Denunciation by Whistleblowers was the Ex Employee s Defamation Suit Abusive

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Can a senior executive who has been dismissed based on allegations made in an anonymous letter, and who has signed a release and discharge agreement with his employer, later take suit against the presumed whistleblowers, as well as his ex-employer and its directors? In its recent decision in *Fournierc. Brouillet* 1, the Superior Court reiterated that filing a legal proceeding before a court of law is not something to be undertaken lightly, merely to cast about in search of a cause of action.

The Facts

Mr. Éric Fournier (Fournier) held the position of General Manager of the Association Touristique Régionale de la Montérégie (the Association), a not-for-profit organization founded in 2002. In January 2014, the Association's directors received an anonymous letter in the mail expressing the desire of the employees to have Fournier removed from his position as general manager. The letter criticized him for lack of motivation, competence and vision.

Following an investigation conducted by an outside consultant, the Association's directors concluded that Fournier's continuation in his position was unrealistic, considering the deterioration of his relationship with the employees. The Association then offered Fournier a choice between resigning voluntarily and being dismissed. Fournier decided to resign and signed a severance agreement, together with a release and discharge agreement, providing: "the employee hereby releases, discharges and grants a full and final receipt to the employer." However, the release and discharge agreement did not specifically mention the Association's employees or its officers.

In November 2014, Fournier filed a lawsuit for damage to his reputation against seven employees and four directors of the Association, claiming from them $320,000, plus extrajudicial fees. Alleging that he had sustained both moral and material damages as a result of the sending of the anonymous letter, he further claimed punitive damages.

During the proceedings, Fournier's original application was amended four times, increasing the claim from $320,000 to $3,051,614.16, and reducing the number of defendants from 11 to nine, including the Association. The court further rendered a case management order striking out certain defendants named in the allegations of

unjustified dismissal — a cause of action separate from that relating to the alleged defamation. Fournier nonetheless took another such action, asking the court to strike out those allegations a second time. Fournier also launched a campaign against the Association in the media.

Simultaneously with Fournier's action, the Association applied to the court to reserve its legal recourses, so as to permit it to file a claim for damages for abuse of process.

The Decision

The defamation suit

In a decision dated January 16, 2019, the Superior Court held that no defamation had been demonstrated. Since Fournier had been unable to establish the identity of the author or authors of the anonymous letter, he had not met his burden of proof in demonstrating a wrongful injury to his reputation. Moreover, several individuals, even from outside the Association, had disapproved of Fournier's working methods and had requested the Association to let him go. In any event, the defamation action was prescribed, because it had been instituted more than one year after release of the contents of the *consultant's report.*

Enforceability of the release and discharge agreement

Furthermore, the release and discharge agreement concluded between the Association and Fournier rendered his action inadmissible, both against the Association and against its directors. The parties' intention was to settle all of the consequences connected with the termination of Fournier's employment with the Association. In addition, the Association's directors had acted in good faith throughout the whole process.

It is noteworthy that if the release and discharge agreement had been drafted clearly and had protected the directors and employees as fully as it did the employer, there would have been no ambiguity as to the inadmissibility of Fournier's action against them.

Abuse of process

Regarding the abuse of process, the court allowed the Association's application. Indeed, Fournier's statements to the media, his behaviour during his testimony, as well as the multiple amendments to his written proceedings, were all instruments serving to identify the author or authors of the anonymous letter, which identity he was nevertheless unable to establish.

Costs

Lastly, Fournier's claim for reimbursement of his extrajudicial fees was held unfounded and was dismissed.

Conclusion

This decision is interesting in a number of respects. First, it shows that whistleblowers need not necessarily live in dread of being sued for defamation. The terminated

employee must be able to meet his or her burden of demonstrating some reputational harm, by proving a fault, an injury and a causal connection, which will obviously not be the case if the allegations are unfounded. Secondly, the decision reminds us of the principle that judicial proceedings may not be used for purely exploratory purposes. Finally, it highlights the importance of always concluding a release and discharge agreement with the employee who is being terminated, and of drafting such documents in clear and complete terms that will prevent the ex-employee from suing not only the employer, but also the other employees, the officers, directors, shareholders and other agents of the company, and even its insurers, where applicable.

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