

Case Alert

Shaping the future of insurance law

NSW Court of Appeal overturns \$238,000 payout over defamatory email

***KSMC Holdings Pty Ltd t/as Hubba Bubba Childcare on Haig v Bowden* [2020] NSWCA 28**

6 MARCH 2020

AT A GLANCE

- Increasingly, disenfranchised employees are looking to novel causes of action against employers to avoid damages and costs caps imposed by the *Fair Work Act 2009* and other legislation. As a result, there has been an uptick in the number of defamation actions taking issue with the explanation of the employee's termination that has been provided by the employer to staff and/or clients.
- On 3 March the NSW Court of Appeal overturned an award of \$238,000 in damages arising from an allegedly defamatory email announcing an ex-employee's termination in *KSMC v Bowden*. In that matter, a defence of qualified privilege had been established and was not defeated by a plea of malice on the part of the employer in publishing the allegedly defamatory email.
- The NSW Court of Appeal indicated that even if defamation had been established, the award of damages was manifestly excessive given the scope of the alleged offending. An award of \$40,000 was flagged as having been more appropriate, with no element of aggravated damages.
- This decision clearly shows the difficulty of establishing malice. Further, the scope of damages available for such defamation ought to be limited to an amount that has an appropriate and rational relationship with the harm sustained by the ex-employee.

BACKGROUND

In this matter the Respondent, Mr Bowden, was employed in a childcare centre operated by the Appellant, KSMC. The Respondent's employment with the Appellant commenced in mid-2015 and ceased in early 2016.

On 4 April 2016, the Appellant sent two identical emails to 35 parents whose children attended the childcare centre. The emails contained the heading "Staff Updates" and addressed the arrival and departure of

various staff members, including the Respondent. The emails relevantly said that "while good with the children in general, [the Respondent] was not truthful with us regarding his studies and some other issues, and I felt it was better for him to move on and possibly gain a bit more life experience. We wish him well with his future".

The Respondent commenced proceedings for defamation in the District Court regarding the two emails.

AT FIRST GLANCE

On 4 April 2019, Levy SC DCJ found in favour of Mr Bowden and awarded him \$237,970.22 in damages, including an award of aggravated damages.

His Honour Judge Levy SC found that the two emails conveyed the following imputations about the Respondent:

- he is dishonest
- he was not truthful with the Appellant regarding his studies and some other issues
- he was fired for disciplinary reasons
- he conducted himself in such a manner that a childcare centre terminated his employment, and
- he is not a fit person to work in childcare.

Levy J rejected all the Appellant's defences, relevantly including a defence of common law qualified privilege. Such a defence allows free communication in certain relationships without the risk of an action for defamation – generally where there is legitimate interest in the statement.

His Honour held that there may have been a legitimate interest in the Appellant providing the parents of children at the childcare centre with up-to-date business related information regarding the identity of staff working there, including the names of staff no longer working there. However, that interest did not extend to having details for the termination provided to them.

His Honour went on to make a contingent finding that the Respondent had established malice on the part of the Appellant in sending the two emails, defeating any qualified privilege defence. Levy J made that finding for two reasons:

- the first basis was that the imputations contained in the two emails were “*so unreasonable that the [Appellants] must have known the imputations were false*”, and
- the second basis was that the statements made in the two emails were “*so reckless that they were made with willful blindness to the truth*”.

Levy J awarded damages of \$237,970.22 plus costs.

ON APPEAL

The appeal was heard on 9 December 2019 and judgment was handed down on 3 March 2020. Payne JA wrote the lead judgment, with Basten JA and White JA agreeing.

The issues in the appeal were essentially whether the primary judge:

- erred in failing to find the defence of common law qualified privilege was made out, and
- incorrectly assessed the quantum of damages.

The NSW Court of Appeal held that Levy J had erred in not accepting that the defence of common law qualified privilege was made out. This was because, firstly, the primary judge had erred in determining that parents only had a limited interest in the matters set out in the two emails. Payne JA considered the matters relevant to the parents and concluded they had a legitimate interest in:

- the identity of staff working at the childcare centre, including the names of staff no longer working there
- the qualifications of current and former staff, and
- the suitability of current or former staff to supervise children.

His Honour went on to assess that the information in the two emails was relevant to the above interest, if only to exclude natural speculation, if the reasons for termination were left unstated, where the care of young children was involved.

The NSW Court of Appeal then held that the Respondent had failed to establish malice on the part of the Appellant. Payne JA referred to the *Roberts v Bass* judgment, which sets out the test for proving malice by the maker of an allegedly defamatory statement.

His Honour considered the matters relied upon by Levy J in detail and the evidence of the parties and found that malice on the part of the Appellant had not been established.

Payne JA then addressed the subject of damages on a contingent basis. His Honour stated that “... *there is an issue in this State about the fundamental approach to damages in defamation cases*”, but that nevertheless awards of damages for defamation must ensure “*that there is an appropriate and rational relationship*

between the harm sustained by the plaintiff and the amount of damages awarded”.

His Honour concluded that the award of damages fixed by the primary judge was manifestly excessive and resulted from a failure by the primary judge properly to exercise discretion in fixing the damages. If the defence of common law qualified privilege had failed, an award of \$40,000 would have reflected an appropriate amount of damages given the harm sustained.

THE SIGNIFICANCE OF THIS DECISION FOR INSURERS

The *KSMC* decision provides a useful guide from the NSW Court of Appeal on circumstances in which a defence of common law qualified privilege may be upheld and the difficulties faced by a plaintiff in seeking to defeat such a defence by way of a claim of malice.

The decision also includes some useful commentary on the damages that may be available as a result of defamation. It could signal a decrease in awards for defamation and, whilst not a binding authority, will be a useful bargaining tool in any settlement negotiations in claims of this nature.

NEED TO KNOW MORE?

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