

ONTARIO

SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

SACHS, WILTON-SIEGEL, MYERS JJ.

BETWEEN:)	
)	
Adam Papp)	<i>B. Radnoff and B. Hamud</i> , for the Appellant
)	
)	Appellant
)	
– and –)	
)	
Ernest Stokes and)	<i>G. Kler and J. Pinkus</i> , for the Respondents
Stokes Economic Consulting Inc.)	Ernest Stokes and Stokes Economic
)	Consulting Inc.
)	
)	Respondents
)	
)	HEARD at Brampton: March 7, 2018

Wilton-Siegel J.: (Orally)

[1] The Appellant Adam Papp appeals an order dated October 3, 2017 of Madam Justice Gisele Miller awarding the Appellant \$17,192.57 in damages for wrongful dismissal and awarding costs to the Respondents in the amount of \$35,000.

Factual Background

[2] The Appellant was terminated from his employment at the corporate Respondent Stokes Economic Consulting Inc. (the “Company”) on December 19, 2013 due to a lack of work. The next day, the Appellant emailed the individual Respondent Ernest Stokes, the president of the Company, asking whether he could put Stokes down as a reference. Stokes replied “That is okay”.

[3] The Appellant applied for a job with the Yukon Government and was ranked the first candidate for the job. He was advised of this by Amanda Ho, one of the interviewers, who also advised him that she had to check his personal references before making a formal offer.

[4] On June 19, 2014, the appellant advised Stokes of the status of his application including the fact that he would be contacted as a reference. Ho called Stokes on July 2, 2014 and asked him a number of questions. As a result of this conversation, the Yukon Government “de-certified” the Appellant for the job and hired another individual.

[5] Stokes testified that after advising that he could be used as a reference he became aware of concerns with the Appellant’s interactions with colleagues.

[6] The Appellant brought a claim seeking \$65,000 for wrongful dismissal; \$500,000 for defamation; \$200,000 for punitive, exemplary and aggravated damages; and \$30,000 for intentional infliction of mental suffering.

[7] The trial judge found that what Stokes said to Ho in response to her questions was “substantially true”. The Appellant did not work well in a team and his colleagues found it difficult to work with him. The trial judge also held that she “was not satisfied on a balance of probabilities that Stokes acted maliciously in what he said to Ho”.

[8] On the basis of these findings, the trial judge concluded that Stokes had a complete defence to defamation and further held that there was no basis for punitive, exemplary or aggravated damages or damages on the basis of intentional infliction of mental suffering. She awarded \$17,192.57 to the Appellant, representing four months’ notice less payments already made, on account of reasonable notice. In a separate endorsement, the trial judge awarded costs of \$35,000 on an all-inclusive basis calculated as costs on a partial indemnity basis to January 27, 2017, being the date of an offer of the Respondents, and on a substantial indemnity basis thereafter.

Jurisdiction of the Court

[9] The court has jurisdiction to hear this appeal pursuant to section 19(1.2) of the *Courts of Justice Act*, R.S.O. 1990, c. C-43 as it involves a single payment of not more than \$50,000, exclusive of costs.

Grounds of Appeal

[10] The Appellant raised the following five grounds of appeal:

1. The trial judge erred in not specifying the defamatory words or their meaning;
2. The trial judge erred in accepting unpleaded defences of justification and qualified privilege;
3. The trial judge failed to provide adequate reasons for credibility findings;
4. The trial judge failed to adequately address the claims of intentional infliction of mental suffering, bad faith in the manner of dismissal, aggravated damages and punitive damages; and

5. If leave is granted to appeal the cost award, the trial judge erred in principle or rendered a clearly wrong award.

Standard of Review

[11] The parties agree that the standard of review is palpable and overriding error for questions of fact and correctness for questions of law.

Did the trial judge err in failing to specify the defamatory words or their meaning?

[12] The trial judge found that there was no issue that the words spoken by Stokes to Ho were defamatory, in the sense that (1) they would tend to lower the Appellant's reputation in the eyes of a reasonable person; (2) the words in fact referred to the Appellant; and (3) the words were published, meaning that they were communicated to at least one person other than the plaintiff.

[13] The Appellant says that the trial judge was required to address a threshold question of whether the words cited are reasonably capable of a defamatory meaning and whether the words do, in fact, bear the defamatory meaning. He submits that the trial judge failed to specify what Stokes actually said and whether such words were defamatory. He says that it is therefore not possible to determine if any defence of justification is available without knowing the exact words spoken, if any defence of qualified privilege is available without knowing what information was given, or if words were spoken maliciously or recklessly without knowing the words spoken and their meaning. The Appellant argues that it is an error of law not to first determine whether the words are capable of a defamatory meaning.

[14] We agree that in a case where there is a substantial dispute on the evidence about what was said and the meaning of what was said, and the trial judge made no findings with respect to that dispute, the Appellant's argument might have merit. However, in this case, while there may have been a dispute about the actual words that were said (not surprising in a slander case), there was no substantial dispute about the essence of what was said or its meaning.

[15] As the trial judge noted, Ho took notes of her conversation with Stokes, notes she admitted were not a complete record of what was said. As put by her, "probably not all of it - just pieces." As found by the trial judge "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 a team setting but that he was good on the computing side."

[16] This testimony is entirely consistent with Stokes' evidence about the Appellant's quality of work (the main area that Appellant's counsel focused on in alleging a substantial dispute about what Stokes said). According to the trial judge's findings, Stokes told Ho "that he had no problem with Mr. Papp's technical capabilities but was not pleased he could not get along well with staff." With respect to the other aspects of Ho's notes about her conversation with Stokes,

Stokes did not dispute that he did tell Ho that the Appellant had a “chip on his shoulder”, that he had problems getting along with other staff and that he would not rehire him.

[17] Further, the trial judge’s reasons do disclose her findings about what Stokes said. This occurs at paragraph 74, among other places, where she states that what Stokes said to Ho was substantially true and then goes on to detail what was said and why it was true. Paragraph 74 reads as follows:

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.

[18] It is clear from this paragraph that the trial judge accepted that Stokes stated that the Appellant did not work well in a team setting, did not get on well with his co-workers and conveyed an attitude of superiority. It is also clear elsewhere in the Reasons of the trial judge that she accepted that the Appellant had a “chip on his shoulder”.

[19] Thus, there could be no problem in the consideration of the operation of the defences of justification and qualified privilege in the present circumstances. Accordingly, there is no merit to the Appellant’s first ground of appeal.

Did the trial judge err in accepting unpleaded defences of justification and qualified privilege?

[20] The Appellant argues that the Respondents failed to plead the defences of justification and qualified privilege in the Statement of Defence. The Appellant argues that the Respondents altered their theory of the case subsequent to the pleadings to assert these defences with the result that the Appellant was denied the opportunity to know the case he was required to meet.

[21] However, whatever the failings of the Statement of Defence to plead these defences expressly, the evidence establishes that the Respondents made their intention to assert these defences clear to the Appellant in correspondence well in advance of the examinations for discovery and the trial. The availability of these defences was also addressed in the Appellant’s trial factum, in the submissions of both parties at the opening of the trial and in their closing submissions. The purpose of pleadings is to ensure that the party opposite has notice of the facts and legal basis of the case being argued by the pleading party. We are satisfied therefore that, in the present circumstances, the Appellant knew the scope and meaning of the defences asserted by the Respondents. There is also no evidence of any prejudice to the Appellant from any inadequacy of the Statement of Defence in this regard.

[22] Further, this is a new argument that has been raised for the first time on appeal. The Appellant's failure to object at trial to the assertion of these defences and its actions in responding to the defences are fatal to this ground of appeal.

[23] As a related matter, the Appellant suggests that the Respondent altered their theory of the case between the pleadings, which alleged that the defamatory comments were based solely on Stokes' personal opinion, and the trial at which time Stokes testified that the defamatory comments were based on the comments of the employees of the corporate Respondent. The Appellant suggests that he was prejudiced by being denied the right to conduct discoveries and obtain disclosure based on the new materials filed in support of this approach to the case and, more generally, in being denied knowledge of the case the Appellant had to meet. Apart from the factual matter of the Appellant's knowledge discussed above, the Appellant failed to raise this objection to this development at or prior to trial when it came to the Appellant's knowledge. It is too late to do so now on appeal after completion of the trial.

Did the trial judge fail to provide adequate reasons for her findings on credibility?

[24] The Appellant argues that the trial judge erred in failing to make or explain her findings that the Respondents' witnesses were credible and, in particular, in failing to address evidence that it characterizes as "confusing and contradictory evidence, inconsistent with the pleadings." He argues that the trial judge's credibility findings lack the transparency required by *Dovbush v. Mouzitchka*, 2016 ONCA 38 and comprise excessively general conclusory statements, analogous to the error in *Law Society of Upper Canada v. Neinstein*, 2010 ONCA 193.

[25] The Appellant submits that the trial judge failed to explain satisfactorily her assessment of the credibility of the witnesses and, in particular, did not satisfy "the overarching principle of whether the reasons permit meaningful and effective appellate review": see *Dovbush* at para. 23. In that decision, the Court of Appeal cited with approval the statement that "[t]he exercise has been variously described as one of determining whether the reasons demonstrate: "the path taken by the trial judge through confused or conflicting evidence"...; or that "the trial judge came to grips with the issues and explained sufficiently his ... conclusions and the reasons and basis for them." [citations omitted]

[26] We find that the reasons of the trial judge satisfy this standard for the following reasons.

[27] First, with respect to the testimony of Stokes, as set out above, despite any contradiction between Ho's notes and the Statement of Defence or Stoke's testimony, the evidence at trial established that there was, in fact, no dispute regarding the substance of Stoke's defamatory statements.

[28] Second, with respect to the other witnesses, the Appellant suggests that the trial judge made her decision on the basis of demeanor alone, particularly in respect of the witnesses Daniells and Sturgeon. We do not agree that the trial judge made a palpable and overriding error in this respect. As the Court of Appeal noted in *Dovbush*, appellate courts must take a contextual and functional approach to addressing whether reasons meet the standard. In this case, the trial

judge addressed the issues raised by the Appellant in respect of each of the three employee witnesses in paras. 72-74. There was an evidentiary basis for her conclusions on these issues. The fact that the trial judge did not refer to the matters relied upon by the Appellant on this appeal does not mean that she failed to take them into consideration to the extent that she considered these issues to be relevant.

Did the trial judge fail to adequately address the claims of intentional infliction of mental suffering, bad faith in the manner of dismissal, aggravated damages and punitive damages?

[29] The Appellant argues that the trial judge erred in law in dismissing his claims for intentional infliction of mental suffering, bad faith in the manner of dismissal, aggravated damages and punitive damages on the basis that the defamation claim was dismissed.

[30] At trial, the Appellant based these claims on the defamatory statements. The trial judge held that these defamatory statements were justified and that Stokes did not act with malice in making these statements. These findings were fatal to the other causes of action alleged. There was no need for the trial judge to discuss each element of the legal test for these causes of action that could not be satisfied given these findings. Accordingly, the trial judge did not err in dismissing these claims on the theory of such claims that was put to her.

[31] On this appeal, the Appellant now situates these claims in the actions of Stokes in leading him to believe that he would provide a favourable reference. However, the Statement of Claim does not plead any such connection. In particular, any claim based on bad faith is tied specifically to the provision of a false reason for his termination, for which there is no evidence whatsoever. The actions upon which the claims are based are not related to the manner of the Appellant's termination. They occurred six months later. We agree with the Respondent that this is in substance a new claim of negligent misrepresentation that was never pled and was not raised at trial. It cannot be raised on this appeal for the first time.

Should leave be granted to appeal the cost award and, if so, did the trial judge commit an error of principle or render a plainly wrong award?

[32] The Appellant also seeks to appeal the costs award of the trial judge in her endorsement dated May 29, 2017 for which leave is required under Rule 62.02 of the *Rules of Civil Procedure*. The Appellant acknowledges that an appellate court should only interfere with a costs award if the trial judge committed an error of principle or is clearly wrong. In our view, this case meets this threshold and therefore we grant leave.

[33] The Appellant argues the trial judge incorrectly applied r. 49.10(1) in respect of the Respondents' offer, that there were no special circumstances justifying substantial indemnity costs, and that the Respondents' pre-trial conduct should disentitle the Respondents to costs.

[34] The trial judge awarded costs in favour of the Respondents calculated as costs on a partial indemnity basis to January 27, 2017, being the date of an offer of the Respondents, and on a

substantial indemnity basis thereafter. In doing so, the trial judge incorrectly applied r. 49.10(1) in reaching her conclusion regarding an appropriate costs award. Given that the offer to settle was made by the Respondents, as the defendants in the action, the applicable rule is r. 49.10(2). That provision requires in the present circumstances that the Appellant receive his costs on a partial indemnity basis to the date of the offer to settle and that the Respondents are entitled to their costs from that date on a partial indemnity basis. Accordingly, the costs award is set aside and the issue of costs is remitted to the trial judge for a determination on the basis of the application of r. 49.10(2) and such other factors as she may consider appropriate.

Conclusion

[35] Based on the foregoing, the appeal is dismissed other than with respect to the award of costs which is remitted to the trial judge as addressed above.

	_____	Wilton-Siegel J.
I agree	_____	Sachs J.
I agree	_____	Myers J.

Date of Reasons for Judgment: March 9, 2018

Date of Release:

CITATION: Papp v. Stokes 2018 ONSC 1598
DIVISIONAL COURT FILE NO.: DC-17-0000047-00
DATE: 20180309

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– and –

Stokes Economic Consulting

Ernest Stokes

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ORAL REASONS FOR JUDGMENT

THE COURT

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