially true. Additionally, the defence of qualified privilege is available for truthful references as long as it is not malicious or reckless.

An employer who is considering providing a negative reference should ensure:

- (i) that the information is true and based on objective findings;
- (ii) verify any information that is not within the personal knowledge of the person giving the reference; and
- (iii) ensure the reference is not being made with malice or in bad faith.

QUESTIONS?

If you have any comments or questions about this update please contact Karen Jewell, Division Manager of Information, Compensation and Advisory Services at 604-432-6228 or by email at karen.jewell@metrovancover.org.

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SOURCES

Papp v Stokes et al, 2017 ONSC 2357 (CanLII), <<http://canlii.ca/t/h3sz1>>, retrieved on 2017-06-15