Peterkin v. *U.N.W. et al,* 2006 NWTSC 34

Date: 2006 07 12
Docket: CV 05834

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

BRUCE PETERKIN

Plaintiff

- and -

UNION OF NORTHERN WORKERS, DARM CROOK and LONA HEGEMAN

Defendants

Action for damages for defamation.

Heard at Yellowknife, NT, on November 7-9, 1995; June 5-9 and June 12-16, 2006.

Reasons filed: July 12, 2006

REASONS FOR JUDGMENT OF THE HONOURABLE JUSTICE J.Z. VERTES

Counsel for the Plaintiff: Steven L. Cooper and Theresa Wilson

Counsel for the Defendants: Austin F. Marshall and James Mahon

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REASONS FOR JUDGMENT

Introduction:

[1] This is an action for damages for defamation. The plaintiff alleges that he was defamed in certain correspondence and reports, authored by the individual defendants who were acting in various ways as officers of the defendant union.

[2] The events complained of occurred in 1994. This action was commenced in 1995. Why it took so long to bring this action to trial was not explained. Despite the passage of time, however, counsel did a commendable job in marshalling a great deal of evidence so as to reconstruct events that are now over a decade old.

[3] The plaintiff, at all times material to this action, was employed by the Government of the Northwest Territories as the Executive Director of the Keewatin Regional Health Board. The position was based in Rankin Inlet (now part of Nunavut). He assumed that post in late 1991. He was the chief executive officer and had 275 people, located in 8 communities, reporting to him. The Health Board was charged with the delivery of health services to those communities so his job carried a

great deal of responsibility. Two witnesses called on behalf of the plaintiff, Robert Kielly and Caroline Hidalgo, testified as to the high regard they had for the plaintiff as a supervisor and manager during the time they worked for him at the Health Board.

[4] The first defendant, Union of Northern Workers, is an association created by statute and is the designated bargaining agent for employeesin the public serviceof the Northwest Territories. It is a component of the Public Service Alliance of Canada but it has its own executive and local committees. Employees of the Keewatin Regional Health Board were members of the union. The second defendant, Darm Crook, was the president of the union at all material times. The third defendant, Lona Hegeman, was an employee of the Health Board and also the chief shop steward for the union local in Rankin Inlet.

[5] The alleged defamation is said to be found in parts or all of four documents: (1) a letter written by Mr. Crook, in his capacity as union president, to the senior government official overseeing labour relations, dated June 20, 1994; (2) a letter written by Mr. Crook, dated July 13, 1994, conveying a grievance to the employer pursuant to the provisions of the collectiveagreement then in force; (3) a memorandum authored by Ms. Hegeman, in her capacity as chief shop steward for the Rankin Inlet local, dated August 13, 1994; and, (4) a second memorandum authored by Ms. Hegeman, dated August 14, 1994. The defendants have pleaded in their defence that any statements in these documents, if defamatory,were made on occasionsof qualified privilege and without malice. With respect to the first two documents, the defendants also pleaded justification.

Evidence:

[6] Ms. Hegeman was taken on staff at the Health Board in August, 1993, as a health promotion officer. Her direct supervisor was the regional nursing officer. Sometime soon after, Derek Alexander was hired as an environmental health officer. His supervisor was Robert Kielly. A personal relationship developed between Ms. Hegeman and Mr. Alexander. This did not last long and at one point Ms. Hegeman went to the police in Rankin Inlet to lay complaints of assault, harassment and threats by Mr. Alexander. She had, however, told the police that she did not want them to charge Mr. Alexander, merely to talk to him.

[7] On November 14, 1993, during their investigation of Ms. Hegeman's complaints, the police contacted Mr. Kielly. They were concerned about Mr.

Alexander's mental condition and worried that he might harm himself. Mr. Kielly in turn contacted the plaintiff. He did so primarily because the plaintiff was the person in charge but also because, at that time, the plaintiff shared a house with Mr. Alexander and two others. The two of them talked to Mr. Alexander and decided that it would be best to get him to some place where professional help was available. At that point the police gave the plaintiff no details of the complaints but they did tell him that no charges were to be laid. The next day Mr. Kielly and Mr. Alexanderflew to Winnipeg. A few days later Mr. Alexander contacted the plaintiff and resigned from his employment. Mr. Alexander never returned to Rankin Inlet.

[8] The truth or falsity of Ms. Hegeman's complaints about Mr. Alexanderis not an issue before me. An investigation concluded that the complaints were well-founded. But the complaint was the catalyst for the subsequent events that unfolded. Those events came to include numerous grievances filed by the union and no less than three full-scale investigations into the allegations of harassment and the state of the workplace in Rankin Inlet. All of this unfolded in an atmosphere of suspicion and gossip, the involvement of people not connected with either the employeror the union, stories in the press, and misunderstandings as to the appropriate roles and responsibilities on the part of many of the participants. This led in turn, to quote one of the investigators, to specific workplace issues taking on new and problematic dimensions beyond their original parameters. In other words, things got blown out of all proportion.

[9] The evidence was presented through the testimony of six witnesses and a prodigious number of documents. There was no agreement by counsel that the documents could be considered as proof of the truth of the facts stated therein. The issue of credibility raised particular concerns. I am sure that each witness, when recounting his or her evidence, tried to communicate an accuratedescription of what he or she perceived at the time. But much of the evidence of each witness consisted of impressions and opinions formed on the basis of things they had either heard or read from other sources. So it became necessary to separate fact from opinion, personal knowledge from that gained through others, and direct evidence from mere hearsay (and in some cases double and triple hearsay). I also recognize that many of the impressions were formed many years ago. Whether they are factually accurate or not, the witnesses now believe them to be true. This case presented therefore a classic example of the distinction between the credibility of a witnessand the reliabilityof that witness' evidence. While I may be satisfied that each witness was trying to be truthful,

the factual content of the evidence had to be assessed for its accuracy in the context of the whole of the evidence.

[10] A repetition of all of the evidence presented at this trial would be a far too lengthy exercise. So I will concentrate on what I consider to be the main points. Not all the evidence on these points was the same. I am satisfied, however, that for the most part the divergences in recollection are due more to the way a certain event has become interpreted as opposed to any deliberate attempt to mislead.

[11] After Mr. Alexander'sdeparture from the workplace,the plaintiffhad no contact with Ms. Hegeman until November 22nd. The events of that day became central to what unfolded thereafter.

[12] Ms. Hegeman testified that on November 22nd she went to talk to Alexander's supervisor, Robert Kielly. She wanted him to know about her problems with Alexander. She testified that Mr. Kielly was dismissive and did not want to talk to her. At this point Ms. Hegeman did not know that Alexander had quit. She thought he was merely on duty travel.

[13] Mr. Kielly testified about the same meeting. He said that Ms. Hegemantold him there were concerns about stalking and harassment but specifically said that none of these incidents happened at the workplace. Kiellysaid he was particularlyinterested in that because if anything had happened at the workplace then there were certain protocols he had to follow. He did not relate to Ms. Hegeman what he knew because he was aware of the ongoing police investigation. Mr. Kielly reported this conversation to the plaintiff.

[14] Also on or about November 22nd, Ms. Hegeman had told a co-worker, Caroline Hidalgo, that there had been problems between her and Alexander and that she had made a complaint to the police. Ms. Hidalgo testified that Ms. Hegeman told her that the problems had occurred outside of the workplace. I accept this evidence.

[15] Then, on the same day, Ms. Hegeman requested a meeting with the plaintiff. According to Ms. Hegeman she asked the plaintiff if he knew about her problems with Alexander. The plaintiff told her that he knew nothing. Then abruptly, again according to Ms. Hegeman, the plaintiff told her not to speak to anyone about these things and, if she does, he will "destroy" her. Ms. Hegeman said she felt threatened.

[16] The plaintiff, however, testified to a different sequence of events. When Ms. Hegeman came to see him on the morning of November 22nd, he told her he did not know about her and Alexander. Why did he say that? Because, according to the plaintiff, he did not want to talk about one employee with another. This deception, no matter what the plaintiff's motive for it, was the cause of much suspicion on Ms. Hegeman's part later on. In any event, Ms. Hegeman then purportedly said to the plaintiff that it did not matter because what she really wanted to talk to him about was a complaint she had about another employee breaching confidentiality. The plaintiff then told her he would meet with her later in the day. He then arranged a meeting for the afternoon between him, Ms. Hegeman, the co-worker Ms. Hegeman was complaining about, and the human resources director.

[17] Ms. Hegeman testified that before the afternoon meeting she had gone out to lunch and had encountered a group of her fellow employees (including the co-worker that she complained about to the plaintiff). Ms. Hegeman claimed that these people taunted her. It became obvious to her that these people knew about her problems with Alexander and her complaint to the police. Then, after lunch, when she went to the meeting with the plaintiff, she saw the particular co-worker sitting there (along with the human resources director who was also part of the group that Ms. Hegeman had seen earlier at lunch). Ms. Hegeman immediately jumped to the conclusion that they were there to discuss her problems with Alexander. She told the plaintiff that she did not want to talk in front of the others and left. The plaintiff dictated a written request for Ms. Hegeman to attend the meeting. This was delivered to her. She refused to go. The plaintiff then issued a written reprimand.

[18] At the end of the day on November 22nd Ms. Hegeman was convinced that the plaintiff was trying to force her to talk about her problems with Alexander. The plaintiff, on his part, had no idea as to why Ms. Hegeman refused to meet since he thought they were going to discuss something else altogether. Only later did he discover that Ms. Hegeman claimed that he was trying to force her to talk about her problems with Alexander.

[19] I am satisfied, however, that at no time did the plaintiffthreaten to "destroy"her. This accusation did not appear in any of Ms. Hegeman's subsequent complaints or grievances. She said that she told one of the investigators retained by the government about this yet it appears nowhere in that investigator's report. If such a threat had been made I am sure it would have made its way into some subsequent written account of that day.

[20] Because of everything that was happening Ms. Hegeman took stress leave from her employment on November 23rd and did not return to work until April 11, 1994.

[21] On December 1, 1993, Ms. Hegeman went to see Linda Pemik, the designated sexual harassment officer for the Health Board. She outlined her complaints about Alexander's conduct, including conduct that had allegedly taken place in the workplace. Her report was put in writing. It included complaints about, what was termed, "a spirit of ill-will" against her by her co-workers and her feelings of "betrayal and humiliation" by the plaintiff's attitude toward her. By this she referred to the plaintiff's denial of any knowledge as to her problems with Alexander, despite the fact that he did know, and her perception that he was trying to force her to talk about her problems in front of others. This complaint was forwarded to the office of the Secretary of the government's Financial Management Board, Lew Voytilla. The Financial Management Board ("FMB") was the body responsible for labour relations on the government side.

[22] Also, on December 3, 1993, the union, on behalf of Ms. Hegeman, filed a grievance alleging that she had been "required to work under unacceptable conditions in her workplace and has been harassed by fellow employeesin a manner which was of an offensive personal and sexual nature". The grievance did not give specifics but it did refer to the plaintiff by stating that he "attempted to discuss some sensitive issues" openly in front of other employees. The grievance, signed by Glen Boone, then a vice-president of the union local, and copied to the defendant Crook, sought some form of disciplinary action against the plaintiff.

[23] The grievance letter of December 3rd was addressed to Bette Palfrey, the Health Board's chairperson. When there was no response from Ms. Palfrey, the grievance was taken to the next level. On December 29th a letter was sent to John Pollard, the then FMB Chairperson. This letter, signed by Scott Wiggs, a regional vice-president of the union at the time, alleged "severe sexual and personal harassment" of Ms. Hegeman by Alexander and that these incidents "occurred both at work and in non-work related situations". It also alleged that Ms. Hegeman had been subjected to "vicious taunts and gossip" by her co-workers with the full knowledge of supervisors and management. It went on to repeat what Ms. Hegemanclaimed to have occurredon November 22nd and stated that "by his actions . . . (the plaintiff) has condoned the actions of the alleged perpetrator". The grievance sought various items of relief.

[24] In the meantime the earlier sexual harassment complaint resulted in the appointment of an investigator. This person was subsequently replaced by two FMB officials. The documents filed as exhibits suggests no improper motive for this switch but it too became the subject of suspicion on Ms. Hegeman's part. The two investigators issued a report on February 15, 1994. The investigators concluded that Ms. Hegeman's allegations of harassment, both on and off the workplace, were substantiated. Since Alexander was no longer an employee there was no recommendation by the investigatorswith regard to him. They found, however,that all employees of the Health Board should be required to participatein a sexual harassment seminar so as to become more sensitive to the issues.

[25] As a result of the report, the governmentdecided to contracta privateconsultant, Lynn Bevan, a lawyer from Toronto, to conduct a separate investigation into management's role in responding to the sexual harassment complaint. Ms. Bevan issued her report on April 29, 2004. Her findings are not material to this judgment.

[26] The grievance process was on a separate track and that resulted in the issuance of "Minutes of Settlement" on April 6, 1994. These minutes were signed by the FMB Director of Labour Relations, on behalf of the employer, and by the defendant Crook on behalf of the union. The plaintiff testified, and I accept, that he was not consultedat all about the substance of this agreement. The minutes required various steps to be taken to reintegrate Ms. Hegeman into the workplace. Included among the provisions was a clause stating that it was "agreed that the actions of the (plaintiff) were inappropriate and insensitive by his attempting to require the grievor to discuss issues concerning Mr. Alexander with him and other employees". Upon seeing this the plaintiff immediately wrote to Mr. Voytilla to express his disagreement with this statement. He claimed that this was a misrepresentation of the truth.

[27] There were problems in Ms. Hegeman's reintegration into the workplace. Ms. Hegeman and the union complained that the plaintiff was not working to facilitate it. The plaintiff complained that Ms. Hegeman and the union were bypassing normal procedures. One of the big issues was the plaintiff's apparent refusal to meet with Ms. Hegeman in person. He, on the other hand, insisted that she meet with her direct supervisor. All of this just kept adding to the feelings of mutual distrust.

[28] Meanwhile the workplace issues became the subject of talk in the communityof Rankin Inlet and in the regional press. The plaintiff became the focus of much of the talk. The director of the Northwest Territories Status of Women Council gave

interviews to the press telling them that a number of female employees at the Health Board had made complaints of sexual harassment and racism and these had not been acted on by management. Ms. Hegeman acknowledged getting the Council involved in her issues. The Minutes of Settlement in Ms. Hegeman's case were set out in one newspaper article. Prominent citizens were quoted as calling for a full public inquiry into the Health Board organization.

[29] The witnesses, Robert Kielly and Carolina Hidalgo, testified about the adverse impact all of the talk and gossip had on the Health Board's employees as well as on the plaintiff. They described the various investigations as "witch-hunts". Their impression was that the investigators were out to cast blame on the plaintiff and no one, neither officials in the government or the union, wanted to hear anything favourable about the plaintiff.

[30] On May 30, 1994, the plaintiff went to talk with the R.C.M.P. officer who investigated the complaints against Alexander. He said that he wanted the investigation reopened so as to look into the allegations of harassment at the workplace. According to the plaintiff, he had not been aware, prior to the issuance of the harassment investigators' report and the Bevan report, that there were incidents at the workplace. The information he had previously, as relayed to him by Mr. Kielly and others, was that Ms. Hegeman had not alleged any incidents at the workplace. So, because he thought the police investigation was limited to off-workplace incidents, he wanted the police to conduct an investigation into the allegations of on-site criminal conduct.

[31] While I may think the plaintiff was misguided in going to the police, I accept his evidence as to why he did it. It is supported by various items of correspondence exchanged between the plaintiff and the police. I say "misguided" because it prompted two predictable reactions. First, the police refused to reopen their investigation since as far as they were concerned the matter was closed. Second, Ms. Hegeman, upon learning of the plaintiff's inquiries from the police, immediately assumed that he was trying to get access to information from these files. She became quite concerned and took her concerns to the union. This then led to the first of the alleged defamation.

[32] On June 20, 1994, the defendant Crook, signing as president of the defendant union, sent the following letter to Lew Voytilla of FMB:

> Dear Mr. Votilla,

RE: Bruce Peterkin's attempts to access Lona Hegemans RCMP files regarding her sexual assault complaint with the RCMP

It has come to my attention that Ms. Peterkin approached the Rankin Inlet RCMP in an effort to review and possibly obtain a copy of Lona's file. He did so under the pretence that he was a concerned supervisor. When refused access to the file he then contacted Yellowknife RCMP in an effort to have them obtain the file for him. Here his efforts were under the guise that possible criminal activity took place at work and with the file he could work to resolve it.

Quite frankly it is none of Mr. Peterkin's business. Lona can follow whatever avenues she wishes under the law in regards to the assault of her person. She must be allowed to do this without having to watch over her shoulder for fear of what Bruce may or may not be up to.

Mr. Peterkin's actions can only be seen as interference, coercionand intimidation, all aimed at Lona. This must be stopped. Since Lona's return to Rankin Inlet Mr. Peterkin has done nothing to facilitate a smooth re-integration to the work site for her. Instead, being the man in charge he can only be seen as an obstructionist.

Lew, I suggest he be given direction to back-off and get down to doing what he was hired to do, oversee the delivery of health services in the Keewatin and ensure the safety and harmony of every work site under his control. I also see him as being ultimately responsible for fulfilling, in an honourable fashion, the terms laid out in the Lona Hegeman Minutes of Settlement.

Thank you for your attention to this matter.

Sincerely,

"Darm Crook"

Darm Crook
President

[33] Mr Crook testified that he had received a telephone call from Ms. Hegeman complaining about the plaintiff attempting to get information from her file at the RCMP. Ms. Hegeman considered this an attempt to intimidateher. He wrote the letter as a complaint, not a formal grievance. Mr. Crook viewed it as a problemconnected to the earlier settlement of Ms. Hegeman's grievance. In addition to this letter, a formal grievance was sent directly to the plaintiff, complaining about the same things, by the union. The plaintiff rejected the grievance. Whatever happenedfurther with either the complaint or the grievance was not in evidence.

[34] Upon Ms. Hegeman's return to the workplace in April 1994, she also assumeda position as shop steward with the union local representing the Health Board employees. In this role she received a complaint from Grace Furtowsky alleging various incidents of discrimination by the plaintiff and instances of harassment. The incidents complained of dated back to October of 1993. Ms. Hegeman testified that Ms. Furtowsky had spoken to her about these things back then. The complaint was passed on to Mr. Crook. Ms. Furtowsky had written a statement outlining her allegations. Mr. Crook reviewed this statement and then prepared the document that represents the second item of defamation alleged in this case.

[35] On July 13, 1994, Mr. Crook sent to the Chairperson of FMB the following letter as a formal grievance:

> Dear Mr. Pollard,
>
> The Union of Northern Workers on behalf of Grace Fortowsky, an employee of the Keewatin Regional Health Board (K.R.H.B.) initiates this third level grievance. We do so under the authority of articles 3.02, 37, 40 and 50 of the Collective Agreement.
>
> At issue in this grievance are the action of the K.R.H.B.'s Executive Director (E.D.) and his adverse treatment of the grievor. Attached find Ms. Fortowsky's statement concerning his actions and lack of respect being displayed towards her. His actions, and lack thereof can be construed as nothing short of discrimination, harassment, coercion and intimidation as well as sexual harassment in relation to the phone calls he placed to her.
>
> Although these actions in themselves are a violation of the Agreement and basic human dignity they also violate article 40 which states "The Employershall (continue to) make all reasonable provision for the (occupational safety and) health of employees".
>
> The Executive Director has created an unhealthy and stressful work environment for Ms. Fortowsky.
>
> Redress to the Union's satisfaction will be:
>
> 1) That the E.D. treat Ms. Fortowsky with dignity, respect and the same as all other employees in the Rankin Inlet K.R.H.B. office. This is to apply to, but not necessarily be limited to the following:
>   a) the issuing of keys
>   b) personal recognition and acknowledgement

c) courtesy and natural respect
d) equality of treatment
e) the ceasing of exclusion, etc.

2) That in reference to the phone calls made to Ms. Fortowsky the E.D. be properly and adequately disciplined and that he provide a detailed letter of apology for these calls.

3) That the E.D. be given instruction in the matter of ethics as they apply between reasonable, rational adults, as well as what dignity in the work place is and how to foster it by example.

4) That the Employer guarantee a health and safe work site at the Rankin Inlet K.R.H.B. office for the grievor and all other employees.

5) That the E.D. provide a sincere unconditional letter of apology without any excuses including "I never meant to . . . Or, if I had only known", etc. for his actions towards Ms. Fortowsky.

6) Due to lost of self esteem, imposed stress and emotional anguish caused by the actions of the E.D. a cash gratuity of ten thousand ($10,000) dollars be forwarded to grievor.

7) That no one meet with or contact the grievor regarding this grievance without a union representative being present.

In closing, I am providing Ms. Fortowsky's attached statement to you in confidence; it is not be passed to the E.D. or the K.R.H.B. members.

Sincerely,

"Darm Crook"

Darm Crook
President

[36] The substance of the grievance was relayed to the plaintiff by FMB. He wrote back denying the allegations. What eventually happened to this grievance was not in evidence.

[37] Ms. Hegeman was a dedicated shop steward. In August, 1994, she became concerned about the actions of Ken Stewart, the then regionalvice-presidentin Rankin Inlet for the union. She was worried that he was trying to negotiate settlements on a

number of grievances (not her own) with the plaintiff. She relayed these worries to Scott Wiggs at union headquarters in Yellowknife. Mr. Wiggs asked her to document her concerns.

[38] On August 13 and 14, 1994, Ms. Hegeman prepared two memos which she forwarded to Mr. Crook. These memos were described as internal union documents prepared for the purpose of reviewing Ken Stewart's conduct. The plaintiff, in his Statement of Claim, complains about both reports in their entirety. However, only certain portions of the first memo (dated August 13th) relate to the plaintiff. The following reproduces the significant parts of that first memo:

UNW Local 0004
Chief Shop Steward Report by Lona Hegeman
Memo #1, August 13, 1994

Friday, August 12, 1994

- Late afternoon; Mary states Ken is at Happy Hour with John Todd.
- Mid-evening; Ken Stewart phones me. He sounds drunk [1] and informs me he is meeting with Bruce Peterkin (Exec Director, KRHB) at Ken's home soon and he does not want me to come in unexpectedly. (I had no plans to visit his home and was planning a camping tip for the weekend.) He has spent several hours talking to Bruce and Bruce gave him a ride home. Now he is expecting Bruce any minute. I state that alarms me and he should realize we have put our lives on the line for the last 10 months and we don't need more problems. I tell him I am worried he will make statements regarding our grivances. He responds by stating "Don't tell me what to ... do". He is very drunk and feels he can out-smart Bruce Peterkin . . .

I am worried (in a panic) but I don't say much (no point once alcohol is significantly involved). Bruce and Ken are not in the habit of socializing together. Bruce has disdain for Ken. I am the only person who knows both men well. I know Bruce would not meet with Ken unless he had an ulterior motive. I know Bruce is extremely manipulative. I know Bruce is a habitual liar. I know this meeting is not reassuring to workers who have been put through the meat grinder by Bruce. Bruce is trying to sue the GNWT; he will try to sue anyone. I do not want Ken discussing our cases while drunk. I am afraid he will disclose confidential information . . .

- Late evening; a phone call from Pauline Proulx in Baker Lake. Pauline has been semi-hysterical for weeks. Now she is worse - tripping over her words. She has spoken with Ken - he is very drunk [2] and slurring his words - and he has told her he is sitting with Bruce Peterkins discussing a deal to

> a) drop the letter to the Registered Nurses Association
> b) make the ANCEP audits the entire focus
> c) give Pauline a "nice 3-nurse station" once audits are completed.
>
> in return for dropping the grievances [3]. He asks Pauline: "Ok, do you want this deal or don't you" . . .
>
> In addition to deals being negotiated by a drunken union official, the deal worries me for the following reasons:
>
> 1. Once matters are brought to the attention of the registered nurses' association, a letter from Bruce will not stop the issues raised. Since it concerns allegations by superiors of nursing incompetence, it appears likely to me that they must pursue this. What is Bruce going to tell them: "Oops, just kidding"?
>
> 2. Bruce is trying to make the ANCEP instructor totally responsible and trying to absolve the KRHB from all responsibility. That's the pay-off.
>
> 3. The audits are Pauline's "Achilles tendon". Bruce does not want the KRHB conduct, such as, how they loaded the file with damaging information, examined. So these audits, which were not a job requirement in the first place, are being utilized to "get" Pauline.

[39] This extract also contains a footnote (number 3 above) that pertains to the plaintiff:

> [3] Bruce made repeated attempts to get me to drop my grievance. At one point, earlier on, he offered me a 17,000 pay increase. Often it works: Not with me. I like being broke. Used to it.

[40] Mr. Crook provided copies of these memos to the members of a union investigation committee who eventually recommended that the union sanction Ken Stewart. Mr. Crook testified that, while the union tried to maintain confidentiality, he realized that these things had a way of leaking out. This was proven by the fact that the plaintiff received copies of these memos from one of the members of the union's local executive committee.

[41] Following on the heels of these memos was a letter from the union local president to the chairperson of the Health Board repeating the allegation that the

plaintiff had a meeting with Ken Stewart and that they were consuming alcohol and discussing grievances. The letter demanded disciplinary action be taken against the plaintiff. The plaintiff responded by vehementlydenying the allegation,saying that his get-together with Stewart was a social occasion and, by the way, he did not drink alcohol. The local president then replied with a written apology to the plaintiff. But all of this correspondence had been copied to government and union officials.

[42] At the same time various other steps had taken place. The government decided to appoint another independent investigator, Donald R. Munroe, Q.C., to conduct a review of the Health Board workplace. In preparation for that review, Mr. Wiggs and Ken Lovely, Deputy Minister of Health, travelled to Rankin Inlet to meet with the employees. The meeting degenerated into an acrimonious confrontation as between the plaintiff and numerousemployees supportinghim (includingsome union members) and others who were blaming the plaintiff for the problems at the workplace.

[43] Mr. Munroe conducted an investigation and issued his report on November 30, 1994. His conclusions are not germane to the issues in this law suit but I find it interesting that he noted as one of the primary causes of the problems to be a lack of clear definition of the relationship between the government and the Health Board and the application of FMB policies and procedures. This is instructive because, during this whole period, there were constant communications betweenthe plaintiffand FMB officials over the plaintiff's concern that the government had not followed its own policies in the various investigations conductedinto Ms. Hegeman'scomplaints. It got to the point where the plaintiff was accusing union officials, as well as Ms. Hegeman, of orchestrating a campaign against him, based on falsehoods,and motivatedin part by racial bias (since the plaintiff is an African-Canadian).

[44] The union, and Ms. Hegeman, throughout this period continued to complain about what they perceived as the plaintiff's lack of effort to effect the terms of the April Minutes of Settlement. By late August those terms became academic because Ms. Hegeman accepted a transfer to a position in Yellowknife. This was something arranged by Mr. Lovely and Mr. Crook, with Ms. Hegeman's agreement, as a way of getting her out of Rankin Inlet. Ms. Hegeman is still employed by the government in Yellowknife.

[45] In October, 1994, the plaintiff took stress leave and went to Winnipeg. There, on December 19, 1994, he received a letter from the chairperson of the Health Board informing him that his employment was terminated immediately. He eventually

negotiated a severance package with the government. This action was commenced on June 12, 1995.

[46] These are the main aspects of the evidence providing the factual underpinnings to this case. There was much more evidence given which I will refer to as it becomes relevant later in these reasons.

Issues:

[47] The plaintiff claims that the four items referenced above were defamatory: (1) the letter from Mr. Crook to Lew Voytilla dated June 20, 1994; (2) the letter from Mr. Crook to John Pollard dated July 13, 1994; (3) the memo authoredby Ms. Hegemanon August 13, 1994; and (4) the memo authored by Ms. Hegeman on August 14, 1994. He asserts that each of these communications contained information that was untrue and that they were published maliciously, with knowledge that they were false or with reckless disregard for the truth.

[48] With respect to the June 20th letter, which was a union complaint arising from the settlement of the earlier Hegeman grievance, the specific allegations to which the plaintiff takes issue are:

a) the plaintiff had contacted the RCMP in Rankin Inlet in an effort to review and possibly obtain a copy of Hegeman's file;

b) the plaintiff did so under the pretence that he was a concerned supervisor;

c) the plaintiff's efforts were under the guise that possible criminal activity took place at work;

d) the plaintiff's actions can only be seen as interference, coercion and intimidation, all aimed at Hegeman; and

e) since Hegeman's return to Rankin Inlet, the plaintiff had done nothing to facilitate her reintegration into the workplace.

[49] With respect to the July 13th letter, which was the Furtowsky grievance submitted to the employer by the union, the plaintiff takes issue with the following allegations:

a) the plaintiff had adversely treated the grievor; and

b) the plaintiff's actions can be construed as nothing short of discrimination, harassment, coercion and intimidation, as well as sexual harassment in relation to phone calls he place to her.

[50] With respect to the memos authored by Ms. Hegeman, the plaintiff takes issue with the following specific allegations contained in the August 13th memo:

a) the plaintiff would not meet Ken Stewart without an ulterior motive;
b) the plaintiff was extremely manipulative;
c) the plaintiff was an habitual liar;
d) the plaintiff would sue anyone; and
e) the plaintiff had made repeated attempts to get Hegeman to drop her grievance, including offering Hegeman a $17,000 increase in pay.

[51] The plaintiff pleaded that both memos authored by Ms. Hegeman were defamatory in their entirety. Yet these are the only specific allegationsrelied on by the plaintiff. The memo dated August 14th makes no reference whatsoever to the plaintiff nor, in my opinion, can any such reference be inferred. The emphasis was on the August 13th memo so I will consider that only.

[52] In response to the plaintiff's assertions, the defendants plead, with respect to all communications, that they were made on occasions of qualified privilege and without malice. Essentially the defendants say that whatever was done was done in a bona fide effort on the part of the union to protect the interests of its members. In addition, with respect to the letters of June 20th and July 13th, the defendants plead the truth of the statements contained therein (although defendants' counsel concededthat justification was an alternative argument).

[53] No issue was taken with the allegation that the personal defendants, Crook and Hegeman, published the documents complained of in their respective roles as officers of the defendant union. Therefore, the defendant union is liable vicariously for the publication of these communications should they be held to be defamatory.

Publication & Defamatory Meaning:

[54] In a defamation action, the plaintiff has the burden of establishing that the impugned words were published, that they referred to the plaintiff, and that they are defamatory. In this case, the defendants did not strenuously contest these points. The communications clearly refer to the plaintiff and they were published in the sense that they were communicated to a third party.

[55] I am also satisfied that the statements complained of are defamatory on their face. The words used would be clearly understood by ordinary persons in such a way as to lower the plaintiff's reputation in their estimation and to expose the plaintiff to contempt. The allegations in the June 20th letter convey an impression of the plaintiff as acting under a pretence, with ulterior motives, and as being coercive and intimidating to his employee. The allegations in the July 13th letter accuse the plaintiff of adverse treatment of another employee as well as accusing him of discrimination, intimidation and sexual harassment. The comments in Ms. Hegeman's memo of August 13th refer to the plaintiff as a manipulator and a liar. All of these imputations convey attacks on the plaintiff's personal and professional character. They are clearly defamatory.

Justification:

[56] The defendants plead justification in respect of the two letters authored by Mr. Crook. Justification is merely the technical name for the defence of truth. It is a complete defence. The onus is on the defendants to prove that the impugned statements are true in substance.

[57] In this case, the letters authored by Mr. Crook contain certain assertions as fact and others that may be better characterized as opinion or argument. The statement in the June 20th letter for example that the plaintiff had contacted the RCMP "in an effort to review and possibly obtain a copy of (Ms. Hegeman's) file" is one of fact. The statement that his actions "can only be seen as interference, coercionand intimidation" is more accurately one of opinion. Yet in this case the defence has not pleaded fair comment. Therefore, the defendants must prove that the statementsof opinion are true or at least that the facts on which the opinions are founded are true: see McConchie & Potts, *Canadian Libel and Slander Actions* (2004), at pp. 508-509.

[58] The defendant Crook testified that he believedthat what he wrote in those letters was true. He believed what he was told by Ms. Hegeman (the source of the information for the June 20th letter). He believed the allegations contained in Grace Furtowsky's statement (the source of the information for the July 13th grievance). He still, at the time of trial, believed the truth of those communications. Yet honest belief in the truth of the defamatory statements, even if the information originated from someone else, is no defence: McConchie & Potts (*supra*) at p. 500.

[59] The defendants made no real effort in this case to establish the truth of the statements contained in these two letters.

[60] With respect to the June 20th letter, the central allegation was that the plaintiff had made an inappropriate approach to the RCMP for an ulteriorpurpose. But the only evidence as to his purpose came from the plaintiff himself. The information that Mr. Crook used was that conveyed by Ms. Hegemanwhich essentiallyconsisted of nothing more than her assumptions based on the mere fact that she had been told by an RCMP officer about the plaintiff's inquiry. No RCMP officer was called to testify and no explanation was given as to why that was so.

[61] With respect to the July 13th letter, that was a grievance alleging very serious conduct on the part of the plaintiff based solely on the written statement of Grace Furtowsky. Ms. Furtowsky was not called as a witness and, again, no explanationwas provided. Indeed, the statement prepared by Ms. Furtowsky was not even put in evidence. The only direct evidence as to the truth or falsity of those allegations was that of the plaintiff. He denied them under oath and his evidence was uncontradicted.

[62] The plea of justification fails in this case.

Qualified Privilege:

[63] The central issue in this case is that of qualified privilege. The defendantsassert that all occasions on which the impugned communications were made were privileged. If that is so, then the plaintiff must prove malice or excess of privilege to defeat the privilege. In that regard, the plaintiff claims that the communications were made with a reckless disregard for the truth, the words used were disproportionate and excessive for the occasion, and the defendants were motivated by personal animosity.

[64] The law respecting qualified privilege has been outlined in numerous Canadian cases, most notably *Botiuk* v. *Toronto Free Press Publications Ltd.*, [1995] 3 S.C.R. 3, and *Hill* v. *Church of Scientology et al*, [1995] 2 S.C.R. 1130.

[65] Qualified privilege applies to an occasion where the defendants have an interest or duty — legal, social or moral — to make the communication and its recipients have a corresponding interest or duty to receive it. On such occasions, a person is protected from liability for statements that would otherwise be actionable. It was explained as follows by Cory J. in *Hill* (at paras. 143-144):

> Qualified privilege attaches to the occasion upon which the communication is made, and not to the communication itself. As Lord Atkinson explained in Adam v. Ward, [1917] A.C. 309 (H.L.), at p. 334:
>
> > . . . a privileged occasion is . . . An occasion where the person who makes a communication has an interest or a duty, legal, social, or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it. This reciprocity is essential.
>
> . . .
>
> The legal effect of the defence of qualified privilege is to rebut the inference, which normally arises from the publication of defamatorywords, that they were spoken with malice. Where the occasion is shown to be privileged, the bona fides of the defendant is presumed and the defendant is free to publish, with impunity, remarks which may be defamatory and untrue about the plaintiff. However, the privilege is not absolute and can be defeated if the dominant motive for publishing the statement is actual or express malice.

[66] As this extract notes, qualified privilege may be defeated by proof of actual or express malice. Malice, in this context, refers to any indirect motive or ulterior purpose which conflicts with the duty or interest engagedby the occasion. Malicemay also be established by demonstrating that the defendants spoke in knowing or reckless disregard of the truth: *Hill* (at para. 145). In addition, qualified privilege may be defeated if the limits of the duty or interest have been exceeded, for example, where the information communicated was not reasonably appropriate or relevant to the legitimate purposes of the occasion: *Botiuk* (at para. 80).

[67] Evidence of malice may be intrinsic or extrinsic. Intrinsic evidence is that provided by the words themselves. For example, the words used may be so

immoderate or extreme as to lead to an inference of malice. Extrinsic evidence consists of evidence apart from the words used and may include the conduct of the defendants both before and after the defamatory publication and the circumstances of the publication. Such evidence may enable the trier of fact to infer that the defendants were motivated by ill-will or an improper motive: *Leenen* v. *Canadian Broadcasting Corporation* (2000), 48 O.R. (3d) 656 (S.C.J.), at para. 143, aff'd (2001), 54 O.R. (3d) 612 (C.A.); see also *Hill* (at paras. 192-194).

[68] The truth of the statements is not the issue when qualified privilege is pleaded. But there is a requirement for at least an honest belief in the truth of the statements on the part of the maker of the statements: *Haight - Smith* v. *Neden* (2002), 211 D.L.R. (4th) 370 (B.C.C.A.), at p. 384 (leave to appeal refused [2002] S.C.C.A. No. 176). If the defendants act in good faith and have a genuine belief in the truth of their statements, then the communications are privileged even if the statements are false. But the mere fact that a defendant has an honest belief in the truth of his or her statements does not protect the privilege if it can be shown that he or she was reckless as to its truth or falsity. This may seem to be a contradiction, i.e., how can a reckless disregard for the truth nevertheless allow an honest belief? The defendant may assert, as Mr. Crook did in this case, that he honestly believed that the impugned statements he authored were true; but, he may yet be reckless in publishing those statements when he ought to have made some effort to ascertain at least some foundation for those statements. A person may believe in the truth of a defamatory statement but, when he or she publishes it, be reckless as to whether that belief be well-founded or not: *Watt* v. *Longsdon*, [1930] 1 K.B. 130 (at p. 154).

[69] The Canadian position on this point was outlined in *Botiuk* (at para. 97) where Cory J. quoted from the English case of *Horrocks* v. *Lowe*, [1975] A.C. 135 (H.L.):

> . . . what is required on the part of the defamer to entitle him to the protection of the privilege is positive belief in the truth of what he published or, as it is generally though tautologously termed, "honest belief". If he publishes untrue defamatory matter recklessly, without considering or caring whether it be true or not, he is in this, as in other branches of the law, treated as if he knew it to be false. But indifference to the truth of what he publishes is not to be equated with carelessness, impulsiveness or irrationality in arriving at a positive belief that it is true.

[70] The key words are "indifference to the truth"; mere carelessness or negligence is not enough.

[71] Having set out what I understand to be the law respecting qualified privilege, it is necessary to now consider whether any of the impugnedcommunications were made on occasions of privilege and, if so, whether the privilege has been lost. For reasons that will be apparent, I will deal with the two letters authored by Mr. Crook as one category and the memos authored by Ms. Hegeman as a separate category.

The Crook Letters:

[72] It has been said that the circumstances that constitute a privileged occasion can never be catalogued or rendered exact: *Arnott* v. *College of Physicians and Surgeons of Saskatchewan*, [1954] S.C.R. 538(at p. 539). Occasions of privilege can arise in many different circumstances. The Hon. Allen Linden, in his text, *Canadian Tort Law* (5th ed.), nevertheless identified four main areas where a qualified privilege has been recognized (at p. 665):

1. Protection of one's own interest.

2. Common interest or mutual concern.

3. Moral or legal duty to protect another's interest.

4. Public interest.

[73] In my opinion, the two Crook letters come within the third category listed above, that being defined by Linden (at p. 668) as a privilege enjoyedby someonewho makes a statement in the discharge of a public or private duty to protect another's interest, to a recipient who must have a reciprocal interest in receiving it.

[74] There is no question that these two letters were published in the context of the grievance arbitration scheme enacted in the collective bargaining agreement between the union and the government. That agreement set out a step-by-step grievance procedure and, at any step, an employee may be assisted and represented by the union. The union exists to serve the interests of its members. The July 13th letter was a grievance presented on behalf of an employee to the employer. The June 20th letter was not a grievance but it was a complaint relating to certain alleged conduct on the part of the plaintiff that jeopardized what was meant to be a settlementthat arose out of a grievance. Therefore, in my opinion, the letter of complaint can also be regarded as

part of the grievance process. But in both cases, the union was fulfilling its duty to represent the interests of one or other of its members.

[75] Many cases have held that the employment context gives rise to occasions of qualified privilege. For example, it has been held that when an employer reports to a union on the reasons for an employee's discharge then that is an occasion of qualified privilege. There is a duty on the employer to provide the reasons for the discharge so that the union can consider whether to grieve it; and, there is a corresponding duty on the union to receive it so that it can put the case for the affected employee: *Fisher* v. *Rankin*, [1972] 4 W.W.R. 705 (B.C.S.C.). Similarly, in a case where the employer reported on the incompetence of an employee to the union, it was held that the two had a common interest in the evaluation of the employee's competence by reason of their respective obligations under the union agreement: *Silbernagel* v. *Empire Stevedoring Co.*, [1979] B.C.J. No. 890 (S.C.).

[76] In the Northwest Territories, the *Public Services Act*, R.S.N.W.T.1988, c. P-16, provides, in s. 41(6), that the collective bargaining agreement binds the government, the union and its members. Section 43 states that, if a collective agreement fails to provide for the determination of disputes arising out of the agreement, such disputes shall be determined by arbitration. These provisions, together with the grievance arbitration clauses of the agreement, invoke the exclusive jurisdiction model, as articulated in *Weber* v. *Ontario Hydro*, [1995] 2 S.C.R. 929, whereby deference is shown for the grievance arbitration process for the resolution of disputes arisingout of the collective agreement. The reciprocal duties and interests of an employerand union are reinforced by the importance placed on this process. This can be gleaned from the words of Iacobucci J. in *Alberta Union of Provincial Employees* v. *Lethbridge Community College*, [2004] 1 S.C.R. 727 (at para. 34):

> As noted earlier, the purpose of this grievance arbitration scheme, like all others, is to "secure prompt, final and binding settlement of disputes" arisingout of the collective agreement . . . Finality in the resolution of labour disputes is of paramount significance both to the parties and to society as a whole. Grievance arbitration is the means to this end. . .

[77] Therefore, I have concluded that the two letters authored by Mr. Crook were published on occasions of qualified privilege.

[78] Plaintiff's counsel argued that there was evidence in this case to defeat the privilege. First, he submitted that there was evidence of malice. It was argued that Mr.

Crook had a reckless indifference to the truth. He took no steps to investigate the truth of the allegations conveyed to him by Ms. Hegeman or Ms. Furtowsky. In counsel's words, Mr. Crook did not care about the truth of the statements in his letters. In addition, counsel submitted that there was extrinsicevidence of malice,particularly ill-will on the part of Ms. Hegeman.

[79] Second, counsel argued that the two letters suffered from an excess of privilege. The words used and accusations levelled at the plaintiff went beyond the necessary and reasonable limits of the duty being exercised when Mr. Crook wrote those letters.

[80] The significant issue, in my opinion, is the question of recklessnesswith respect to the truth. Did Mr. Crook have an obligation to investigate the complaints conveyed to him before he published them in his letters? The case law is not at all clear on this point. As noted previously, the law recognizes a distinction between carelessness or negligence, which do not amount to malice, and recklessness, which does: see *Botiuk* (at para.96).

[81] In *Botiuk*, the Supreme Court of Canada held that a group of lawyers, who had signed a "declaration" in which they claimed to verify a report that was found to be defamatory, had an obligation to take reasonable steps to investigate and ensure that the document was correct (see para. 99). The judgment held that "as lawyers" they should have known how significant the impact of their declaration would be on the plaintiff. Because of their profession their conduct was put to closer scrutiny. As stated by Cory J. (at para 98): ". . . actions which might be characterized as careless behaviour in a lay person could well become reckless behaviour in a lawyer with all the resulting legal consequences of reckless behaviour."

[82] Similarly, in *Hill*, a lawyer was found liable for defamation when he made defamatory statements about another lawyer during a press conference. The Supreme Court held (at para. 155) that the defendant, in the circumstance, ought to have taken steps to confirm the allegations that were being made.

[83] What I draw from these cases is that a finding of recklessness for failure to investigate is highly fact-specific. As stated by Estey J. in *Arnott* (at p. 548): "There may be cases where the conduct of the party is such that the failure to make further investigation or inquiry might be evidence of lack of honesty, or even of actual malice."

[84] During his testimony, Mr. Crook acknowledged that he was a “hands-on” president. He got involved in the filing and handling of grievances. His practice, when he received a complaint from a union member,was to get as much informationas possible from the grievor. His aim was to ascertain if the grievor’s story was consistent. He would attempt to speak to others if those others were identified by the grievor. But, for the most part, he relied on the information provided by the grievor to prepare the grievance (assuming of course that there was a grievableissue). He did not make personal inquiries as to the honesty or credibility of the grievor. As Mr. Crook said, he took them at face value until proven wrong.

[85] Scott Wiggs, one of the regional vice-presidents of the union at the time, testified to a similar practice. If a member came to him with a potentially grievable issue, he would take it at face value as well. If the information provided to him by the grievor amounted to cause for complaint ---- what Mr. Wiggs referred to as a *prima facie* case ---- then he would proceed with a grievance. The union did not do any independent investigation as a matter of course. In effect, they relied on the employer to investigate the matter once the grievance was filed. In this way he expected the truth to come out.

[86] Both witnesses, however, acknowledged that they were aware of union-recommended procedures for the handling of grievances that suggest a greater responsibility. Submitted as evidence were several publications, printed either by the Union of Northern Workers or its parent, the Public Service Allianceof Canada,which were meant to be used as guidelines for shop stewards. All of them recommend obtaining as much information as possible, including interviewing potential witnesses and possibly even speaking to the supervisor involved, so as to ascertain all the available facts. Mr. Crook admitted that his practice was not consistent with these guidelines. Mr. Wiggs agreed that the procedures recommended were helpful but, based on his experience, shop stewards did not have the necessary skill or resources to carry out investigations.

[87] Mr. Crook testified that he did not make any inquirieswhen he was contactedby Ms. Hegeman about her concerns regarding the plaintiff’s approach to the police. He was, of course, aware of her earlier complaints and, as he said, Ms. Hegeman had conveyed to him her fear that the plaintiff was “out to get her”. With respect to Ms. Furtowsky’s complaint, this was conveyed to him by Ms. Hegeman. He talked to Ms. Furtowsky but only to confirm that he could pass along her written statement with the letter of grievance. He did not discuss the details of her complaint with her.

[88] Plaintiff's counsel noted that, in this case, the letters were prepared,not by some unskilled lay-person, but by the full-time president of the union. Thus his actions, like those of the lawyers in *Botiuk*, should be held to a higher standard. Counsel did not suggest that the union needs to act like a police investigator, but simply that some investigation should be done before launching a complaint or a grievance since the potential adverse ramifications on the person complained about should be obvious.

[89] Defendant's counsel argued that, in filing grievances, the union acts as the grievor's agent and advocate. There is no duty to independently investigatethe facts of a grievance other than to ascertain whether the matter complained of was properly a grievable matter. Further, the union does not have the resources and powers that are available to the employer to conduct a full-scale investigation into complaints, particularly if those complaints relate, as they do here, to the conduct of someone in management.

[90] In my opinion, there are two significant points. First, in writing the letters in issue, Mr. Crook was acting as the representative of a grievor, advancing what he considered to be complaints that should be brought to the attention of the employer. But, and this is the second point, he was also acting as an advocate for the grievor. That is an essential part of the union's role in the grievance arbitration process. The union is not acting as an independent arbiter of the facts and issues. It is representing one side of a two-sided process for the resolution of workplace disputes. And these complaints emanated from the workplace.

[91] Professor R.E. Brown, in his text, *The Law of Defamation in Canada* (2nd ed., looseleaf), notes (at pp. 16-45 to 16-47) that the test is whether the defendant exercises his or her judgment in good faith, not whether someone would have acted differently. An error of judgment, carelessness, negligence, or even gross negligence, is not sufficient to establish malice if the defendant otherwise had an honest belief. If that is the case, then I fail to see how a mere error in the correctness of the facts complained of can be regarded as a "reckless indifference to the truth".

[92] It may be argued, as plaintiff's counsel argued here, that the history of the animosity between Ms. Hegeman and the plaintiff should have put Mr. Crook on guard and he should have made further inquiries to satisfy himself that there was at least a reasonable foundation in truth for these complaints. That really begs the question of

how far a union official has to go, while in their "advocate" role, to verify what a grievor says.

[93] An obvious, albeit broad, analogy can be drawn to the role of a lawyer in litigation. The law has long recognized that an absolute privilege will attach to communications which take place during, incidental to, and in the processing and furtherance of judicial or quasi-judicial proceedings before bodies that have power to determine the legal rights of the parties: see, for example, *Prefontaine v. Veale*, [2004] 6 W.W.R. 472 (Alta. C.A.), at para. 10; *Hamouth v. Edwards & Angell* (2005), 253 D.L.R. (4th) 372 (B.C.C.A.), at para. 23. This includes pleadings but also complaints made to regulatory bodies to initiate proceedings. Why is this privilege absolute? It is because the lawyer (or any advocate) must not be fearful to advance his or her client's cause by worrying if there is some misstatement of fact. An advocate can only work with what he or she is provided. As was said in the venerable case of *Munster v. Lamb* (1883), 11 Q.B.D. 588 (quoted in *Hamouth* at para 37):

> Of all the three classes, judges, witnesses, and counsel, the person who most wants to have his mind clear from fear of the consequences of what he may say is a counsel who is engaged in the conduct of a case. *A counsel is in a position of extreme difficulty, for he has not to speak of the things which he knows; he does not know whether the facts which he is instructed to bring forward are true or false, but he has to argue in favour of the proposition which will best advance the case of his client.* If in the midst of these difficulties he is to be called on to consider whether what he desires to say in support of his client's case is relevant to the question at issue, if he is to be subject to the risk of being liable to an action, should he, by an error in judgment, or in consequence of incorrect instructions, make a statement which turns out not to be relevant, the difficulty of doing his duty will be greatly increased. He wants protection more than the judge or the witness, and he wants it more for the public benefit. (Emphasis added)

[94] I do not suggest that a union official processing a grievance and a lawyer pursuing litigation are comparable. Both may regard the comparison as somewhat unfair. But the essential function is the same. They are both representatives and advocates for a cause. There is a responsibility on both to make sure they do not advance a frivolous or abusive claim. But they do not guarantee, nor are they required to guarantee, the truth of a claim. To do so would greatly inhibit their ability to argue their cause.

[95] If, every time a complaint is presented to a union official by an employee the official was required to investigate the truth of the complaint, then that could interfere

with the representation and advocacy role of the union. Grievances are meant to be handled expeditiously and, at least at the initial levels, relatively informally. To require intensive investigation would only complicate matters and lengthen the time required to resolve these disputes. The union, as counsel put it, cannot force other employees or outside parties to submit to an investigation. Plus, extensive investigations into the credibility of their own members could undermine the sense of trust and solidarity that unions try to foster.

[96] There was nothing in the evidence to suggest that Mr. Crook was not acting in good faith, with an honest belief in the truth of what he was told, when he published the two letters in question. He reviewed the complaints and satisfied himselfthat there were at least grounds to advance them.

[97] While I may think that, in regard to the July 13th grievance letter, it would have been preferable to make additional inquiries of Ms. Furtowsky as to her allegations, considering the seriousness of some of the allegations, this is the perspective of hindsight. It is carelessness at most. Some inquiry is advisable in most cases but the extent of that inquiry need not be the same in all cases. This is not to say that in all circumstances the failure to investigate will not amount to recklessness. I simply say that in this case I find no evidence as to that state of recklessness the law says must be proven to establish malice. Recklessness, after all, is a state of mind that requires knowledge of a risk and the decision to proceed in the face of that risk. There is no evidence in this case as to Mr. Crook possessing that state of mind.

[98] I also find that there was no evidence of an ulterior motive or animosity on the part of Mr. Crook to publish the statements. There was some evidence of animosity as between Ms. Hegeman and the plaintiff, more due to misunderstandings and assumptions than anything else in my opinion. But there was no evidence that Mr. Crook carried any ill-will toward the plaintiff. He was indifferent to the plaintiff; this is something different from indifference to the truth. Even though both letters requested some form of sanction or direction to be taken by the employer against the plaintiff, Mr. Crook testified that this was not the aim of the letters. Even if the employer did discipline the plaintiff, he did not expect to learn about it. Mr. Crook was simply carrying out one of his duties as a senior union official.

[99] Plaintiff's counsel also submitted that the privilegewas exceededbecause of the excessive language used by Mr. Crook. Specifically, counsel referred to the use of the words "coercion and intimidation" (found in both letters) and "discrimination,

harassment", as well as "sexual harassment" (in the July 13th letter). Mr. Crook testified that he used these words because he wanted to track language used in the collective agreement and found in arbitration awards. Plaintiff's counsel argued, however, that they were not reasonably appropriate in the circumstances.

[100] In my opinion, the words used were nothing more or less than the type of rhetoric found in all sorts of pleadings or complaints. They are the conclusionsthat the pleader invites the reader to draw. In the context of what is being complained about, and the role being performed by Mr. Crook, with the information he had at hand, I find that they do not exceed what was appropriate and relevant to the circumstances. The subject-matter was appropriate to the duty for which the privilege is applied; the communications were directed to people who had a reciprocal duty to receive them; and, Mr. Crook did not publish them beyond those people who had a legitimateinterest in them.

[101] For these reasons, I dismiss the plaintiff's action with respect to the two letters authored by Mr. Crook.

The Hegeman Memos:

[102] Ms. Hegeman wrote the memos of August 13 and 14, 1994, in response to a request from Crook for her to document the conduct of another union officer, Ken Stewart. Mr. Crook then provided those memos to other union officialsfor the purpose of conducting an internal inquiry into Mr. Stewart's conduct. Mr. Stewart was eventually sanctioned by the union. As it turned out, however, copies of these memos went beyond those people since the plaintiff received copies from a member of the local union.

[103] In my opinion, these memos come under the category of "common or mutual interest". Linden's text states (at p.667): "A privilege will arise with regard to communications between parties on a subject in which the speaker and the recipient have a common legitimate interest." Here, Ms. Hegeman, as a shop steward, was communicating to the union president on matters respecting the conduct of another union official. Internal union communications on union affairs have been held to be occasions of qualified privilege: see, for example, *Masunda v. Johnson*, [1999] B.C.J. No. 2570, appeal dismissed [2001] B.C.J. No. 1860 (C.A.); *Teamsters Local Union 987 v. O'Halloran*, [2005] A.J. No. 984 (C.A.). Thus, I am satisfied that a qualified privilege attaches to these memos.

[104] Plaintiff's counsel submitted, however, that the comments about the plaintiff in the August 13th memo were baseless and unnecessary to the purpose of the communications. They therefore exceed the privilege. This conceptwas recognizedin *Hill* (at para. 146):

> ...the fact that an occasion is privileged does not necessarily protect all that is said or written on that occasion. Anything that is not relevant and pertinent to the discharge of the duty or the exercise of the right or the safeguarding of the interest which creates the privilege will not be protected.

[105] I have concluded that the August 13th memo does exceed the privilege. The comments made about the plaintiff are irrelevant and unnecessary to the purpose for which the memo was created. Those comments label the plaintiff (not the person who is supposed to be the subject of the memo) as a manipulator and an "habitual liar". No evidence was presented as to the pertinence of these comments to the purpose of the memo.

[106] Furthermore, the memo states that the plaintiff "would sue anyone". Ms. Hegeman acknowledged on cross-examination that she had no knowledge of any lawsuits nor had she heard the plaintiff threaten to sue anyone. The memo refers to the plaintiff making "repeated attempts" to get Ms. Hegeman to drop her grievanceand, at an earlier point, offering her a pay increase. Yet, she admitted on cross-examination that this was not true. The subject of a pay increase came up during discussions about a possible reclassification of her position. Those discussionspre-dated her grievances. Yet, on the stand, Ms. Hegeman characterized this as a "pre-emptive" attempt by the plaintiff to try to get her out of the union. There was no evidence to support this assertion.

[107] In my opinion, these comments go beyond what was necessary for the occasion and are not protected by privilege. They are also evidence of actual malice. Ms. Hegeman admitted that several statements were not true and she knew that at the time. There can be no honest belief in the truth if the writer publishes a deliberate falsehood. Her comment at trial about a "pre-emptive" attempt also demonstrated malice. The privilege is lost.

[108] Mr. Crook received those memos and distributed them to others. That republication makes him liable as well (in addition to the union being vicariously

liable). It is not the same with respect to the finding of actual malice. Malice must be found against each defendant specifically. The malice of one does not necessarily infect another: *Sun Life Assurance Co. v. Dalrymple*, [1965] S.C.R. 302. This is important because malice may aggravate the damages. In this case, there was no evidence that Mr. Crook was actuated by malice when he requested or distributed the memos. But his distribution, and how it was done, is still a factor to be considered on general damages.

Damages:

[109] The principal remedy in defamation suits is an award of damages. These may be special damages (there were none claimed in this action), generaldamages, aggravated and punitive damages. At common law, damages are presumed to flow from publication of a libel.

[110] In this case, the plaintiff claimed general damages for loss of reputation, mental distress and anxiety. General damages are meant to be compensation for the defamatory insult and to act as vindication of reputation. They are by nature difficult to quantify. It is very much a unique and subjective assessment. Other cases can provide little assistance. Perhaps this is why neither counsel bothered to submit a list of damage awards from other cases.

[111] As noted in *Hill* (at para. 187), there are a number of factors to consider in the assessment of general damages: the nature, extent and circumstances of the publication of the defamation; the plaintiff's position and standing; the effect of the defamation upon the plaintiff; the motives and conduct of the defendants; and, the absence or refusal of any retraction or apology.

[112] In this case, plaintiff's counsel submitted that the plaintiff's professional reputation was destroyed as a result of the defamatory statements. He lost his job with the Health Board and this is a "black mark" that has followed him in the years since and will follow him for the rest of his career. The plaintiff is 51 years old, living in Ottawa, and currently working as a consultant on medical management issues. But there was evidence as to how, in the past 10 years, he was unable to obtain suitable employment due to the lack of positive references from the territorial government. He has suffered periods of depression and sought psychiatric help.

[113] It is important here to distinguishbetween the effect of the defamationcaused by Ms. Hegeman's memos and the effects caused by the other communications, which I held to be privileged, and the entire course of events. The plaintiff's dismissal was the culmination of events that occurred over the course of many months. It is clear to me that the plaintiff has as much to complain about, if not more so, with respect to his treatment at the hands of his employer as he does regarding the union's actions. It was the FMB officials who negotiated the Minutes of Settlement without the plaintiff's involvement; it was they who decided to proceed with the Bevan and Munroe investigations; and, it was they who dealt directly with the union officials in Yellowknife and everyone else who got involved in these issues. So it would be wrong to lay the plaintiff's dismissal on the defamatory statements contained in the August 13th memo.

[114] Defendant's counsel argued this very point. He submitted that the plaintiff's own conduct should be considered in the assessment of damages: Brown, *The Law of Defamation in Canada* (2nd ed., looseleaf), at p.25-11. Counsel characterized the plaintiff as "waging a war" with the union and his own employer. He could not accept the results of the investigations into Ms. Hegeman's grievance. His reactions aggravated the situation and led to his termination.

[115] There was a great deal of evidence tendered, by way of exchanges of correspondence between the plaintiff and FMB officials, demonstrating an ever-increasing agitation and frustration on the part of the plaintiff. This was evidence presented as part of the plaintiff's case. He accused the union, and Ms. Hegeman specifically, of concerted harassment and racial discrimination. He accused Ms. Hegeman and others, including some FMB officials, of deliberate fabrication. He copied much of his correspondence to others in government.

[116] There was no testimony at this trial from anyone involved with the territorial government at the time. So it is difficult to know exactly what did and what did not enter into the decision to terminate the plaintiff's employment. But I am sure that his own actions played a significant part. This is reflected in the termination letter sent to him by the Health Board's chairperson on December 19, 1994:

> The Board has lost confidence in your ability to follow its direction, particularly with respect to leaving behind you, the events surrounding certain matters which have recently been the subject of an independent inquiry.

[117] I am also sure, however, that Ms. Hegeman's memo played a part. She testified that she forwarded the memo not just to Mr. Crook but also to the local president, Peter Loedden. While there was no evidence that the memo got into the hands of the Health Board chairperson, Mr. Loedden took it upon himself to write to the chairperson repeating the allegation that the plaintiff had been consuming alcohol and discussing grievances with the union regional vice-president. He eventually apologized, but these accusations were copied to others. Mr. Crook himself took no steps to try to limit the circulation of these memos. There was evidence that copies of the memos got into the hands of people who should not have had them.

[118] In my opinion, the defamatory statements in Ms. Hegeman's memo damaged the plaintiff's reputation and the consideration with which he would be regarded by others. The fact that it contained deliberate falsehoods, and assertions of improper personal conduct, added to the injury. The apology made by Mr. Loedden was one directed solely to one aspect of the defamation and did nothing to restore the plaintiff's reputation.

[119] Taking into account all of the relevant factors in this case, I have concluded that an appropriate award for general damages is $20,000.00. I assess this amount as against all defendants jointly and severally.

[120] The plaintiff also claimed aggravated and punitive damages.

[121] Aggravated damages may be awarded in circumstances where the defendant was motivated by malice and his or her conduct was so insulting or oppressive that it results in additional harm to the plaintiff's humiliation, indignation and anxiety: *Hill* (at paras. 188-190). In this case, I have already explained why I found actual malice on the part of Ms. Hegeman. The deliberate falsehoods, and the insistence on maintaining a justification for them even at trial, have aggravated the situation for the plaintiff where, in my opinion, an award is merited. The continuing impact of these events was evident in the plaintiff's demeanour during his testimony at trial.

[122] I therefore award the sum of $10,000.00 as aggravated damages as against the defendant Hegeman. For this the union is vicariously liable. Because liability for aggravated damages is individual, and not joint and several, the situation of Mr. Crook must be separately considered. I have already indicated that I found no evidence that he was motivated by actual malice. He is therefore not liable for this head of damage.

[123] Punitive damages are meant to punish a defendant where his or her misconduct is so malicious, oppressive and high-handed that it offends the court'sdecency: *Hill* (at para. 196). While I have no doubt the plaintiff considers the defendants' conductto be egregious, I do not find the factors to warrant such an award.

[124] In summary, I award $20,000.00 as general damages, assessed jointly and severally against all three defendants,and $10,000.00as aggravateddamages, assessed jointly and severally against the defendants union and Hegeman.

Interest and Costs:

[125] The plaintiff seeks pre-judgement interest. The *Judicature Act*, R.S.N.W.T. 1988, c.J-1, provides for pre-judgment interest on general damages(but not exemplary or punitive damages) from a specified date and at specified rates: s.56. It also preserves a discretion to the court to vary either the date or the rates if it is just to do so in the circumstances: s.56.2. The prevailing jurisprudence, as I understandit, is that a successful party is *prima facie* entitled to pre-judgment interest in accordance with the statute. The onus is on the party seeking a deviation from the statute to justify it: see, for example, *Spencer v. Rosati* (1985), 50 O.R. (2d) 661 (C.A.); *Young v. Dawe* (1998), 156 D.L.R. (4^{th}) 626 (Nfld. C.A.).

[126] I heard no submission as to why a deviation from the statute would be justified. All I heard was that the calculation of interest would be a difficult exercise. No one told me why the case took so long to come to trial so I cannot assume anything in that respect. The statute clearly sets out how to calculate pre-judgment interest so I will leave that in the hands of counsel. It is enough for me to order that the plaintiff will have pre-judgment interest on the award of general damages according to the statute.

[127] On costs, plaintiff's counsel submitted that this case warranted an award of solicitor-client costs, or at least increased costs, together with a fee for second counsel. Defendants' counsel said submissions should await my findings on liability.

[128] My inclination is to award to the plaintiff the usual solicitor-and-client costs, on the applicable tariff, together with a second counsel fee for the trial. I see nothing unusual about this case that would presumptively justifysomething other than the usual award. If, however, the parties cannot agree on costs, then I invite counsel to make written submissions on the appropriatedisposition. Those submissions should be filed,

for the plaintiff, within four weeks and, for the defendants, within six weeks of the release of these reasons.

J.Z. Vertes
J.S.C.

Dated this 12th day of July, 2006.

Counsel for the Plaintiff: Steven L. Cooper and Theresa Wilson

Counsel for the Defendants: Austin F. Marshall and James Mahon

CV 05834

IN THE SUPREME COURT OF THE
NORTHWEST TERRITORIES

BETWEEN:

BRUCE PETERKIN

Plaintiff

- and -

UNION OF NORTHERN WORKERS, DARM CROOK and LONA HEGEMAN

Defendants

REASONS FOR JUDGMENT OF
THE HONOURABLE JUSTICE J.Z. VERTES