

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:)
)
ADAM PAPP)
) B. Hamud and M. Hassell, for the Plaintiff
Plaintiff)
)
- and -)
)
STOKES ECONOMIC CONSULTING) G. Kler and J. Pinkus, for the Defendants
INC. and ERNEST STOKES)
)
Defendants)
)
)
)
) HEARD: February 8-10, 2017

REASONS FOR JUDGMENT

MILLER J.

- [1] Adam Papp brings a claim for wrongful dismissal against Stokes Economic Consulting Inc. and Ernest Stokes. He seeks damages for wrongful dismissal in the amount of \$65,000; damages for defamation in the amount of \$500,000; punitive, exemplary and aggravated damages in the amount of \$200,000 and damages on the basis of intentional infliction of mental suffering in the amount of \$30,000.
- [2] It is the position of the Defendants in their Statement of Defence that Mr. Papp was terminated not for cause but for shortage of work and that he accepted and received more than his statutory entitlements pursuant to the *Employment Standards Act, 2000*. Further, Ernest Stokes did not make any false statements about Mr. Papp, rather he responded honestly to questions posed to him in respect of his personal opinion of Mr. Papp's conduct and behaviour in the workplace.
- [3] At the commencement of the trial the Defendants conceded that Mr. Papp is entitled to common law notice as he was dismissed without cause. They also conceded that they took no issue with respect to Mr. Papp's efforts to mitigate by searching for alternative employment. The parties continue to disagree on the quantum of reasonable notice.

Background

- [4] Ernest Stokes is the president and secretary/treasurer of Stokes Economic Consulting Inc. He started the company in 1995. He hired Adam Papp.
- [5] Adam Papp commenced employment with Stokes Economic Consulting Inc. March 14, 2011 as a staff economist. He began on a six month probationary period following which he became a permanent employee. His starting salary was \$50,000 annually. Mr. Papp was one of five staff economists when he commenced his employment. They all shared responsibilities within the workplace although Mr. Papp had primary responsibility for preparing the Ontario forecast.
- [6] Mr. Papp has a Bachelor of Arts in Mathematical Economics from the University of Guelph with a minor in Statistics. He also has a M.Sc. in Economics from the University of Edinburgh. This was his first job performing work as an economist.
- [7] Adam Papp received salary increases and bonuses during his employment at Stokes Economic Consulting Inc. In 2012 he earned a total of \$56,321. He earned a total of \$63,986 in 2013. He did not receive a bonus in 2013.
- [8] November 1, 2013 Ernest Stokes provided a letter to Mr. Papp confirming Mr. Papp's annual salary was \$62,000. This was used by Mr. Papp to obtain a mortgage for a house he purchased.
- [9] As late as December 13, 2013 Adam Papp and Ernest Stokes were corresponding on a project.
- [10] Adam Papp was terminated from his employment at Stokes Economic Consulting Inc. on December 19, 2013. Aaron Stokes informed Mr. Papp of his termination.
- [11] December 20, 2013 Adam Papp emailed Ernest Stokes, who was at that time in Florida. In his email to Dr. Stokes he asked if he could put him down as a reference. He also provided a list of the type of work he had done at Stokes Economic Consulting Inc. which he told Dr. Stokes he would like to include in his cover letter and asked Dr. Stokes to let him know if he had any comments. The same date Dr. Stokes replied by email "That is okay".
- [12] Adam Papp commenced seeking other employment. On January 13, 2014 Ernest Stokes emailed Adam Papp and indicated: "We are running late with sending your Record of Employment and would like to ensure that you have enough funds to meet expenses. As a result we will send you a pay cheque for the first two weeks of January." He also asked for Adam Papp's mailing address.
- [13] Ernest Stokes testified that as of January 13, 2014 he believed that Adam Papp had been paid what was owed to him pursuant to the *Employment Standards Act* but it was his understanding that until Stokes Economic Consulting Inc. provided a Record of Employment for Adam Papp Mr. Papp would not be eligible to receive employment insurance payments. That is why he provided what he considered to be extra payment in order to ensure that Adam Papp was not left without funds.

- [14] Adam Papp replied to this email by providing his address. Adam Papp received payments of \$2,369.92 and \$1,766.44 following his termination from Stokes Economic Consulting Inc.
- [15] Adam Papp applied for a job as a Socio-Economic Statistician posted by the Yukon Government in May 2014. He provided two references: Ernest Stokes and Alex Barnhoorn. He noted that as Mr. Barnhoorn was in Japan, he could get in touch with Dr. Campbell from the University of Guelph "if needed".
- [16] Adam Papp was screened in as a candidate for the position. He completed a written test and was then granted a telephone interview. There were three people who conducted the interview with Adam Papp. One of the interviewers was Amanda Ho. At the conclusion of the interview Adam Papp was the first ranked candidate for the job.
- [17] In an email dated June 17, 2014 Amanda Ho advised Adam Papp that he was the first ranked candidate but that she still had to check his references before making an official offer on the position. She advised that she would be out of the office until June 25th but would contact him when she got back to let him know if his references "checked out".
- [18] Adam Papp sent an email to Ernest Stokes June 19, 2014 in which he advised Dr. Stokes that he was the first ranked candidate for the Yukon position and letting him know that they will be contacting him.
- [19] Ernest Stokes did not reply to that email.
- [20] On July 2, 2014 Amanda Ho called Adam Papp advising she had been trying unsuccessfully to reach Ernest Stokes. She asked Adam Papp if he wanted to provide a replacement reference. Adam Papp told her to keep trying to reach Dr. Stokes as he wanted him as a reference.
- [21] Later on July 2, 2014 Amanda Ho spoke to Ernest Stokes by telephone and asked him a series of questions about Adam Papp. The questions were pre-printed on a form. Ms Ho made notes of Dr. Stokes responses to the questions as follows:
1. In what capacity did Adam work for you? For how long?

Economic modeling for a couple of years. Let go because he was not needed anymore and a performace and attitdue[SIC] issue.
 2. How would you rate his quality of work

We were not that pleased.
 3. Describe how he gets along in a team setting?

Not well. He has a chip.
 4. How well does he get along with his co-workers?

Not greatly.

a. And his supervisor?

At one time supervised. One time we got along.

5. Is he able to develop good working relationships?

Did not see any evidence[SIC] of it.

6. What are his strengths?

Ok in computing

7. What could he improve on?

See above

8. Would you re-hire?

No way

[22] The same day, after speaking with Dr. Stokes, Amanda Ho contacted Adam Papp to tell him that he would not be offered the position. Ms Ho testified that it was because of Dr. Stokes' reference that Adam Papp was "de-certified" for the position.

[23] Another person was hired for the Yukon Government Socio-Economic Statistician job in September 2014. That person remains in that position today.

[24] Amanda Ho testified that the salary range for the position was, as indicated in the posting, between \$89,732 and \$103,874 for 2014. She testified that salaries increase, on average, at 2% per year.

Disputed Facts

[25] Adam Papp testified that the workplace at Stokes Economic Consulting Inc. was informal and normally relaxed and friendly but that on occasion Dr. Stokes and his son Aaron would shout at each other and use bad language. He testified that Dr. Stokes' approach was casually demeaning; telling people that their work was "shit".

[26] Anthony Sturgeon, another staff economist at Stokes Economic Consulting Inc., worked with Adam Papp the entire time Mr. Papp was there. He described the workplace as relaxed except that it could get tense if there were deadlines approaching. Mr. Sturgeon agreed that there was sometimes joking between staff members and that on occasion they discussed personal matters.

[27] Robert Daniells, another staff economist at Stokes Economic Consulting Inc., worked with Adam Papp the entire time Mr. Papp was there. He agreed it was a relaxed, friendly work environment wherein staff discussed current events and engaged in office banter. He agreed that personal matters were discussed a little bit.

- [28] Aaron Stokes, Ernest Stokes' son, was also a staff economist at Stokes Economic Consulting Inc. when Adam Papp began there. He testified that the workplace was relaxed and friendly and that there was some joking around between staff when not working. He agreed that at times personal matters were discussed.
- [29] Anthony Sturgeon, who is also Ernest Stokes' nephew, testified that he found it frustrating to work with Adam Papp as although Mr. Papp had good technical ability his work ethic was poor and he tried to pass off work to Mr. Sturgeon. He testified that Mr. Papp also made inappropriate comments demonstrating a lack of respect for authority. Mr. Sturgeon testified that Mr. Papp behaved like an intellectual snob, telling him he was wrong and using a belittling tone. Mr. Sturgeon described a meeting in which Adam Papp said that only the person making the presentation knew what he was doing and that the rest of them were stupid.
- [30] Anthony Sturgeon agreed that he made no formal complaint about Mr. Papp's behaviour in the workplace although he and Aaron Stokes would "vent" about Mr. Papp from time to time. He testified that on one occasion he complained directly to Mr. Papp when Mr. Papp blew off Mr. Sturgeon's comments about the quality of his work. He testified that Mr. Papp just shrugged it off.
- [31] Anthony Sturgeon testified that in the summer of 2014 Ernest Stokes asked him about Mr. Papp. While Mr. Sturgeon testified that he could not recall the exact conversation, he recalled telling Ernest Stokes that it was extremely frustrating because Adam Papp showed promise technically but a poor work ethic. He was also belittling to other staff and had a chip on his shoulder. He recalled telling Ernest Stokes that Adam Papp looked down on a lot of his colleagues and that he didn't think he respected Aaron Stokes based on the way they communicated.
- [32] Rob Daniells testified that he found that Adam Papp had excellent programming skills and a good economic base but was very stuck in his ways and argumentative. Mr. Daniells testified that he was "not one to argue" so would let things slide but he, on occasion, left the room because he felt uncomfortable when Mr. Papp and Aaron Stokes engaged in arguments. He described it as a "not particularly good work environment" but said it did not prevent him from doing his work.
- [33] Rob Daniells testified that "around July time" the year after Adam Papp left, Ernest Stokes asked him what it was like to work with Adam Papp. He recalled telling Ernest Stokes that Mr. Papp was good technically but often argumentative. Mr. Daniells testified that after Mr. Papp left he had asked Mr. Daniells for a reference but that Mr. Daniells did not respond because he felt that he could not give a good reference.
- [34] Aaron Stokes described Adam Papp as a good programmer with a good knowledge of economics but testified that Mr. Papp was not liked by others as he made inappropriate comments. He testified that Mr. Papp was never disciplined for his behaviour as he and the other coworkers just tolerated it as a personality issue. He testified that on occasion he would vent to Anthony Sturgeon about Mr. Papp and a couple of times mentioned Mr. Papp's behaviour to his father. He testified that he had to watch Mr. Papp as on one occasion

he found that he had not done work he was supposed to and then lied to Aaron Stokes about it.

[35] When asked if he ever had any difficulties with Anthony Sturgeon or Rob Daniells, Adam Papp testified that he worked side by side with them and spoke every day and they did not express any issues with or to him. He denied ever belittling his coworkers describing their interchange as “banter”. He testified that he did not feel that he ever “crossed the line”. He denied ever telling any of his coworkers that they were stupid. He denied ever passing off work to coworkers.

[36] With respect to Aaron Stokes, Adam Papp testified that in the fall of 2013 there were issues including one occasion when Aaron Stokes shouted at him and he shouted back. He testified that on that occasion Ernest Stokes had come out of his office and shouted Aaron Stokes down. Mr. Papp testified that Aaron Stokes made disparaging comments to him in front of other staff, unfairly accusing him of not doing his assigned work. He did not raise it with Ernest Stokes because, as he described it, “it was a family first company”.

[37] Anthony Sturgeon testified that while Ernest Stokes was in charge of the company Aaron Stokes was his “direct report”; Aaron Stokes was the forecast manager. He testified that Adam Papp also reported to Aaron Stokes.

[38] Rob Daniells testified that he began as a staff economist at Stokes Economic Consulting Inc. in 2007. Initially he reported to Ernest Stokes but gradually over time that shifted to Aaron Stokes. He testified that it was the same for Adam Papp – he initially reported to Ernest Stokes but that gradually shifted to Aaron Stokes, as did Anthony Sturgeon and the other staff economist Tara Schill.

[39] Mr. Daniells was cross-examined on the fact that in his statement, prepared January 16, 2017, he said he was promoted to Assistant Forecast Manager in 2014 and for the first seven years reported to Ernest Stokes. Mr. Daniells maintained that for the first five years he clearly reported to Ernest Stokes but over the next two years there was a gradual shift to reporting to Aaron Stokes. He could not give a firm date as to when the shift finally occurred.

[40] Mr. Daniells was also cross-examined as to the fact that his uncle is a partner in C4SE, of which Stokes Economic Consulting Inc. is a part. Mr. Daniells testified that he in fact did very little work for C4SE.

[41] Aaron Stokes testified that he began at Stokes Economic Consulting Inc. in 2005 and reported to Ernest Stokes. He explained that in 2013 his mother was diagnosed with terminal cancer and as a result Ernest Stokes began spending as much as three days per week taking his mother for treatments. As a result Aaron Stokes became responsible for checking Adam Papp’s work.

[42] Adam Papp testified that Aaron Stokes was never the person he reported to. He testified that Ernest Stokes was training Aaron Stokes to be the forecast manager between December 2012 and March 2013. He testified that the next round of forecasting was in November 2013. He maintained that Ernest Stokes always oversaw the work and denied that he ever reported to Aaron Stokes.

- [43] Aaron Stokes testified that in 2013 the company sales were down and there was not enough work for the economists they had. He testified that it was necessary to cut costs. Adam Papp was chosen as the one to be terminated because they had completed the rebuilding of the modelling system that Mr. Papp had been involved in and, because Mr. Papp had a Masters degree, his salary was higher than the other staff economists who had undergraduate degrees only. Aaron Stokes testified that he discussed the decision with Ernest Stokes who agreed.
- [44] Aaron Stokes testified that on December 19, 2013 he told Adam Papp they needed to let someone go, they had a downturn in work and that he would "pay him out". He testified that Mr. Papp's work station computer had not been removed at the time.
- [45] Adam Papp testified that on December 19, 2013 he arrived at work to find that his work station computer had been removed. Aaron Stokes called him in to Dr. Stokes' office and told him, "We are not going to make a case against you; we are not going to deny you EI. The paperwork will be in the mail. Clean out your desk." And he was handed a box.
- [46] Adam Papp testified that he did not respond but took the box and cleaned out his desk.
- [47] Ernest Stokes confirmed that he had hired Adam Papp in 2011 and that Mr. Papp had completed the probationary period without incident. Dr. Stokes testified that initially all the staff economists reported to him but that in the fall of 2012 his wife was diagnosed with cancer and so Aaron Stokes was made the forecast manager as at the beginning of 2013. Dr. Stokes testified that there had been no formal email announcement of this to the staff, he just walked out to the work area and told them. From that point Adam Papp along with the other staff economists reported to Aaron Stokes.
- [48] Ernest Stokes testified that during the period he was reviewing Adam Papp's work the quality of the work was good but Mr. Papp had behaved in a way he did not like on a couple of occasions. He described Adam Papp coming in one day and aggressively accusing the staff of making him sick. He also recalled the meeting wherein Adam Papp had called everyone stupid. Ernest Stokes testified that he was surprised by this; he did not think that Adam Papp behaved like that all the time. He testified that although he found this behaviour to be inappropriate he did not consider it serious and found no need to reprimand Mr. Papp.
- [49] Ernest Stokes testified that in 2013 Aaron Stokes complained of Adam Papp to him, but Dr. Stokes was preoccupied with his wife and brushed the complaints off as "just a few hiccups". He did not dislike Adam Papp but was disappointed that he did not get on well with the others. He confirmed that Aaron Stokes had discussed the decision to terminate Mr. Papp with him and he agreed because the company had slower growth in sales, the workload was falling and they needed to reduce costs. He testified that Mr. Papp's behaviour played no role in the decision to terminate him.
- [50] Ernest Stokes testified that in his response to Mr. Papp's December 20, 2013 email he was agreeing to verify to anyone what work Mr. Papp had done at the company and his technical capabilities. Dr. Stokes testified that he had not done a reference interview before,

or at least not for a very long time, and expected he would be asked to verify the work Adam Papp had done.

[51] Ernest Stokes testified that after had replied to Adam Papp's email of December 20, 2013 he began to become aware that there had been some issues between Mr. Papp and his coworkers while he had worked there. Aaron Stokes said that he had talked to the other employees and that they were not too happy about Mr. Papp's behaviour toward them. Ernest Stokes testified that he was surprised to hear this as he had not noticed any problems.

[52] When Ernest Stokes had this conversation with Aaron Stokes he was still in Florida. When he got back he had further conversation with Aaron Stokes then spoke to Rob Daniells and Anthony Sturgeon in late spring or early summer. Ernest Stokes testified that he was aware that Aaron Stokes and Adam Papp had differences, so he wanted to verify with the other employees what he had heard from Aaron Stokes.

[53] February 17, 2014 Ernest Stokes received an email from Craig Alexander, the chief economist at TD Bank. Mr. Alexander indicated that Adam Papp had sent him a *c.v.* and he wanted to know why Mr. Papp had left Stokes' company. Ernest Stokes replied that it was because of staff changes. Ernest Stokes testified that he did not mention Adam Papp's behaviour to Mr. Alexander because Mr. Alexander did not ask. Ernest Stokes received no other enquiries about Adam Papp before Mr. Papp's email of June 19, 2014.

[54] Ernest Stokes testified that he did not think it was necessary to reply to that email. Although he was disappointed in what he had heard about Adam Papp's behaviour from the other employees, he still felt he could give a positive reference with respect to Mr. Papp's technical abilities.

[55] Ernest Stokes testified that when he received the call from Amanda Ho on July 2, 2014 he was not expecting such a "mechanical" conversation. He thought there should have been more questions about Adam Papp's technical abilities. Upon reviewing Amanda Ho's notes of the conversation Ernest Stokes testified that the order of the questions did not accord with his recollection. He also disagreed with the answers recorded by Amanda Ho, indicating that he speaks in complete sentences; he denied saying that there were performance and attitude issues. He agreed that he said that Mr. Papp was "Ok in computing" but that Ms Ho had not given him a chance to say that usually economists are not good in computing but that Adam Papp was. He testified that it bothered him that she did not seem to be interested in Adam Papp's technical capabilities.

[56] In respect of the "chip", Mr. Stokes recalled saying that "the feeling from staff was that he [Mr. Papp] had a chip on his shoulder". He agreed that he had said that Adam Papp did not get along well in a team setting and did not get on "greatly" with co-workers. Ernest Stokes testified that he had no animosity toward Mr. Papp but felt an obligation to answer those questions honestly.

[57] In respect of the question about the supervisor, Mr. Stokes testified that he had told Ms Ho that when he was Mr. Papp's supervisor he had no problems getting along with him. In respect of good working relationships Mr. Stokes acknowledged saying that he did not see

any evidence of it but also explained to Ms Ho that he had not worked with Mr. Papp for over a year. In respect of things Mr. Papp could improve upon, Mr. Stokes testified that he did not say “see above” but had identified that Mr. Papp could get along better with staff.

[58] In respect of the question whether he would re-hire Mr. Papp Mr. Stokes agreed that his answer was “No way” because there was no way Mr. Stokes could re-hire him if he could not get along with the other staff. Mr. Stokes recalled that the question of Mr. Papp’s quality of work came up toward the end of his conversation with Ms Ho, and that he had told Ms Ho that he had no problems with Mr. Papp’s technical capabilities but was not pleased he could not get along well with staff. He denied saying that Mr. Papp would not get along with Ms Ho’s staff.

[59] Ernest Stokes testified that it was not his intention to give Adam Papp a negative reference and that it was not his intention to hinder Adam Papp’s job prospects. He denied being “that kind of a person”.

[60] Amanda Ho testified that the questions to be asked of a reference are prepared before the reference call and related to the specific position applied for. Her notes were taken while on telephone with Mr. Stokes - typing while talking and listening. When asked if her notes were a complete record of what was said Ms Ho testified that her notes were “probably not all of it, just pieces”. Ms Ho testified that her notes were just a summary of what was said and captured the gist of it - that Mr. Papp didn’t get along in team setting but that he was good on the computing side.

[61] Ms Ho testified that she would have assessed this reference along with the one from Alex Barnhoorn. She recalled that she then discussed them with her supervisor and that Adam Papp was then “de-certified” as a candidate because of the Stokes reference.

[62] Ms Ho indicated in cross-examination that in her job she would have done some 50-100 reference checks since the one with Ernest Stokes and she could not really remember the conversation with Mr. Stokes some three years previous. She agreed it was possible that she asked the questions of Mr. Stokes out of sequence and testified that she “kinda summarized” Mr. Stokes’ responses. Her notes were “very rough” and not verbatim. She agreed it was possible that Mr. Stokes told her that he was pleased with Mr. Papp’s technical abilities.

[63] Ms Ho testified that she was already satisfied with Mr. Papp’s technical abilities from the earlier steps in the application process and that the reference checks were more to see if the candidate would be “a good fit” for the job and that it was possible that Mr. Stokes said things about Mr. Papp’s quality of work that did not make it into her notes.

Defamation

The Law

[64] The parties agree on the applicable law. As indicated in *Grant v. Torstar Corp.* [2009] S.C.J. No. 61 at paragraphs 28-30 :

28 A plaintiff in a defamation action is required to prove three things to obtain judgment and an award of damages: (1) that the impugned words were defamatory, in the sense that they would tend to lower the plaintiff's reputation in the eyes of a reasonable person; (2) that the words in fact referred to the plaintiff; and (3) that the words were published, meaning that they were communicated to at least one person other than the plaintiff. If these elements are established on a balance of probabilities, falsity and damage are presumed, though this rule has been subject to strong criticism: see, e.g., R. A. Smolla, "Balancing Freedom of Expression and Protection of Reputation Under Canada's Charter of Rights and Freedoms", in D. Schneiderman, ed., *Freedom of Expression and the Charter* (1991), 272, at p. 282. (The only exception is that slander requires proof of special damages, unless the impugned words were slanderous per se: R. E. Brown, *The Law of Defamation in Canada* (2nd ed. (loose-leaf)), vol. 3, at pp. 25-2 and 25-3.) The plaintiff is not required to show that the defendant intended to do harm, or even that the defendant was careless. The tort is thus one of strict liability.

29 If the plaintiff proves the required elements, the onus then shifts to the defendant to advance a defence in order to escape liability.

30 Both statements of opinion and statements of fact may attract the defence of privilege, depending on the occasion on which they were made. Some "occasions", like Parliamentary and legal proceedings, are absolutely privileged. Others, like reference letters or credit reports, enjoy "qualified" privilege, meaning that the privilege can be defeated by proof that the defendant acted with malice: see *Horrocks v. Lowe*, [1975] A.C. 135 (H.L.). The defences of absolute and qualified privilege reflect the fact that "common convenience and welfare of society" sometimes requires untrammelled communications: *Toogood v. Spyring* (1834), 1 C.M. & R. 181, 149 E. R. 1044, at p. 1050, per Parke B. The law acknowledges through recognition of privileged occasions that false and defamatory expression may sometimes contribute to desirable social ends.

[65] *Grant v. Torstar* also makes clear that justification is a defence to defamation failing which there may be a defence of qualified privilege. At paragraphs 32-34:

Where statements of fact are at issue, usually only two defences are available: the defence that the statement was substantially true (justification); and the defence that the statement was made in a protected context (privilege).

To succeed on the defence of justification, a defendant must adduce evidence showing that the statement was substantially true. If the defence of justification fails, generally the only way a defendant can escape liability for an untrue defamatory statement of fact is by establishing that the statement was made on a privileged occasion.

[66] In *Korach v. Moore* [1991] O.J. No. 1, the Court of Appeal indicated that where qualified privilege is established, the onus rests on the plaintiff to show malice.

[67] The test for malice is set out in the dissenting opinion of Houlden J.A. at paragraph 25 and 26:

Evidence of malice may be extrinsic or intrinsic. Extrinsic evidence is evidence of surrounding circumstances. Intrinsic evidence is the wording of the document itself. The wording may be so violent, outrageous or disproportionate to the facts that it furnishes strong evidence of malice.

Extrinsic evidence that the defendant made the defamatory statements knowing them to be untrue will ordinarily be conclusive evidence that the defendant lacked an honest belief in the truth of what he wrote. But the evidence need not go that far. If the defendant was reckless in making the statements, that will be sufficient. "Recklessness" in this branch of the law means indifference to the truth or falsity of what was said.

Analysis

[68] There is no issue here that that the words spoken by Ernest Stokes to Amanda Ho were defamatory, in the sense that they would tend to lower Adam Papp's reputation in the eyes of a reasonable person; (2) that the words in fact referred to Adam Papp; and (3) that the words were published, meaning that they were communicated to at least one person other than the plaintiff.

[69] These elements having been established, the onus then shifts to Ernest Stokes to advance a defence in order to escape liability.

[70] Ernest Stokes raises the defence of justification - that the statements were substantially true.

[71] Counsel for Mr. Papp submits that I should find that the testimony of Aaron Stokes is not credible because he clearly had an axe to grind with Mr. Papp. While it is clear that Aaron Stokes and Adam Papp had their differences, I find that there was a reasonable basis upon which Aaron Stokes concluded that Adam Papp did not get along well with his co-workers.

[72] Counsel for Mr. Papp submits that I should find that the testimony of Anthony Sturgeon is not credible because he is related to Aaron and Ernest Stokes. I have considered this connection but I do not find that it detracts from the credibility of Anthony Sturgeon who gave his testimony in a straightforward manner. Despite his feelings about Mr. Papp's behaviour toward him, Mr. Sturgeon did his best to maintain a pleasant work environment.

[73] Counsel for Mr. Papp submits that I should find that the testimony of Rob Daniells is not credible because of his familial connection with C4SE, the company affiliated with Stokes Economic Consulting Inc. I found Mr. Daniells to be frank in his testimony and no basis to conclude that he skewed his testimony in any way because his connection with C4SE. He, as well, although he found Mr. Papp's behaviour unsettling, did his best to maintain a pleasant work environment.

[74] I am satisfied on a balance of probabilities that what Ernest Stokes said to Amanda Ho was substantially true. While it is clear that Adam Papp's co-workers made an effort to get along with him while they worked together and made no formal complaint about his behaviour, they did find it difficult to work with him given that they perceived his behaviour towards them as conveying a feeling of superiority on his part. I find that while Adam Papp's technical ability to do the work assigned him was good, he did not work well in the team setting at Stokes Economic Consulting Inc. I find that this was not confined to his personality differences with Aaron Stokes but extended to Mr. Papp's co-workers as well.

[75] Ernest Stokes also raises the defence of qualified privilege. It is clear that words “published” in the context of a reference check fall within the range of qualified privilege. This privilege can be defeated by proof of malice.

[76] Counsel for Mr. Papp submit that even if Ernest Stokes had an honest belief in what he told Amanda Ho he demonstrated a reckless disregard for the truth as he did not bother to verify what he had been told about Adam Papp’s behaviour with Adam Papp himself.

[77] I am not satisfied on a balance of probabilities that Ernest Stokes acted maliciously in what he said to Amanda Ho. It is clear that what Ms Ho recorded of her conversation with Ernest Stokes is not a complete record. I am satisfied that what Ernest Stokes said to Amanda Ho he genuinely believed to be true.

[78] I also find no basis upon which to conclude that Ernest Stokes was reckless. He did not accept at face value what he had been told by Aaron Stokes as he was aware of the differences between Aaron Stokes and Adam Papp. He took steps to verify what he had been told by speaking independently with Anthony Sturgeon and Rob Daniells. He also said what he could to Amanda Ho in respect of Mr. Papp’s positive qualities. I find no evidence to support the contention that Mr. Stokes acted with malice.

[79] Having made these findings I am satisfied that Ernest Stokes has a complete defence to defamation, and there is no basis for punitive, exemplary or aggravated damages or damages on the basis of intentional infliction of mental suffering.

Reasonable Notice

[80] The parties agree that any amount awarded to Adam Papp as compensation for reasonable notice should be reduced by the \$4,136.36 he was paid by Stokes Economic Consulting Inc. following his termination.

[81] The parties are agreed that in determining an appropriate notice period the proper principles to be applied are those as set out in *Bardal v. Globe & Mail Ltd.* [1960] O.J. No. 149 at paragraph 21:

The reasonableness of the notice must be decided with reference to each particular case, having regard to the character of the employment, the length of service of the servant, the age of the servant and the availability of similar employment, having regard to the experience, training and qualifications of the servant.

[82] Counsel for Mr. Papp rely on cases of *Porter v. Canadian Taxpayers Federation* [1995] S.J. No. 676 (Q.B.); *Gillies v. Goldman Sachs Canada Inc.* [2001] B.C.J. No. 2542 (C.A.); *Serrao v. National Bank Financial Inc.* [2004] O.J. No. 2821 (S.C.J.) and *Wong v. Rogers Communications Inc.* 2011 BCSC 128 in support of their position that Mr. Papp is entitled to reasonable notice of 10 -12 months. In particular they rely on the specialized nature of Mr. Papp’s employment and that the reference given by Ernest Stokes was made in bad faith and had an effect on Mr. Papp’s ability to mitigate.

[83] In addition, they take the position that Mr. Papp’s bonus was an integral part of his compensation. *Paquette v. TeraGo Networks Inc.* 2016 ONCA 618, paragraph 17:

Damages for wrongful dismissal may include an amount for a bonus the employee would have received had he continued in his employment during the notice period, or damages for the lost opportunity to earn a bonus. This is generally the case where the bonus is an integral part of the employee's compensation package: see *Brock v. Matthews Group Limited* (1988), 20 C.C.E.L. 110, at para. 44 (Ont. H.C.J.), aff'd (1991), 34 C.C.E.L. 50, at paras. 6-7 (Ont. C.A.) (appeal allowed in part on other grounds); *Bernier*, at para. 44 (Ont. S.C.), aff'd, at para. 5 (Ont. C.A.). This can be the case even where a bonus is described as "discretionary": see *Brock v. Matthews Group*, at para. 44 (Ont. H.C.J.), aff'd, at paras. 6-7 (Ont. C.A.).

[84] Counsel for the Defendants submit that the cases cited by counsel for Mr. Papp are distinguishable on the basis that those employees had been recruited (had given up other employment too take the position in question) and/or they held management positions with significant authority and were compensated at a high level. They rely on *Drysdale v. Panasonic Canada Inc.* [2015] O.J. No. 6324 (S.C.J.) in support of their position that level of compensation is a factor to be considered.

[85] Counsel for the Defendants rely on cases of *Wong v. Wong Ltd.* 1993 CarswellOnt 2496 (G.D.); *Hummel v. Treaty 7 Urban Indian Housing Authority* 2007 ABPC 114; *Johnston v. Levencrowne* [2008] O.J. No. 1735 (S.C.J.); *Tse v. Trow Consulting Engineers Ltd.* [1995] O.J. No. 2529 (G.D.); *Asselin v. Gazarek Realty Holdings Ltd.* [2011] O.J. No. 4425 (S.C.J.) and *Branch v. Canadian Imperial Bank of Commerce* [2010] O.J. No. 2631(S.C.J.) in support of their position that reasonable notice in this case would be four months.

[86] Counsel for the Defendants submit that as mitigation is not in issue, the employer is not responsible for how long it takes a former employee to find alternative employment. In this they rely on *Holland v. Hostopia.com Inc.* [2015] O.J. No. 5821(C.A.) at paragraph 61:

Notice is to be determined by the circumstances existing at the time of termination and not by the amount of time that it takes the employee to find employment: see *Panimondo v. Shorewood Packaging Corp.* (2009), 73 C.C.E.L. (3d) 99 (S.C.), citing *Harper v. Bank of Montreal* (1989), 27 C.C.E.L. 54 (Ont. Div. Ct.). If two employees in identical circumstances are terminated at the same time, they are entitled to the same notice, regardless how long it takes each of them to find a new job. One may mitigate her damages by finding a comparable job shortly after being dismissed. The other may be unable to find work for years. They are entitled to the same notice, regardless of the outcome. The time it takes to find a new job goes to mitigation of damages, not to the length of notice.


[87] Counsel for the Defendants submit that the bonus was not, as in *Paquette*, an integral part of Adam Papp's compensation. They point to the fact that the bonus amounted to only approximately 2% of the base salary and was discretionary.

[88] Adam Papp's employment as an economist at Stokes Economic Consulting Inc. was relatively specialized. He worked there for less than three years. He is still, in his early 30's, a relatively young man. I did not and do not find any bad faith on the part of Ernest Stokes in respect of the reference, and I accept that, that notice is to be determined at the time of termination. Mitigation is not in issue here. Taking into consideration all of the factors around the bonus I am not satisfied that it was an integral part of compensation.

[89] I am satisfied that reasonable notice in this case is four months, less credit for the \$4,136.36 he was paid by Stokes Economic Consulting Inc. following his termination. I find

that Adam Stokes is to be paid \$17,192.57 by Stokes Economic Consulting Inc. for his wrongful dismissal.

[90] The parties may exchange and file written submissions as to costs, if necessary, not to exceed five pages exclusive of a Bill of Costs, no later than May 18, 2017.



MILLER J.

Released: April 18, 2017

Papp v. Stokes et al, 2017 ONSC 2357
COURT FILE NO.: 901/15
DATE: 20170418

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

ADAM PAPP

Plaintiff

– and –

STOKES ECONOMIC CONSULTING INC. and
ERNEST STOKES

Defendants

REASONS FOR JUDGMENT

MILLER J.

Released: April 18, 2017