

Member's Quarterly

Winter 2018 Edition

Feature

References: Employer Sued for Telling the Truth but Action Dismissed

Adopt a "no-reference" policy

Employers often struggle with whether or not they should offer letters or oral references for departing employees. More and more employers appear to be adopting "no-reference" policies.

In some ways, these policies may be seen as overly cautious. Should a manager or employer not be able to provide a positive reference to an employee who is departing on good terms – perhaps due to a layoff or restructuring? We get the impression that many employers make exceptions to assist these good but departing employees. This can be a good practice as a positive reference may increase the employee's odds of securing new employment and mitigating the damage caused by the dismissal. Finding adequate alternate employment also reduces the damages claimed in a wrongful dismissal lawsuit.

But what about the "bad" employee? What are former employers supposed to do or say about them? A recent case from the Ontario Superior Court of Justice highlights the risk involved with providing references to these employees.

In the case of *Papp v. Stokes Economic Consulting Inc.* ("Stokes") the owner of Stokes offered to provide a terminated employee with a reference but only to confirm his technical capabilities as an economist. Papp was interviewed for a government position and, after several rounds of interviews, he was the top ranked applicant. During the reference check portion of the process, a representative of Stokes was asked standard interview questions regarding Papp. Most of the questions focused on Papp's interpersonal skills. The owner of Stokes responded honestly. Some of the interview questions and answers are reproduced below directly from the reported decision (online: <http://canlii.ca/t/h3sz1>):

How would you rate his quality of work?

We were not that pleased.

How well does he get along with his co-workers?

Not greatly.

Is he able to develop good working relationships?

Did not see any evidence of it.

Would you re-hire?

No way.

Not surprisingly, Papp did not get the job. He then sued Stokes and the owner personally seeking \$500,000 for defamation and a further \$50,000 for intentional infliction of mental suffering. These claims were added to Papp's wrongful dismissal lawsuit. Papp was awarded four months' notice as part of his wrongful dismissal lawsuit - approximately \$17,000.



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Fortunately for Stokes and the owner, the other larger claims were dismissed. The Court found that the statements made by the owner of Stokes were defamatory as they did lower Papp's reputation in the eyes of a reasonable person. However, Stokes was able to defeat the lawsuit on the basis that he genuinely believed that the reference he gave in the interview was true and that he had not intended any malice.

Many lawyers have been writing about this case since it was released in April 2017. The consensus seems to be that this case is a "win" for employers who wish to give references as an employer will not be found liable for speaking the truth about a former employee. We generally agree with this analysis, subject to two points that we think employers should be aware of before providing a bad reference regarding a former employee.

First, ensure that what you are saying is true and also that you have proof that it was true in the event that the employee makes an issue out of the poor reference. Second, as a practical matter, remember that Stokes still had to pay a lawyer and go to trial in order to defend the reference provided by Stokes' owner and that the legal fees associated with this were likely very high and most of which would not be recoverable from Papp. Accordingly, it may still be prudent practice to deny providing references – particularly when you do not have positive things to say. As the old saying goes, "If you do not have anything nice to say, do not say anything."

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