

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

WANDA MCDONALD

Plaintiff

-and-

DIANE KOE, VICTOR STEWART,
LAWRENCE NORBERT AND MARJORIE BAETZ

Defendants

MEMORANDUM OF JUDGMENT

[1] The Plaintiff, Wanda McDonald, applies for judgment for damages for defamation, as well as declaratory and injunctive relief.

FACTS

[2] The defendants were noted in default and, accordingly, are deemed to have admitted the truth of what is alleged in the Statement of Claim, pursuant to Rule 166.1 of the *Rules of the Supreme Court of the Northwest Territories*. They were served with notice of Ms. McDonald's application for judgment, including the affidavit she swore in support of her claim. They did not appear at the hearing.

[3] Ms. McDonald was the Chief Operating Officer ("COO") of the Gwich'in Tribal Council (the "GTC") from January of 2010 until June 19, 2012. Immediately prior to this, she worked for the GTC as its Manager of Business Development for three years and in an unspecified position from 1993 until 1997.

[4] Ms. McDonald was first appointed COO for a one year term, but this was extended twice. The second extension, in August of 2011, was to last until the position was filled permanently. No date was set for this, although the permanent

position was advertised publically in May of 2012 at which time Ms. McDonald submitted an application for it.

[5] The defendants are former employees of the GTC. They wrote an 8-page letter dated March 13, 2012, in which they made many disparaging comments and allegations about Ms. McDonald. Among other things, they wrote that Ms. McDonald “. . . bullied, harassed or victimized former and present staff, subjecting them to unwarranted and deliberate criticism, allegations and fault-finding” and that she poisoned the work environment. They also wrote that “. . . the nature of her criticisms reveal that they really are for power, control, domination and subjugation, i.e. to make us subservient or submissive. Her behavior is deliberate and are [*sic*] acts of malice.”

[6] The letter was addressed directly to eight individuals who were presidents or councilors of Designated Gwich'in Organizations. Copies were sent to another twenty-four individuals, including current and former GTC staff members, elders, the President of the Workers' Safety and Compensation Commission, the Director of Human Rights for the Northwest Territories, the federal Minister of Aboriginal Affairs and Northern Development and the Auditor General of Canada.

[7] The letter was distributed in both electronic and hard copy formats.

[8] In addition to the addressees and others noted on the face of the letter itself, a copy of the letter was provided to a reporter at the local CBC radio station. A story repeating the allegations about Ms. McDonald was aired on the CBC radio station on May 2, 2012. A written version of that story was posted on the CBC website the following day.

[9] As a result of the allegations in the letter, the GTC retained a law firm in May of 2012 to undertake an investigation of the allegations. The defendants objected to the GTC's choice of investigator, citing potential bias. The GTC retained another firm to conduct the investigation.

[10] The defendants' objection to the first investigator also became known the media and a story entitled “Independent Investigation Questioned” appeared in print in the *News of the North* on May 28, 2012. It repeated the allegations of bullying and named Ms. McDonald. The story was also published on the Northern News Services Limited (“NNSL”) website.

[11] As of May 1, 2013, almost a year later, the CBC and NNSL stories still appeared on their respective websites.

[12] By letter dated May 22, 2012, Ms. McDonald asked the defendants for a retraction of the statements and an apology. She set a deadline of May 30, 2012. The defendants replied in writing that they could not meet the deadline because they were awaiting the results of the investigation undertaken on behalf of the GTC as well as the results of an investigation by the Canadian Human Rights Commission.

[13] Ms. McDonald has not ever received an apology, nor an offer of retraction, from any of the defendants.

[14] On June 19, 2012, the GTC advised Ms. McDonald in writing that her appointment as COO was terminated immediately and that she would be returned to her former position of Business Development Manager. The explanation was that this was being done in anticipation of the position being filled permanently. Ms. McDonald was advised that she would continue to earn the COO salary \$120,000.00 a year for four months, after which her salary would be reduced to that of the Business Development Manager of \$93,000.00 a year. In the same letter, the GTC confirmed that Ms. McDonald had applied for the position of COO on a permanent basis and advised that her application would be considered.

[15] The investigator hired by the GTC concluded, ultimately, that the allegations made against Ms. McDonald were unsubstantiated and that she had conducted herself properly. Ms. McDonald was advised of the result by letter dated December 19, 2012. The investigation report was not made public, nor was a copy provided to Ms. McDonald.

[16] Throughout the time that she served as the COO and prior to publication of the defendants' letter, Ms. McDonald regularly received salary increases and performance bonuses in the maximum allowable amount of 10%. For the 2012 year, however, she received a significantly lower bonus at a rate of only 6.5%. She was advised of this by letter dated December 13, 2012, but the GTC did not provide an explanation for why she received a lower performance bonus than she had over the previous years.

[17] Ms. McDonald was never contacted for an interview for the permanent COO position and she was never re-appointed to it.

ISSUES

[18] Ms. McDonald must establish that defamation has occurred and if she does, the Court must address the appropriate remedies. With respect to remedies, the Court must determine the appropriate *quantum* and heads of damages and whether she should be granted the declaratory and injunctive relief she seeks.

THE CLAIM FOR DEFAMATION

[19] To establish a claim for defamation, Ms. McDonald must prove three things on a balance of probabilities: (1) that the words in the letter were defamatory, in the sense that they would tend to lower her reputation in the eyes of a reasonable person; (2) that the words in the letter did in fact refer to Ms. McDonald; and (3) that the words were published. The law presumes that the words are false. *Grant v. Torstar Corp.*, [2009] 3 S.C.R. 640 at paragraph 28

[20] The words were published in a letter circulated to numerous individuals and organizations, including media outlets. The letter refers specifically to Ms. McDonald and the words in the letter are clearly defamatory. Taken in their plain and ordinary sense, any reasonable person would readily conclude that Ms. McDonald was a malicious supervisor who created a poisoned and hostile work environment and who harassed, bullied and wrongfully terminated the employment of her subordinates. It is difficult to imagine that these words would do anything but diminish Ms. McDonald's reputation in the eyes of anyone who read them or heard them read.

[21] Ms. McDonald has established that there was defamation.

REMEDIES

[22] Ms. McDonald seeks general, special, aggravated and punitive damages. She also asks the Court for a declaration that the defendants have defamed her and for a permanent injunction enjoining them from publishing further defamatory words about her. At the hearing, Ms. McDonald's counsel confirmed that she is not seeking an order directing the defendants to retract their defamatory statements.

General Damages

[23] The Statement of Claim sets out a claim for damages for the defamation in the amount of \$165,000.00. Ms. McDonald's counsel indicated that this is comprised of general damages in the amount of \$100,000.00 and damages for loss of past and future earnings in the amount of \$61,843.86. These amounts are in addition to claims for aggravated damages of \$50,000.00 and punitive damages of \$25,000.00.

[24] In *Hill v. Church of Scientology of Toronto*, *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130 at 1203, Cory, J. adopted the factors set out in *Gatley on Libel and Slander* (8th ed.), London: Sweet & Maxwell, 1981 at pp. 592-593 as the proper basis for assessing damages for defamation. These are: (1) the plaintiff's conduct, position and standing; (2) the nature of the defamation; (3) the mode and extent of publication; (4) the absence or refusal of retraction or apology; (5) the

conduct of the defendant from the first publication to the time of the verdict; and (6) evidence led in aggravation or mitigation of damages.

[25] He went on to state (*supra*, at 1204):

At the outset, I should state that I agree completely with the Court of Appeal that each libel case is unique and that this particular case is in a "class by itself." The assessment of damages in a libel case flows from a particular confluence of the following elements: the nature and circumstances of the publication of the libel, the nature and position of the victim of the libel, the possible effects of the libel statement upon the life of the plaintiff, and the actions and motivations of the defendants. It follows that there is little to be gained from a detailed comparison of libel awards.

[26] It is clear that Ms. McDonald suffered both personally and professionally as a result of the allegations in defendants' letter.

[27] Ms. McDonald's professional standing in the GTC was profoundly altered. She was a relatively long-term employee with a good track record. Yet, in a matter of a few months, she went from being a senior executive who received performance bonuses and pay increases at the maximum allowable level, to being removed from her acting position without notice.

[28] I recognize that Ms. McDonald held the COO position on a term basis and that the GTC's stated reason for removing her from the position was because of a move to fill it permanently. Nevertheless, the fact this decision was so abrupt and came on heels of the distribution of the letter and the media reports cannot, in all the circumstances, be attributed to bad timing or mere coincidence. It is both a logical and reasonable inference that her diminished role in the organization resulted directly from the publication of the defamatory letter.

[29] Ms. McDonald states in her affidavit that she was shocked when she read the letter and that she "could not believe that the Defendants had written, signed and published such terrible defamatory statements" about her. She was "extremely upset and embarrassed" by the allegations, which, she says, became well-known in the relatively small community of Inuvik, the place where she made her home and pursued her career.

[30] Although the investigator found that the allegations were unsubstantiated, Ms. McDonald does not feel her name has been cleared. This is completely understandable, given that the investigation report was not made public. Moreover, the defendants never apologized and they did not offer to retract their statements, despite being requested to do so.

[31] As for Ms. McDonald's conduct, there is no evidence that she did anything to provoke the defendants or exacerbate the situation.

[32] The manner and extent of the publication is troubling and it no doubt exacerbated the harm to Ms. McDonald's reputation. It is not at all surprising that the defamatory comments became well-known.

[33] The letter was sent directly to eight individuals and copied to another twenty-two, many of whom had no obvious relationship with the GTC and almost none of whom had any legitimate interest in its internal employment issues. Further, it was transmitted by electronic mail and as such it could be published to an even wider audience with relative ease. In choosing to use electronic distribution, the defendants created a significant risk of further publication beyond the intended recipients. Indeed, it wound up in the hands of both print and broadcast media outlets, both of which disseminated the allegations amongst an even larger audience. This, no doubt, added to Ms. McDonald's humiliation.

[34] The defendants' conduct between the time the letter was first published and judgment is not a significant factor in assessing damages in this case. There is no evidence that the defendants continued to make defamatory statements about Ms. McDonald subsequent to the letter. Further, they did not defend the action and so they were noted in default. Consequently, the case was not drawn out and Ms. McDonald was not subjected to a lengthy court process, examinations for discovery, harsh cross-examination at trial or further suggestions that the allegations were true.

[35] I have considered the possibility that the defendants' objection to the first investigator proposed by the GTC exacerbated the situation by drawing out the length of time required to complete the investigation.

[36] According to Ms. McDonald, the defendants' concern was that the first investigator was in a conflict of interest, but the basis of that concern is not apparent from the evidence. Ms. McDonald states in her affidavit that the defendants reported their concerns about the first investigator being in a conflict of interest to the Law Society of the Northwest Territories and that the latter found no transgression. This is, however, hearsay evidence and the source of Ms. McDonald's information is not identified. Consequently, the legitimacy of the defendants' concern with the first investigator and, in particular, whether the defendants raised it to bring further harm to Ms. McDonald's reputation, simply cannot be assessed.

[37] I also note that the second investigator was appointed within a month of the objection. Thus, it does not appear that the defendants' objection led to any significant delay in the investigation process.

[38] Ms. McDonald's claim of \$100,000.00 in general damages is a significant amount, but the damages she is awarded must reflect the harm visited upon her as a result of the defendants' actions. As stated in *Hill, supra*, there is little to be gained by comparing damage awards amongst defamation cases. Each case is unique.

[39] The harm that the defendants' defamatory words caused to Ms. McDonald's reputation and the impact this had had on her is profound. This is clearly evidenced by her swift fall from grace in her workplace and in her description of the hurt and humiliation she felt upon reading the defendants' letter.

[40] Once damaged, a reputation is not something that can be repaired easily. Reputations are built over time and are comprised of innumerable parts. They are the aggregate of our actions throughout our lives: the way we treat others, whether we display honesty, integrity and reliability in the things that we do, whether we are kind or mean-spirited, motivated or lazy, and so on. Sadly, despite the time and effort it takes to build a good reputation over the course of a lifetime, it takes relatively little to destroy it. That has been borne out here.

[41] Having regard to all of the circumstances, Ms. McDonald's claim for general damages in the amount of \$100,000.00 is appropriate.

Special Damages

[42] Ms. McDonald also claims actual monetary loss as a result of the defendants' letter in the amount of \$61,843.86, comprised of both a loss of base salary (\$57,721.20) and loss of bonus pay (\$4,122.66).

[43] Ms. McDonald has calculated the loss of bonus pay using the difference between the maximum bonus she could have received at a rate of 10% of her salary and the bonus she actually received, which was calculated based on 6.5% of her salary.

[44] The loss of base salary has been calculated by taking the difference between what she would have earned had she continued in the position of COO, which she anticipates would have lasted until January of 2014, and the remuneration for her current position. This is a monthly difference of \$3,848.08. Taking into account that the GTC maintained her COO salary level until October of 2012, there would be a total of 15 month of reduced remuneration.

[45] Of course, this is premised on assumptions that Ms. McDonald would have been successful in being appointed as the COO and that she would have received the maximum allowable bonus for 2012. Ms. McDonald had to apply for the job. She

would have to compete with other candidates. She would have had to continue to do the kind of work that attracts the highest level of bonus payments.

[46] Neither of these assumptions is a certainty, but certainty is not required. What is required is proof on a balance of probabilities and on that basis, I find it is more likely than not that but for the defendants' defamatory statements, Ms. McDonald would have been the successful candidate and that she would have earned the maximum bonus for 2012.

[47] As noted, Ms. McDonald started in the position of COO on an acting basis in January of 2010 and she was re-appointed twice, the last time intended to last until the position was filled indeterminately. This, along with the fact that she continually received the maximum in bonuses and pay raises during her tenure, leads to the inescapable conclusion that she enjoyed the trust and confidence of the GTC and was on track for continued career success. But then, the defendants published their letter and mere months later, Ms. McDonald's appointment was suddenly terminated, although the position was not filled. She received bonus pay calculated at a reduced rate. Perhaps most telling is that in spite her application and her experience, she was not even afforded an interview for the position of COO.

[48] Accordingly, Ms. McDonald is entitled to \$61,843.86 in special damages.

Aggravated and Punitive Damages

[49] Ms. McDonald seeks both aggravated and punitive damages. Although I consider the defamation in this case to be very serious, I am unable to conclude that the defendants acted in the high-handed and malevolent manner that attracts additional compensation in the form of aggravated damages. Similarly, the defendants' conduct is not so egregious as to offend the court's sense of decency, thereby attracting punitive damages. The goals of punishment and deterrence may be achieved through the general damages awarded to Ms. McDonald.

Declaration

[50] Included in the prayer for relief is a request for a declaration that the defendants' actions are defamatory. Given Ms. McDonald's success in proving her claim for defamation and the award of damages, there is no need for declaratory relief and issuing it would be superfluous.

Injunction

[51] Ms. McDonald seeks an injunction enjoining the defendants from continuing to publish defamatory statements.

[52] This Court has the power to issue a permanent injunction following a trial to prevent further publication of defamatory statements (see, for example, *Barrick Gold Corp. v. Lopehandia*, 2004 CarswellOnt 2258 (C.A.)); however, this must be based on a realistic apprehension that the defendants will continue to publish defamatory statements.

[53] Ms. McDonald fears that the letter will continue to be circulated and that the defamation will continue. Her fear is understandable. The defamatory letter was circulated widely and the damage it did to her reputation is significant. Nevertheless, there is no evidence that the defendants have continued to circulate the letter or publish other defamatory allegations about her. Thus, an injunction, which is an extraordinary form of relief, is not warranted in this case.

CONCLUSION

[54] Wanda McDonald shall have judgment jointly and severally against the defendants for general damages for defamation in the amount of \$100,000.00 and special damages in the amount of \$61,843.86. She is also entitled to costs in accordance with Column 3 of the *Rules of the Supreme Court of the Northwest Territories* and pre-judgment interest in accordance with the *Judicature Act*, R.S.N.W.T., 1988 c. J-1.

[55] The claims for injunctive and declaratory relief are dismissed.

K. Shaner
J.S.C.

Dated at Yellowknife, NT
this 28th day of October, 2013.

Counsel for the Plaintiff: C. Verville
No one appearing for the Defendants:

S 1 CV 2012 000098

**IN THE SUPREME COURT OF THE
NORTHWEST TERRITORIES**

BETWEEN:

WANDA MCDONALD

Plaintiff

-and-

DIANE KOE, VICTOR STEWART,
LAWRENCE NORBERT AND MARJORIE
BAETZ

Defendants

MEMORANDUM OF JUDGMENT OF
THE HONOURABLE JUSTICE K. SHANER
