IN THE DISTRICT COURT
AT AUCKLAND

CIV-2016-004-002327
[2017] NZDC 18635

BETWEEN	ANGELA ATKINS Plaintiff
AND	CHRISTOPHER TILL First Defendant
AND	HUMAN RESOURCES INSTITUTE OF NEW ZEALAND INCORPORATED Second Defendant

Hearing:	8 June 2017 (and subsequently on the papers)
Appearances:	No personal appearance by the Plaintiff Mr C Griggs for the Defendant
Judgment:	23 August 2017

DECISION OF JUDGE G M HARRISON

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[1] The defendants (hereafter referred to as Mr Till, and "the institute") apply for summary judgment against the plaintiff (Ms Atkins) pursuant to r 12.2(2) District Court Rules 2014 for summary judgment dismissing the plaintiff's claim on the basis that none of the causes of action in the plaintiff's statement of claim can succeed.

History

[2] Ms Atkins commenced proceedings against Mr Till and the institute in December 2016 alleging that an email of 18 May 2015 forwarded by Mr Till as chief executive of the institute to 3,420 email addresses of members of the institute, was defamatory of her.

[3] That part of the email alleged to be defamatory reads as follows:

> As our members appreciate HRINZ has tried, many times, to be reasonable and magnanimous towards Angela and Elephant HR, who have previously indicated an amicable and professional relationship with us will be impossible. HRINZ is disappointed that Elephant Training and HR and Angela continue to act in this aggressive manner.

[4] Ms Atkins' pleaded allegation is:

> Saying someone is acting in an aggressive manner which you are disappointed about, and that they are not a reasonable or magnanimous person when the defendant is the one who has been taking legal action (sic) them.

[5] The institute is a membership organisation for those in the HR profession. It has approximately 3,400 members who make up about 45 percent of the known New Zealand HR market. It regularly emails all its members.

[6] The defendants admit that Ms Atkins is a well-known human resources (HR) professional in New Zealand and that she has authored two published books about HR and management. Ms Atkins served on the institute's Auckland branch committee for a total of four years including two years as branch president. They acknowledge that she speaks at HR conferences and events and writes articles for various publications and websites.

[7] Ms Atkins, and Fraser Atkins (whom I understand to be her husband), are the shareholders and directors of Elephant Training and HR Limited (Elephant). In 2014 Elephant intended to form an association for human resources professionals to compete with the institute. Elephant proposed to use the name "Chartered Human Resources Institute", which name the institute claimed as its own.

[8] The institute filed proceedings in the High Court, but shortly thereafter on 27 February 2015, Muir J recorded Elephant's undertaking not to use the words complained of, or any similarly misleading words. On the basis of the undertakings given, the institute applied to the Court for leave to discontinue the proceeding. A costs hearing was undertaken before Courtney J who fixed a certain amount of costs up to 9 October 2014, being the date on which Elephant notified the institute that it would no longer use the name complained of, but not thereafter. That decision was appealed to the Court of Appeal and upheld.

[9] On 18 May 2015 Mr Till sent the email in question to the members of the institute, reporting on the above matters, although not the decision of the Court of Appeal which was delivered in July 2016. The email is attached to this decision.

[10] It opened with the statement as follows:

> On Friday, 6 March I briefed you and other HRINZ members about the legal proceedings the institute was required to take against Elephant Training and HR to protect our brand.

[11] Later he advised that there were two important developments to be shared with members so that they remained informed and had a clear understanding of the position.

[12] The first of those matters was the decision to discontinue the action against Elephant, but that costs would be sought from that company. The reasons for that were stated to be:

(i) Four offers were made to Elephant to settle the matter but each was declined.

(ii) Justice Muir indicated that the institute had "acted appropriately to protect its rights".

(iii) The High Court recorded Elephant's undertakings not to use the Chartered Human Resources Institute brand.

(iv) The Atkins had written to the institute's legal representatives making it clear that henceforth it would be impossible for them and the institute to have a productive working relationship.

[13] The second development was a possible defamation by Ms Atkins of the institute and possibly Mr Till. He advised in the email that legal advice had been received that Ms Atkins' statements were a clear case of defamation and for the protection of the institute the statement could not stand.

[14] He then referred to an offer to Ms Atkins to withdraw her comment and rectify her error, but that offer was not accepted.

[15] The statement on which Ms Atkins now sues was then made.

The pleadings

[16] Ms Atkins seeks $200,000 by way of damages.

[17] In defence it is alleged that the words complained of, particularly "to act in this aggressive manner", are true. They raise further defences that the statement was the defendants' honest opinion, and that they are entitled to qualified privilege in respect of the email.

Subsequent proceedings

[18] On 10 March 2017 the defendants applied for summary judgment and on 10 April 2017 filed an amended application. That was the same day the amended statement of defence was filed.

[19] On 28 April 2017 Ms Atkins filed a document entitled "Memorandum of Objection to the Summary Judgment Hearing". When the application was called before me on 8 June 2017 there was no appearance by Ms Atkins and I heard Mr Griggs on behalf of the defendants. I delivered a decision on 15 June 2017 in which I adjourned the summary judgment application part-heard for the reasons set out in that decision, but essentially because I was concerned that Ms Atkins was confused that before the application for summary judgment could proceed leave for it to be brought had first to be granted.

[20] Ms Atkins now resides in the USA and has indicated that she can only travel with great difficulty and will not attend the hearing of this application.

[21] I therefore directed that Ms Atkins file notice of opposition and any affidavits within 28 days of the release of my decision of 15 June. That was an unless order. However, Ms Atkins has since filed notice of opposition on 10 July 2017 to the summary judgment application, although no affidavits supporting that notice have been filed.

[22] Again, bearing in mind that Ms Atkins is a litigant in person, I am prepared to treat that document as containing matters of fact as well as grounds of opposition to the application.

[23] In my decision of 15 June 2017 I directed that I would determine the summary judgment application on the papers. Mr Griggs filed a memorandum on 14 August 2017 to the effect that the defendants did not intend to reply to Ms Atkins' notice of opposition.

Assessment

[24] I am mindful that the summary judgment procedure is not conducive to claims in defamation because of the likelihood of disputes of fact and reliance on the credibility of witnesses. Those concerns do not arise in this case. The defendants seek summary judgment on the basis that their defences of qualified privilege and honest opinion are unassailable and must lead inevitably to judgment in their favour.

Dealing with the defence of qualified privilege first

[25] At common law, a defendant in an action for defamation has a defence of qualified privilege if the communication in question was made by a person who had an interest or a duty, legal, social, or moral, to make it to the person to whom it was made, and the person to whom it was made had a corresponding interest or duty to receive it. *Adam v Ward;*[1] *CPA Australia Limited v New Zealand Institute of Chartered Accountants*.[2] Ms Atkins in her notice of opposition stated:

> 3.3 The defendant argues that they had **qualified privilege** to make the statement and that "the relevant statement was quite measured in tone and was a statement of opinion firmly grounded in the facts of what had taken place to that point.
>
> 3.3.1 The plaintiff accepts that a CEO of a society needs to advise members of what is happening, but there is no need in that communication to make defamatory statements. The

1 *Adam v Ward* [1916-17] All ER 157 (HL) at 170

2 *CPA Australia Limited v New Zealand Institute of Chartered Accountants* [2015] NZHC 1854, at [173].

> communication could have easily excluded any accusations of what sort of approach or behaviour Elephant or the plaintiff were taking. …

[26] I find accordingly that the statement was made on an occasion of qualified privilege. That being so, the occasion on which the communication is made rebuts the prima facie presumption of malice arising from a statement prejudicial to the character of the plaintiff.

[27] In *Adam v Ward* Lord Dunedin put it this way (at p 170):

> … nor is it disputed that a privileged communication, a phrase often used loosely to describe a privileged occasion, and vice versa, is a communication made upon an occasion which rebuts the prima facie presumption of malice arising from a statement prejudicial to the character of the plaintiff, and puts the latter on proof that there was malice in fact. …

[28] He went on to say that the following legal principles could not be questioned:

> … nor that the question whether the occasion is a privileged occasion or not is, if the facts be not in dispute, or if in dispute have been found by the jury, a question of law to be decided by the judge at the trial. Nor yet that a person making a communication on a privileged occasion has not, in the first instance and as a condition of immunity, to prove affirmatively that he honestly believes the statement made to be true, his bona fides being in such a case always presumed.

[29] Section 19 of the Defamation Act 1992 provides:

> **19 Rebuttal of qualified privilege**
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> (1) In any proceedings for defamation, a defence of qualified privilege shall fail if the plaintiff proves that, in publishing the matter that is the subject of the proceedings, the defendant was predominantly motivated by ill will towards the plaintiff, or otherwise took improper advantage of the occasion of publication.
>
> (2) Subject to subsection (1), a defence of qualified privilege shall not fail because the defendant was motivated by malice.

[30] For the defendants Mr Griggs submitted that the following facts are incapable of reasonable dispute:

> 18.1 The first applicant was and is the chief executive of the second applicant.
>
> 18.2 The chief executive of any incorporated society has a duty to keep members of that society informed of important matters concerning the

society, including the conduct of legal proceedings brought by or against the society.

18.3 The members of an incorporated society have a corresponding interest in knowing what challenges their society is facing and what is being done in their name.

18.4 The email sent out on 18 May 2015, including the relevant statement, was a member communication of precisely the sort which a chief executive could reasonably be expected to send to members in accordance with his duty and the corresponding interest of the members.

[31] Ms Atkins does not dispute these facts. She says:

3.3.1 … The communication could have easily excluded any accusations of what sort of approach or behaviour Elephant or the plaintiff were taking.

3.3.2 The statement was not measured in tone. The term "aggressive" is not a measured or professional way to refer to a person or company in a factual update.

3.3.3 The defendant has acknowledged that the statement is harmful and upsetting in his letter of 1 June 2016 where he states:

I appreciate that it may be upsetting for you to read that now.

3.3.4 The plaintiff seeks discovery to take place to find out whether HRINZ members felt that the defamatory phrase in the update was something members felt was professional and measured, or whether any negative feedback was received about this.

[32] That reaches the position where the question is, whether the occasion of qualified privilege is lost through malice.

[33] There is no evidence that Mr Till was motivated by ill-will towards Ms Atkins or otherwise took improper advantage of the occasion of the publication of his email. All of the evidence confirms that he was simply fulfilling his duties as CEO of the institute in advising members on matters of which they had a particular interest.

[34] I return to the judgment of Lord Dunedin. At p 173, after reviewing earlier authorities, he said:

> These authorities, in my view, clearly establish that a person making a communication on a privileged occasion is not restricted to the use of such language merely as is reasonably necessary to protect the interest or discharge the duty which is the foundation of his privilege; but that, on the contrary, he

> will be protected, even though his language should be violent or excessively strong, if, having regard to all the circumstances of the case, he might have honestly and on reasonable grounds believed that what he wrote or said was true and necessary for the purpose of his vindication, though in fact it was not so.

[35] The circumstances in which the defence may be lost because of malice were reviewed in *Horrocks v Lowe.*[3] The authors of "Gatley on Libel and Slander," 12th Edn, at para 17.3 state the following:

> The speech of Lord Diplock in *Horrocks v Lowe*, with which three other of the Law Lords agreed, restated the law in the context of qualified privilege in what were clearly intended to be authoritative terms. The following is offered as a summary;
>
> (1) improper motives
>
> (a) There is some special reason of public policy for giving immunity in all cases of qualified privilege. If the maker of a statement uses the occasion for some other reason he loses the protection of the privilege.
>
> (b) The defendant is entitled to be protected unless some dominant improper motive on his part is proved.
>
> (c) (i) The usual motive relied on is that of injuring the claimant, but there may be others.
>
> (ii) Knowledge that a statement will injure the claimant does not destroy the privilege if the defendant was using the occasion for its proper purpose.
>
> (2) absence of honest belief
>
> (a) If it can be proved that the defendant did not believe that what he published was true, that is generally conclusive evidence of express malice, "for no sense of duty or desire to protect his own legitimate interests can justify a man in telling deliberate and injurious falsehoods about another". The burden of proof, at least where conduct extraneous to the privileged occasion, is not relied on, is not a light one.
>
> (b) If the defendant publishes untrue matter recklessly, without considering or caring whether it be true or not, he is treated as if he knew it to be false, but carelessness, impulsiveness or irrationality in arriving at a belief is not to be equated with indifference to truth.

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3 *Horrocks v Lowe* [1975] AC 135 HL

(c) There are exceptional cases where a person may be under a duty to pass on defamatory reports made by another even if he believes them to be untrue: he is not then malicious.

(3) positive belief

(a) Positive belief in the truth of what is published will usually protect the defendant unless he can be proved to have misused the occasion. Judges and juries should be slow to draw the inference that he has misused the occasion, and the defendant's desire to use the occasion for its proper purpose must be shown to have played no significant part in his motives if malice is to be found.

(b) Where the defendant believes in the truth of what he has published and conduct extraneous to the privileged occasion is not relied on, the claimant can only succeed if he shows that the publication contains irrelevant matter, and that it can be inferred that the defendant did not believe it to be true or realise that it was irrelevant, and brought it in for some improper motive. Judges and juries should be slow to draw this inference, too.

[36] As I have said, there is no evidence whatsoever from Ms Atkins that Mr Till had some particular reason to injure Ms Atkins.

[37] For Mr Till's part, his comment was made in the context of the litigation with Ms Atkins and Elephant as outlined in his email. He refers to:

(a) The litigation with Elephant and its resolution on undertakings given.

(b) The minute of Justice Muir of 27 February 2015 in which he recorded his preliminary view that the institute acted appropriately to protect its rights. That observation was made to assist the parties in resolving the issue of costs. In the course of making that minute Justice Muir had described a blog post by Ms Atkins "I'll see them in court" as "bellicose."

(c) The four offers of settlement, all of which were rejected.

(d) The potentially defamatory statement of Ms Atkins regarding the institute and her refusal to withdraw that remark and apologise.

[38] At paragraph 7 of his affidavit of 10 March 2017 Mr Till said:

> It was and continues to be my genuine belief, based on the facts set out above, that the plaintiff's actions up until 18 May 2015 had been aggressive. That was not just my view, it was the view of HRINZ as a corporate entity. I felt safe in reaching that conclusion, given Justice Muir's use of the term "bellicose" in the High Court – a term which is stronger in tone than "aggressive".

[39] That statement in my view confirms the honest belief of Mr Till in his comment. In response, Ms Atkins said in her notice of opposition at para 3.3.4 that she wanted discovery to find out whether HRINZ members felt that the defamatory phrase was something members felt was professional and measured, or whether any feedback was received about this. The views of the members are of course irrelevant. The issue is whether Mr Till held an honest belief in his statement and for the reasons given I am satisfied that he did and that he was not actuated by malice sufficient to destroy the defence of qualified privilege.

Conclusion

[40] Having reached that conclusion it is unnecessary to consider the further defence of the truth of the statement, or honest opinion, although I am attracted to that latter defence. Indeed, I am far from satisfied that stating that a person is "aggressive" can be defamatory. While I acknowledge that the circumstances in which the word is used have to be taken into account to determine whether a statement is defamatory, to describe a person as "aggressive" may often be regarded as a positive quality.

[41] To obtain summary judgment the defendants must satisfy the Court that none of the causes of action in the plaintiff's statement of claim can succeed. I have reached that view. Ms Atkins could only succeed at trial if she could prove that Mr Till was motivated by malice. That would require proof of ill-will towards her on his part of which she has provided no evidence at all. I therefore cannot see how she could later do so at trial.

[42] Consequently, her claim is struck out on the basis that her cause of action in defamation against the defendants cannot succeed.

[43] Costs, assessed on a 2B basis, should follow the event. Failing agreement between the parties on that issue I will receive memoranda.

G M Harrison
District Court Judge