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If You Cannot Say Anything Nice, That May Just Be OK

Adam Papp lost his job in December 2013. There was nothing extraordinary about how he lost his job: he was let go without cause and paid out his statutory entitlements under the Ontario *Employment Standards Act, 2000* and a little bit more. Mr. Papp quickly, diligently and appropriately began a search for alternative employment. On the day following the termination, he contacted his former boss, Ernest Stokes, to ask if he could use Mr. Stokes as a reference. Mr. Stokes agreed. It took time for Mr. Papp to receive any offers but six months after the termination of his employment, he was advised by the Government of Yukon that he was their number one candidate for a job. The Government of Yukon contacted Mr. Stokes with some pre-arranged questions. Mr. Stokes did not provide a positive reference. When asked, for example, how Mr. Papp worked in a team setting, he replied, "Not well. He has a chip." When asked if he saw evidence of an ability to develop good working relationships, Mr. Stokes answered, "Did not see any evidence of it." Mr. Papp did not get the job with the Government of Yukon. Instead, he sued Mr. Stokes and his company for $830,000, made up of claims for defamation, punitive and aggravated damages and mental suffering.

The case of *Adam Papp v Stokes Economic Consulting Inc. and Ernest Stokes*, released by the Ontario Superior Court of Justice on April 18, 2017, raises the question of when a former employer may be held liable, including personally liable, for an unfavourable reference.

The Court notes that the test for defamation is threefold. First, Mr. Papp needed to show that the reference provided by Mr. Stokes tended to lower his reputation in the eyes of the Government of Yukon. He succeeded here. Second, he needed to show that the words referred to him, which they clearly did. And third, he needed to show that the words were published, meaning that they were communicated to a third person and, again, they clearly were.

Having established the three elements of the tort, the burden then shifted to Mr. Stokes to raise a defence. Here, Mr. Stokes relied on the defences of justification (that the statements were substantially true) and of qualified privilege. A qualified privilege exists where a former employer provides a reference. In other words, the law recognizes that an employer should be permitted to provide a negative reference so long as he is not motivated by malice in doing so.

Mr. Stokes prevailed on both defences. The Court found that there was evidence that Mr. Papp did not get along with his co-workers. It also found that Mr. Stokes did not act maliciously when providing the reference. His comments, although negative, were based on facts that he had gathered from some of Mr. Papp's co-workers. The Court dismissed Mr. Papp's claims for defamation, punitive and aggravated damages and mental suffering.

For employers who continue to provide references for former employees, there are lessons here. First, honest references made in good faith are defensible. Second, any references, negative or positive, should be based on objective and verifiable facts. Third, anyone with an axe to grind against a former employee should not be permitted anywhere near a reference. Finally, consider a policy on references that includes, at a minimum, a point person to respond to any such requests.

Despite the outcome, many employers will see this case as a justification for a "No Reference" policy. Mr. Stokes and his company endured three plus years of no-doubt expensive litigation defending themselves. Perhaps somewhere over those years, they came to regret that five minute phone call with the Government of Yukon.

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