

MANAGEMENT COUNSEL

Employment and Labour Law Update



“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.”

Tell me what you really think!

**An honest reference,
even if negative, is not defamatory**

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.



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In *Kanak v Riggan*, 2016 ONSC 2837, Tracey Kanak sued her former manager, Darryl Riggan, 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. Riggan'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
- Riggan 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 Riggan 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 Riggan "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 erase 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. Conversely, as a prospective employer receiving a reference, remember to consider a positive reference within the context of all of the information available.

For more information and assistance, contact the employment law experts at Sherrard Kuzz LLP.

DID YOU KNOW?

Throughout the next several months the Government of Ontario will conduct audits of businesses in the manufacturing sector to determine compliance with the *Accessibility for Ontarians with Disabilities Act* ("AODA"). The audits are likely to focus on compliance with the Employment Standards under the broader Integrated Accessibility Standards Regulation.

In addition, by December 31, 2017, every public sector organization as well as any business and non-profit organization with 20 or more employees must file a report confirming compliance with the AODA. An organization that fails to file the compliance report may be targeted for enforcement initiatives which can include financial penalties.

For assistance with any AODA matter, including compliance assistance, contact the experts at Sherrard Kuzz LLP.

DID YOU ALSO KNOW?

In 2017, the Workplace Safety and Insurance Board published draft Rate Framework policies intended to completely overhaul how premiums will be calculated and claims costed back to an employer's account. Changes are slated for implementation on January 1, 2019, and stakeholder submissions are due by October 13, 2017.

To learn more about these important WSIB changes, please join us at our **HReview Breakfast Seminar to be held on November 29, 2017**. Details, including how to register, are on the back page of this newsletter.

Workplace Offences of the Olfactory Senses



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Ideally, workplace misconduct is dealt with swiftly and decisively through an established disciplinary process. However, when the source of the offence is not a worker's conduct but personal hygiene, what recourse does an employer have?

Why make a stink?

Matters involving personal hygiene can present health, safety, and other workplace risks, and take a toll on employee relations and workplace

morale. For example, a worker who exhibits poor personal hygiene in the context of a food processing facility not only risks public health but an employer's brand and reputation. A healthcare worker who fails to maintain personal hygiene can cause disastrous – even fatal – consequences for patients under his or her care. Personal hygiene can also trigger an employer's accommodation obligations under human rights legislation. For example, where a worker suffers from a disability that causes unpleasant body odour.

Given the discomfort broaching the subject and concerns about becoming ensnared in human rights litigation, it's no wonder many employers are fraught with anxiety about how to navigate body odour issues in the workplace.

Two helpful decisions

The following decisions show us that personal hygiene can and should be treated like any other issue related to health, safety or the breach of a workplace policy.

In *Southwell v. CKF*, 2017 BCHRT 83, CKF, a manufacturer of food packaging products, received complaints from employees that a coworker, Southwell, disregarded the company's sanitation protocols, in that he: (i) spat on the plant floor; (ii) blew on product that was to be packaged; (iii) had offensive body odour; and (iv) failed to excuse himself before passing gas.

CKF advised Southwell his conduct was unacceptable and gave him the opportunity to disclose any medical condition that may have contributed to his workplace behaviour. Southwell reported nothing.

Throughout the next couple of months Southwell's personal hygiene improved. However, he continued to exhibit subpar performance and an inability to follow instruction. His employment was terminated prior to the end of his probationary period.

Thereafter, Southwell was diagnosed with a disability which was said to cause body odour and flatulence. He filed a complaint with the British Columbia Human Rights Tribunal alleging discrimination in employment. CFK took the position it had no prior knowledge of Southwell's disability, there was no evidence of a disability at the time of the termination, and the decision to terminate was not based

on personal hygiene but rather on performance issues. The tribunal agreed with CKF and dismissed the complaint.

A similar result was reached in *Von Bloedau v. Transcom Worldwide (North America) Incorporated*, 2014 HRTO 67, heard before the Human Rights Tribunal of Ontario. Throughout his two year tenure as a customer service agent Von Bloedau was the subject of repeated complaints from coworkers regarding his body odour. As a result, he received progressive discipline, including coaching, verbal and written warnings and suspensions.

With each disciplinary notice, Von Bloedau was told of the requirement to practice proper hygiene and that this was part of a professional and respectful workplace. He was also reminded an individual's scent could be the result of various factors including diet, hygiene or medical issues, and given suggestions how to address his odour issues (*e.g.*, bring a change of clothes to work after bicycling in extreme heat). Von Bloedau was also invited to (but did not) provide medical documentation in the event his odour was caused by a medical condition.

Eventually, Von Bloedau's employment was terminated and he filed a complaint with the Human Rights Tribunal alleging discrimination. However, unlike the previous case, Von Bloedau's complaint was not framed as an issue of disability discrimination, but rather as discrimination based on the protected ground of gender. Von Bloedau alleged his colleagues, predominantly female, had a stronger perception of body odour, and that as a "sweaty male" he was held to a different standard for body odour than his female counterparts. The tribunal disagreed with Von Bloedau, finding there was no evidence of a violation of the *Human Rights Code* on the basis of gender or otherwise.

Practical tips for employers

These two decisions remind us that personal hygiene can and should be addressed like any other health, safety or human rights issue (if applicable) in the workplace. As such, to minimize the risk associated with personal hygiene issues consider the following practical tips:

- **Have and consistently enforce a personal hygiene policy** which makes clear appropriate personal hygiene is a condition of employment.
- **Respect the worker's dignity** by ensuring any discussions about body odour take place in private, in a respectful manner.
- **Inquire and provide the worker an opportunity to explain** any factor that may contribute to body odour, including a medical condition.
- Where the employee discloses, or it reasonably ought to be known, personal hygiene is related to a disability or another protected ground under human rights legislation (*e.g.*, religious observance, *etc.*), **consider the legal obligation of reasonable accommodation.**
- **Document** all discussions and disciplinary steps including coaching, warnings, letters, meetings, *etc.*
- If all else fails, **termination of employment may be an appropriate option.**

For more information and assistance, contact the employment law experts at Sherrard Kuzz LLP.

HReview Seminar Series

Please join us at our next HReview Breakfast Seminar:

Important Changes Coming to the WSIB: Learn how to manage WSIB costs in the new legal landscape

In 2017, the Workplace Safety and Insurance Board published draft Chronic Mental Stress and Rate Framework policies:

- The draft **Chronic Mental Stress policy**, set to come into effect on January 1, 2018, will make it easier for a worker to make a claim for non-traumatic mental stress.
- The draft **Rate Framework policies**, slated for implementation on January 1, 2019, completely overhaul how premiums will be calculated and claims costed back to an employer's account.

Join us as we analyze the changes and discuss strategies to minimize employer-costs. Topics include:

Rate Framework Modernization

- What is it and why now?
- What is changing?
- What is the potential impact on employers?

Chronic Mental Stress

- What is changing and why?
- What does the draft policy propose?

Managing Costs (Guest Speaker: Employer Advocacy Council / Canadian Manufacturers & Exporters)

- How to manage premium costs under the proposed system?
- How to manage claim costs?
- What are the EAC/CME Safety Groups and how can they help your organization?

DATE: Wednesday, November 29, 2017, 7:30 – 9:30 a.m. (breakfast at 7:30 a.m.; program at 8:00 a.m.)

VENUE: Mississauga Convention Centre - 75 Derry Road West, Mississauga

COST: Complimentary

REGISTER: By Monday, November 13, 2017 at www.sherrardkuzz.com/seminars.php (spaces limited)

Law Society of Upper Canada CPD Hours: This seminar may be applied toward general CPD hours.

HRPA CHRP designated members should inquire at www.hrpa.ca for eligibility guidelines regarding this HReview Seminar.

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Jean Cumming Lexpert® Editor-in-Chief

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