

# THE SAYING GOES, “IF YOU DON’T HAVE SOMETHING NICE TO SAY...”

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Employers spend a lot of time and resources investing in their employees, so it is understandable that when there is a breakdown in the employer-employee relationship, emotions can run high. Employers must maintain a high level of professionalism and refrain from publishing materials which an ordinary person may regard as defamatory against a former employee’s reputation.

## IN ISSUE

- Whether statements made about a former employee were defamatory?
- The factors which will influence the Court’s assessment of compensation?

## THE BACKGROUND

Mr Mathew Bowden, a 20-year-old student studying early education, brought defamation proceedings against his former employer KMSC Holdings Pty Ltd t/as Hubba Bubba Childcare on Haig (Childcare centre) and Ms Karen Chapman as the ‘director and guiding mind of the company’.

The proceedings in the District Court of New South Wales (Court) arose out of comments made in an email which Ms Chapman sent to 35 individuals - parents of children who attended the Childcare centre. The email in question included a section on ‘Staff Updates’ whereby Ms Chapman stated:

*“Matt - is unfortunately no longer with us due to disciplinary reasons. Whilst being good with the children in general, Matt 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.”*

After Mr Bowden resigned, he was made aware of the comments when a parent notified him of the statements made by Ms Chapman. The Court heard that he ‘felt ill’ because of his fear of the ‘grape vine effect’ of the comments, resulting in Mr Bowden requiring treatment for depression.

In light of two unsuccessful attempts to have the defendants issue an apology, Mr Bowden brought defamation proceedings pursuant to the *Defamation Act 2005* (NSW) (the Act) on the basis that the statements accused him of:

- being dishonest;
- being untruthful regarding his studies and other issues;
- having been fired for disciplinary reasons;
- conduct which resulted in the termination of his employment; and
- being unfit to work in childcare (imputations).

## THE DECISION AT TRIAL

The Court was required to determine the 'existence, capacity and defamatory meaning of [the] imputations'. The Court stated that the test to be applied is whether the ordinary reasonable reader of the emails would find that the imputations relating to Mr Bowden were in fact conveyed. The main focus of the test is the ordinary natural meaning of the words in the emails, when considered within the context of the email as a whole.

In applying the test, the Court examined each of the imputations and found that an ordinary reasonable reader would ultimately form a view, impression and understanding from the emails that were adverse to, and injurious to Mr Bowden's otherwise good reputation.

## Compensation

In assessing damages, the Court stated that the Act requires damages to bear an appropriate and rational relationship to the harm suffered by the plaintiff.

The Court took into account:

- Ms Chapman's failure to mitigate the injurious effect of the statement by way of an apology;
- Mr Bowden suffered a significant 'sting' from the emails which led to his depression;
- the relatively young age of Mr Bowden;
- the serious impact on Mr Bowden's reputation – because the email was read directly by the recipients of the email but also indirectly by recipients who understood the imputations by way of the grapevine effect;
- the disruptive effect of the statement which caused Mr Bowden to delay his studies; and
- the recipients of the emails were important to Mr Bowden's career as they were in the locality where he lived and the grapevine effect already had an adverse effect (a comment made by a child who was not an intended recipient and some identified staff at the TAFE that he studied at).

His Honour found that the imputations were defamatory and entered judgment of \$237,970.22 against the Childcare Centre and Ms Chapman. The Court awarded compensatory and aggravated damages, special damages and interest to vindicate Mr Bowden, to address his hurt feelings and repair damage to his reputation.

## IMPLICATIONS FOR YOU

It is important that businesses carefully consider the truthfulness of the material that it intends to send to their customers regarding their current and former employees. In particular, when employers explain reasons for staff departures to current employees and customers care is needed to ensure that an ordinary reader of the published material will not form an impression or understanding that would damage the reputation of the departed employee.

*Bowden v KSMC Holdings Pty Ltd t/as Hubba Bubba Childcare on Haigh & Chapman [2019] NSWDC 98*

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