



Tell Me What You Really Think! An Honest Reference, Even if Negative, is Not Defamation

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A prudent employer will use a reference check as a key component to any job competition process. Unfortunately, an employer often receives unhelpful or misleading information as a result of the referee's fear of being sued for providing a negative reference.

However, as two recent decisions from Ontario's Superior Court have shown, a former employer will not be liable for a negative reference if the content is true and made without malice.

In *Papp v Stokes*, 2017 ONSC 2357, after interviewing Adam Papp, the Yukon government called Ernest Stokes, Papp's former employer, for a reference. Stokes said Papp was let go because "he was not needed anymore and had a performance and attitude issue". Stokes also said there was "no way" he would rehire Papp, and that Papp:

was "OK in computing"
had a "chip on his shoulder" and did not work well with others
was unable to develop positive working relationships

Not surprisingly, Papp was not hired. He sued seeking \$65,000 in damages for wrongful dismissal, \$500,000 in damages for defamation, \$200,000 in punitive, exemplary and aggravated damages and \$30,000 for intentional infliction of mental suffering.

In dismissing the defamation claim (and the related claims for punitive damages and intentional infliction of mental suffering), the court agreed Stokes' comments were defamatory on their face. However, because there was evidence the comments were "substantially true" and Stokes "genuinely believed" what he said and did not act maliciously or dishonestly, Stokes had established a complete defence to defamation – known as "qualified privilege". Papp's entitlement was therefore limited to damages for wrongful dismissal amounting to \$17,000.

In *Kanak v Riffin*, 2016 ONSC 2837, Tracey Kanak sued her former manager, Darryl Riffin, for defamation arising from comments he made to a prospective employer during a reference check. Kanak had an offer with a new employer, conditional on a positive reference. Riffin's reference contained both positive and negative comments about Kanak's performance, including that:

there had been a lot of conflict between Kanak, her supervisor and other employees
Kanak did not take direction or handle stress well
Riffin would not re-hire Kanak in a project controls position, but would hire her in an autonomous financial position

The job offer was rescinded and Kanak sued Riffin for defamation.

At trial, the court was satisfied the comments were defamatory on their face, but were not actionable on the basis of qualified privilege because Riffin's "spoke honestly", his comments reflected "what he believed to be the truth" and he was "neither dishonest nor reckless":

*The social policy underpinning the protection of employment references in this manner is clear: **an employer must be able to give a job reference with candour as to the strengths and weaknesses of an employee, without fear of being sued in defamation for doing so. Without this protection, references would either not be given, or would be given with such edited content as to render them at best unhelpful or at worst misleading to a prospective employer.***

[emphasis added]

Best practices for employers

Although these decisions should ease concern about providing an honest (negative) reference for a former employee, the following best practices are recommended:

1. **Be honest:** If asked for a reference, be candid with the employee about the nature and extent of the reference the organization is prepared to provide.
2. **Be proactive:** If there are blemishes that may be disclosed about the employee's performance, let the employee know in advance. This may avoid a later dispute if the reference provided is not wholly flattering.
3. **Put it in writing:** Consider putting the reference in writing to avoid any misunderstanding about what will be communicated and how.
4. **Take notes:** Where a verbal reference is given, take and keep notes of the discussion including specific questions asked and answers given.
5. **Be as positive as you reasonably and truthfully can:** While there will be exceptions, generally speaking it is in everyone's interest a dismissed employee find new work as soon as possible. From the perspective of the former employer, a new job means mitigation income and reduced liability for termination notice. On the other hand, as a prospective employer receiving a reference, remember to consider a positive reference within the context of all of the information available.

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