New South Wales
District Court

CITATION:	**Bristow v Adams [2011] NSWDC 11**
HEARING DATES:	7, 8, 9 and 10 June, 8 October 2010
JUDGMENT DATE:	24 March 2011
JURISDICTION:	Civil
JUDGMENT OF:	Levy SC DCJ
DECISION:	1. Verdict and judgment for the defendant; 2. I will hear the parties on the appropriate order for costs; 3. The exhibits may be returned; 4. Liberty to apply on 7 days notice if further orders are required.
CATCHWORDS:	**TORTS** – defamation – email resignation by employee distributed through employer's email server to co-employees and managers – defamatory content – hurt feelings – whether elements of the tort established – whether injury to reputation established – whether defences established; **DAMAGES** – assessment of damages for defamation; **COSTS** – application by plaintiff for costs against a non-party – former solicitor – procedural fairness requires notice and particulars
CATEGORY:	Principal judgment
LEGISLATION CITED:	Civil Procedure Act 2005, ss 62(1), 62(3) Defamation Act 2005, ss 20, 25, 26, 28, 30, 31, 33 Evidence Act 1995, ss 61(2), 62, 71 Uniform Civil Procedure Rules 2005, r 7.29
CASES CITED:	Bristow v Adams [2010] NSWDC 64 Chase v Newspapers Limited [2002] EWCA Civ 17 Cohen v Daily Telegraph Ltd [1968] 1 WLR 916 Dow Jones and Company Inc v Gutnick [2002] HCA 56; 210 CLR 57 Hepburn v TCN Channel Nine Pty Ltd (1983) 2 NSWLR 664 Maisel v Financial Times Limited [1915] 3 KB 336 Mirror Newspapers Ltd v Fitzpatrick (1984) 1 NSWLR 643 Roberts v Bass [2002] HCA 57; 212 CLR 1 Sims v Wran (1984) 1 NSWLR 317 State of NSW v Deren [1999] NSWCA 22 State of NSW v Riley [2003] NSWCA 208; (2003) 57 NSWLR 496
PARTIES:	Alan Bristow (Plaintiff)

	Tracy Adams (Defendant)
FILE NUMBER:	4259 of 2009 2009/337286
COUNSEL:	Mr B Goldsmith (Solicitor for the plaintiff until the close of evidence) Mr M Duncan (Counsel for the defendant for final submissions) Mr CA Evatt with Mr R Rasmussen (Counsel for the defendant)
SOLICITORS:	Barrie Goldsmith (Solicitor for the plaintiff until the close of evidence) Lyons and Lyons (Solicitor for the plaintiff for final submissions) Stacks Goudkamp (Solicitor for the defendant)

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JUDGMENT

Nature of case and background

1. The plaintiff, Alan Bristow, has brought these proceedings against the defendant Tracy Adams, a former co-employee at their former common place of work. The plaintiff was the defendant's former work supervisor. The defendant addressed her "*I Quit*" emailed letter of resignation to the plaintiff. It was also emailed to another manager in the company, and to two other branch offices of the company. As a consequence, by electronic means, that email was distributed to a number of other employees within the electronic communications network of the company, both in NSW and at the head office of the company in Queensland. The email in question contained remarks that were clearly disparaging of the plaintiff. The plaintiff claims that the email had defamed him.

2. The proceedings were the subject of an earlier interlocutory judgment. The claimed imputations were included in that judgment, which was published electronically as an internet-based legal resource : *Bristow v Adams* [2010] NSWDC 64, per Gibson DCJ. The plaintiff claims that a subsequent newspaper report of that judgment by a journalist writing in the Newcastle Herald on 30 April 2010, constituted a relevant republication. The plaintiff argued that such republication was a matter for which the defendant should be held responsible. It was agreed that the Newcastle Herald had a readership of about 130,000.

3. Unfortunately, for reasons that at present remain unclear, a mediation between the parties did not take place. That was contrary to an order to that effect made by the Defamation List Judge on 23 October 2009. This is a matter that will ultimately require consideration on the question of costs.

4. As part of his final submissions in this case, on behalf of the defendant, Mr Evatt submitted, somewhat delphically at first : "*This case brings defamation into disrepute*", on the assumption that as a tort, defamation had a reputation. He argued that the plaintiff's case was without merit and should never have been brought. On behalf of the defendant he conceded that the offending resignation letter "*was a strong but unfortunate email, but it was only sent to people at work … It's a back*

yarder – in this one a back yarder to end all back yarders – not even an attempt to prove injury to reputation".

5. He also submitted that no evidence had been adduced to indicate that the tort of defamation had been made out. He submitted that, as annoying as spats between employees and name-calling at work may be, defamation in the workplace is protected by the defence of common law qualified privilege. Those submissions were in contention. In order to properly understand those submissions it is necessary to refer to the facts disclosed by the evidence. Before doing so, I will refer to some procedural matters

Procedural matters

6. At the trial, which was estimated to take 5 days, the plaintiff was represented by his solicitor, Mr Barrie Goldsmith of Goldsmith Lawyers. Mr Goldsmith appeared as the solicitor advocate for the plaintiff. Mr CA Evatt appeared for the defendant with Mr R Rasmussen. The trial initially proceeded over the course of 4 days, between 7 and 10 June 2010, until the close of evidence, leaving final submissions outstanding.

7. During the course of the trial much time was taken up with procedural points, objections, applications, calls for documents and justificatory arguments concerning those matters.

8. At the conclusion of the evidence, due to tensions that had developed between the plaintiff and his solicitor, and owing to limitations on the availability of all concerned, the proceedings were stood over to 8 October 2010, for final addresses to proceed on that day, with a direction that the parties file and serve written submissions by 29 July 2010.

9. Some contentious inter-party communications had occurred in the meantime. This had the effect of casting doubt upon the workability of the agreed timetable for the orderly completion of the litigation. At the request of the defendant, based on the defendant's concerns of a procedural nature, the matter was re-listed for directions on 23 July 2010, at which time I vacated the earlier order I had made on 10 June 2010 for the plaintiff to file and serve his written submissions by 29 July 2010. Given the problems the parties ventilated, including the continued representation of

the plaintiff, I varied the orders and ordered that the plaintiff file and serve his written submissions by 27 August 2010, with liberty to apply on 3 calendar days notice if further orders were required. The plaintiff was present in court on 23 July 2010. At that time, no indication was given by Mr Goldsmith, who was also present, that a Notice of Ceasing to Act for the plaintiff had been filed by him.

10. Subsequent events revealed that on 20 July 2010, without the prior consent of the defendant, and without obtaining the prior leave of the Court as was required by UCPR r 7.29, Mr Goldsmith had filed a Notice of Ceasing to Act as solicitor for the plaintiff. Mr Goldsmith did not appear for the purpose of delivering his final submissions when the matter was listed on the scheduled resumption date of 8 October 2010. No written submissions had been received from Mr Goldsmith beforehand. Those circumstances were a matter of some complaint by the legal representatives of the defendant.

11. Notwithstanding these events, Mr M Duncan instructed by the plaintiff's new solicitors, Lyons & Lyons, appeared for the plaintiff on 8 October 2010, and made submissions on behalf of the plaintiff.

12. I shall return to these events at a later point in my reasons, to deal with matters of significance as to costs, as this was raised by the representatives of the parties.

Facts

13. The plaintiff and the defendant both worked for the company J Blackwood & Son Pty Ltd, which traded as Total Fasteners, in the Hunter Valley of NSW. The company was owned by Wesfarmers. The company had other branches in NSW and had its head office in Queensland. It had an internal internet communication network for the distribution of emails amongst its employees. The defendant was an accounts manager in the company and the plaintiff was her supervising manager. The defendant divided her work between the Cardiff and Muswellbrook offices of the company. The plaintiff had been employed by that company from April 1987. The defendant had been employed by the company from April 2008. There had been a history of workplace tensions between the defendant and the plaintiff.

14. Those tensions existed following the promotion of the plaintiff to the position of branch sales manager at the Muswellbrook branch of the company. There was no evidence that the plaintiff's promotion was the cause of those tensions.

15. Other than to record the fact of those tensions, it is not necessary to undertake any further analysis of the detail or the history of the tensions between the parties, or the rights and wrongs of such matters. It is enough to record that the defendant was sufficiently moved by the emotions that had been generated in the workplace by such tensions, to write an email letter of resignation, which she addressed directly to the plaintiff. That email was in the following terms:

> "Wednesday, 10th June 2009
>
> Alan Bristow
> Branch Sales Manager
> Total Fasteners
> Muswellbrook
>
> I hereby submit my resignation as Account manager at the Muswellbrook branch effectively giving four weeks notice as stated within my contract. My last working day being Wednesday 8th July, 2009.
>
> I have been absolutely guttered [sic] by your most recent attempts to bully me into leaving, and have decided to do so of my own accord.
>
> Imagine how I felt when I discovered that for months you and Mr Lange have been discussing that there was no real need for me, and to watch as yourself, John and Peter divided up my 05 territory under the pretence that you're helping me.
>
> To ask Liz and Thom to cover my regular hours, and to inquire if "is she fearing for her job yet" was belittling and unprofessional. But the icing on the cake was to be informed by a Bullivants staff member that I am not suppose to know yet, that its me being let go at the end of the month was quiet [sic] blatantly just cruel. I have had to put up with your name calling, bulling [sic], lack of trust and lack of support long enough.
>
> We have even had to let management know about your lying, laziness and theft as well as your ability to use your position as a paid vacation.
>
> But to discover that you have been using me until all your plans are in place, so you can finish me off, just proves how right we were in regards to your inability to be a manager. I consider your management skills to be unprofessional and immature. You are a person who is untrustworthy and cunning by nature.
>
> I can't understand why Total Fasteners would choose to loose [sic] a competent and reliable employee, to keep a so called manager of questionable and dishonest character. We have watched this business go down hill since the day you took over as manager and as management will surely find out it was not me harming this business but the person they have chosen to keep in charge.
>
> I would hope that you all listen to this letter and when things continue to get progressively worse, you might finally realise that it was not the Muswellbrook staff,

but the lack of management which is resulting in customers leaving for a better quality of service.

So Alan, I hope that you have a nice holiday until the branch finally has to shut and thankyou for ensuring I will always remember my time with Total Fasteners for all the wrong reasons. Oh and before I forget, I will see you out on the road. As my new position in Management will still allow me to see and service my current customers but with a logo on my shirt that I believe and trust in ……

Regards

Tracy Adams
Accounts Manager
Total Fasteners
Muswellbrook"

16. In the circumstances set out in her letter of resignation it is difficult to discern what the defendant truly meant to convey by her use of the sign-off word "*Regards*".

17. Although the defendant's resignation letter was addressed to the plaintiff, it had also been addressed and sent to the human resources manager in the company, Ms Sarah Bosco. It had also been sent to other offices of the company, as was identified in the printed version of the email, which included the Newcastle, Muswellbrook and Queensland offices.

18. On 10 June 2009, the defendant's employment with the company ceased when she resigned. Subsequently, the plaintiff ceased his employment with the company on 12 April 2010, at which time he left Total Fasteners to work with another large company, also in a managerial role. The evidence does not suggest that the plaintiff changed his employment as a result of the plaintiff's email.

19. The plaintiff gave oral evidence in which he denied the factual basis of the assertions contained in the defendant's emailed resignation letter. I will consider his denials in further detail when dealing with the defences raised by the defendant.

20. In his oral evidence, the plaintiff stated, and I accept, that he felt upset and appalled when he read what the defendant had written about him. I accept that he considered the defendant's email to be a spiteful and a hurtful parting shot at him. I also accept that he felt disgusted at these events, especially since the sending of the email coincided with his 40th birthday, and because ever since, he has felt nauseated and depressed at the thought of the content of that email, and the effect that he feels the email has had upon him.

21. The plaintiff's wife, Mrs Vicki Bristow gave evidence confirming the content of her tendered written statement. She described the stress the litigation had caused to the plaintiff and to herself. She stated that she thought the allegations about the plaintiff as contained in the defendant's emailed letter of resignation were untrue. Her evidence described her knowledge of the plaintiff as a patient, tolerant and understanding person, who just got on with his work. That evidence was given from her vantage point of also having worked at Total Fasteners. She described the plaintiff's reaction to reading the email. She recounted that he had been angry and upset, and had described it as comprising lies. She also recounted his ongoing feelings of distress and nausea, which he recounted to her as being regular occurrences since receiving the email in question. I accept Mrs Bristow's evidence without question, on the limited question of the effect the allegations had on the plaintiff. Her opinions on the truth or otherwise of the allegations is not a relevant matter that I can take into account.

22. Mr John Schaeffer, one of the plaintiff's work colleagues was called to give evidence in the plaintiff's case. He described the plaintiff's reaction of anger and concern "*because everyone in the place had got the email*". I took that evidence to mean that according to his own knowledge, Mr Schaeffer knew that other work colleagues of the plaintiff had read the email in question. Mr Schaeffer said that he did not believe the adverse comments made in the defendant's email were true.

23. The plaintiff also tendered a statement from Mrs Elizabeth Wallis, a purchasing officer employed within the administration of Total Fasteners. Mrs Wallis also gave oral evidence. She stated that she had known the plaintiff since about November 2008, and generally, had experienced no problems with his management style. She stated that whilst she did not always agree with some of his decisions, she had no particular concerns, and enjoyed working with him as she found him to be a dedicated and professional person.

24. Mrs Wallis also gave evidence of her working relationship with the defendant. She stated that at times she found the defendant to be aggressive and unreasonable, including displaying conduct that she personally found to be menacing and erratic, and from time to time, quite manipulative. She stated that it was her understanding that the defendant suffered from some form of thyroid disorder.

25. Mrs Wallis described how the defendant had requested her to assist her by typing the email in question because of the defendant's own dyslexia. Although Mrs Wallis found the defendant's complaints about the plaintiff troubling and annoying, she decided to assist with the typing of the email, with the defendant dictating the text from notes.

26. Whilst Mrs Wallis did not agree with most of the content of the defendant's email, she decided not to intervene because she thought that ultimately, it would be helpful overall in the sense, that a meeting between senior management and parties would be arranged, which she thought would stop the defendant's ongoing complaints. The evidence of Mrs Wallis was also directed at some of the matters raised by the pleaded defences. I will refer to the relevant aspects of her evidence when dealing with those defences. In the meantime, I record my finding that I accept the evidence of Mrs Wallis as outlined above.

27. In the defendant's case, evidence was given by Mr Thomas Kane, who was a junior member of the staff at Total Fasteners. Mr Kane stated that although he was aware that there were some differences and arguments between the plaintiff and the defendant in the workplace, he tried to keep to himself, and he tried to keep out of any such disputes. In his statement of evidence, at paragraphs 15-17, he sought to suggest that the plaintiff had undertaken some petty harassment of the defendant by attaching labels with names to her stapler, in her absence.

28. When the basis of that evidence is considered and analysed, it becomes clear that Mr Kane had based that evidence on assumptions, and I therefore have no need to further analyse or to reconcile that evidence in the absence of other direct foundation evidence. I regarded the evidence given by Mr Kane on the basis of unproven assumptions to be an appropriate basis for preferring the reliability of the evidence of the plaintiff to that given by Mr Kane on the question of workplace issues, and matters relating to the defences relied upon by the defendant in these proceedings.

29. The defendant did not give any evidence, but in her case, a typed letter that she had received from the plaintiff was tendered. That letter was dated 1 June 2010, which was almost a year after the defendant's letter of resignation, and just a few days

before the trial of these proceedings was due to commence. The letter was in the following terms:

> "Tracy Adams
>
> 1 June 2010
>
> Dear Tracy
>
> I have been told by my solicitor that if I am going to write to you then my letter should be without prejudice so please treat this as a without prejudice letter.
>
> As you know, the trial of my claim is due to start next Monday. Vikki and I have been baffled from the very beginning why you have wanted to defend this claim. So far, we have paid our lawyers in excess of $50,000. That covers their work so far and we will have to pay their further costs to cover the trial.
>
> If the trial lasts 5 days and then there are written submissions (which I am told will likely be needed) then we will probably incur another $30,000 or so in costs.
>
> That means that our total costs for this case will be about $80,000. I am told by my solicitor that that is about the average cost for a 5 day defamation trial.
>
> If I succeed, then say I recover damages, as an example, of $50,000, that means you will have to pay a total amount to me of about $130,000. In addition, you have your own legal costs to pay. I know you have a Barrister so for arguments sake, I will assume you will have to pay legal costs of at least $50,000.
>
> That means that your total exposure to this case is about $180,000. Needless to say, I am confident that I will win and my confidence is reflected by the large amount of costs I have paid to my lawyers.
>
> As I have said, Vikki and I have been baffled why you want to defend this. Even if you win, you lose because even if you win (and I do not for one minute believe that you will) you will not be able to recover all of your costs, you will only recover a percentage. That means that you will have to pay the difference even if you win the case. In my case, if I win, I am advised that I will likely be able to recover all of my costs from you because you failed to make a reasonable offer after I served the concerns notice.
>
> Tracy, it is entirely a matter for you as to what you want to do. Vikki and I are just startled that you would want to defend this case and risk your house. My lawyers raised this with yours at the beginning and at one time it looked like the case would settled. It didn't over $5,000 and both myself and my lawyer believe that it didn't because of bad advice from your solicitor and his desire to simply drag you in to very expensive litigation.
>
>
>
> For me it just simply does not make sense that you would want to defend the case and risk your house. Your lawyer said that your house was safe because it is in joint names. I am told that that advice is simply wrong and when I succeed against you, if you do not pay everything you are ordered to pay, I will bankrupt you and your trustee in bankruptcy can then take your share of the house. You cannot avoid that even if you transfer your share to your husband (and you will need to pay stamp duty) because of new legislation.

> Tracy, I have never wanted this costly litigation against you. Vikki and I have had to take out a loan against the house to pay our legal costs. You can imagine that we are not very happy about that but it is something we have had to do. An apology, payment of some small damages and payment of my legal costs at the beginning would have resolved all of this. Now, based on my figures, you are running a risk for about $130,000. It just does not make sense.
>
> I will be proceeding with the trial. My lawyers are prepared, we have witness statements. It is entirely a matter for you but you really may wish to reconsider your position and before 5 hearing days' costs are incurred as well as further costs for preparation.
>
> This letter is written with good intentions because Vikki and I simply cannot understand why you want to risk so much on a case that you will not win, and which does not even benefit you even if you do win.
>
> Yours sincerely
>
> Alan Bristow"

30. Although the above letter stated that it "*should be without prejudice*", after hearing legal argument on the point, I ruled the letter was admissible given the circumstances of its despatch, its content and the matters raised in evidence that touched upon it. The letter was marked Exhibit "J".

31. I am left in no doubt that the letter sent to the defendant had been prepared by the plaintiff's then solicitor, Mr Goldsmith. I have inferred this from the word processing footer code embedded in the letter in the following terms : "X:\YELLOW09\0910899\Adamsem.doc". This bears a striking similarity to the word processing codes embedded in other correspondence from Mr Goldsmith in the proceedings. This compels me to the view that Mr Goldsmith prepared the letter for the plaintiff to send to the defendant. It had been sent with a self-evident objective, namely, to seek to induce the defendant into settling the litigation. Obviously, the letter failed to achieve that objective.

32. Apart from the letter revealing the potential for ordinary working people to face ruinous expense as a consequence of involvement in defamation litigation, the letter also reveals a number of other salient features that have some bearing on the issues in the litigation. I shall return to this topic in due course in my evaluation of the defences.

Imputations claimed and defences raised

33. There is no question that the email was published to persons other than the plaintiff. The ultimate question is whether the plaintiff was defamed by the publication of the email. That question requires not only a consideration of the claimed imputations conveyed, but also a consideration of the defences relied upon by the defendant.

34. By his further amended statement of claim, the plaintiff claimed that the ordinary and natural meaning of the matters complained of, being the published email, carried the following imputations that were defamatory of him:

A. He was a bully;

B. He had conspired with others to dishonestly obtain the benefit of the plaintiff's sales territory;

C. As a manager he was unprofessional;

D. He was a liar;

E. He was a thief;

F. He was not suitable for the position of manager;

G. He was dishonest;

H. The employer's business had deteriorated as a result of the failings of the plaintiff.

35. The plaintiff claimed that the defendant had acted with malice in publishing the emails, knowing and believing the allegations within them to be false. The plaintiff claimed that the timing of the publication by the defendant, to coincide with her resignation, was malicious, and was intended to humiliate and demean him. As a consequence of these events, the plaintiff seeks aggravated damages.

36. The plaintiff also complains that the natural and probable consequence of the publication of the email in question was that there was a republication of the imputations in the Newcastle Herald Newspaper on 30 April 2010, following the interlocutory judgment in this matter on 28 April 2010.

37. By her amended defence, the defendant initially denied that the matters complained of, conveyed or were capable of conveying, the pleaded imputation. Initially, she also denied that the imputations claimed to arise were conveyed by the letter in question, or that they were defamatory or capable of being defamatory of the plaintiff. She also denied that there was a republication as claimed, or that it had occurred as a natural and probable consequence of the publication and matter complained of.

38. Subsequent events served to moderate the initial stance of the defendant. On the second day of the trial, counsel for the defendant conceded that all of the claimed imputations except for imputation H, were defamatory, if it was found that they had been conveyed.

39. The defendant also relied upon alternative defences, which asserted that the circumstances of the publication were trivial, and were such that the plaintiff was unlikely to sustain harm. The defendant also raised defences claiming truth, contextual truth and qualified privilege, both at common law and pursuant to s 30 of the *Defamation Act* 2005. There were further defences raised concerning fair comment, and the expressions of opinion relating to matters of public interest.

40. The plaintiff relied upon a pleaded reply, which denied the applicability of qualified privilege, denied the recipients of the email in question had a relevant interest in receiving the communication complained of, and asserted unreasonable conduct on the part of the defendant in publishing the email in question.

41. The reply also re-asserted malice on the part of the defendant, by which it was alleged she had spitefully intended that the plaintiff be hurt by the matters published. By his reply, the plaintiff did not concede that the publication constituted an expression of opinion, and instead asserted it purported to contain statements of fact asserted by the defendant and which referred to him. The reply also asserted that the published material did not relate to a matter of public interest, and maintained that

the opinion matter within the publication was not based on proper material that justified the position asserted by the defendant.

Consideration of whether the imputations were conveyed

42. Each of these issues requires consideration. In view of the ultimate concession made by counsel for the defendant with regard to the claimed imputations, with the exception of imputation H, it is no longer necessary for me to consider whether the imputations are defamatory. It remains necessary to determine whether the matters complained of were conveyed.

Claimed imputation A – the plaintiff was a bully

43. I find the email in question conveyed the imputation that the plaintiff was a bully. This finding is based upon the content of the second paragraph of the email, which refers to alleged earlier attempts by the plaintiff at bullying the defendant, which the defendant asserted made her feel "*guttered*", which I take to be a reference to a claim that the defendant became upset as a result of the plaintiff's behaviour towards her in the workplace. In my view the paragraph conveys the imputation that the plaintiff was a bully.

Claimed imputation B – conspiracy to dishonestly obtain a benefit

44. I find the email in question conveyed the imputation that the plaintiff dishonestly conspired with others, including a colleague of the defendant to obtain for himself, the benefit of the defendant's sales area. I have drawn this conclusion from the third paragraph of the email, in which the defendant described feeling discomforted by the realisation that her work territory was divided amongst others, to her detriment, under the pretence that she was being helped. In my view, in the context, the assertion of "*pretence*" carries with it the meaning of dishonest intent. The reference to that "*pretence*" being maintained in concert with another employee sustains the proposition that the imputation of a "*conspiracy*" between the two employees was conveyed by the email.

Claimed imputation C – as a manager the plaintiff was unprofessional

45. I find the email in question conveyed the imputation that as a manager, the plaintiff was unprofessional. I have come to this conclusion because, in the fourth paragraph of the email, the defendant used the word "*unprofessional*" in connection with workplace communications by the plaintiff that referred to the defendant, the security of the defendant's employment and the need for her at work. It is plainly unprofessional for a manager to have adverse communications of that kind about an employee with other employees without the knowledge of the person affected by such adverse comments, especially where the affected employee has no notice of the nature of that adverse commentary or that the continuity of her employment might be at risk. In my view the imputation that the plaintiff was, as a manager, unprofessional, is conveyed.

Claimed imputation D - the plaintiff was a liar

46. I find the email in question conveyed the imputation that the plaintiff was a liar. In my view that imputation clearly arises from the fifth paragraph of the email, where the defendant, in reference to the plaintiff, used the expression "*your lying*. In my view the imputation that the plaintiff was a liar, is conveyed.

Claimed imputation E – the plaintiff was a thief

47. I find the email in question conveyed the imputation that the plaintiff was a thief. That imputation clearly arises from the fifth paragraph of the email, where the defendant makes reference to alleged "*theft*" by the plaintiff. As a consequence, the imputation that the plaintiff was a thief, is conveyed.

Claimed imputation F – the plaintiff was not suitable for the position of manager

48. I find the email in question conveyed the imputation that the plaintiff was not suitable for the position of manager. In my view that imputation clearly arises from the sixth paragraph of the email, where the defendant referred to the plaintiff's "*inability*" as a manager, and where the plaintiff was accused of being "*unprofessional and immature*", which is clearly not a description of attributes that connote suitability for a management position. The imputation also arises from the

eighth paragraph, there the defendant makes assertions about the Muswellbrook office of the company being affected by "*the lack of management*", in the context of the plaintiff being a manager of that office. In my view, the imputation that the plaintiff was unsuitable as a manager, is conveyed.

Claimed imputation G – the plaintiff was dishonest

49. I find the email in question conveyed the imputation that the plaintiff was dishonest. In my view that imputation clearly arises from the sixth paragraph of the email, where the defendant made adverse comments of the plaintiff being "*untrustworthy and cunning by nature*", which clearly conveys dishonesty. In my view the imputation that the plaintiff was dishonest, is conveyed.

Claimed imputation H – employer's business deteriorated as a result of plaintiff's failings

50. The plaintiff has accepted the defendant's submission that the claimed imputation of deterioration in the employer's business, due to alleged failings on the plaintiff's part, is not defamatory. It is therefore unnecessary to further consider this component of the claim, other than for the purpose of noting that it is no longer relevant.

Publication

51. I conclude that although no direct evidence was called to show how many people had read the defendant's email in question, or how many people were likely to have read it, in my view the inference reasonably arises from Mr Schaeffer's evidence, and from the form and content of the printed version of the email, that other employees in the company who had access to company email accounts and computers, would most likely have also read the email. This leads me to conclude that the email was relevantly published. That was certainly the intention of the defendant, there could be no other sensible explanation for the defendant referring to "*you all listen*" in the eighth paragraph of her letter. It was clearly intended to be sent to others in the company, and not just the plaintiff.

52. I am satisfied that the defendant relevantly published the email in question. In this regard, I accept the evidence of Mr Schaeffer, which was to the effect that he had read the email after he had received it.

53. Mr Schaeffer had read the email after accessing it on the company email system. He did so even though it had not been addressed or directed to him. This had occurred because of the way the email system was configured. I infer from this combination of facts that the email had been relevantly published within the email system of the company and to other employees. I infer from the instance of Mr Schaeffer reading the email, that it was most probable that a significant number of other employees of the company would also have read the email.

54. I accept Mr Schaeffer's evidence to the effect that "*everyone*" in the Cardiff office of the company had read the email. The defendant submitted that evidence was hearsay, and little weight should be attached to it. Whilst Mr Schaeffer's use of the word "*everyone*" may have involved a degree of hyperbole, I consider that he was able to observe what he described, and it was not inherently improbable that he would have had such a perception. I infer from his evidence that he was in a position to have observed others read the email, and therefore acquire such a perception. Accordingly, I consider that Mr Schaeffer's evidence was admissible as a representation of his knowledge as to what he saw, heard or otherwise perceived as to who had read the email so as to prove publication : ss 61(2) and 62 of the *Evidence Act* 1995.

55. Further, at least insofar as the publication of the email to Sarah Bosco was concerned, there are legitimate exceptions to the operation of the hearsay rule with regard to electronic communications: s 71 of the *Evidence Act* 1995. In my view, that exception also applies to this case to prove publication.

Malice

56. The plaintiff claims that the defendant acted out of malice, or spite, in sending the email, and by publishing it in its ultimate distribution within the email system of the company so that the other employees would "*all listen*" to her parting shot at the plaintiff. Although the defendant did not give evidence in the proceedings, for the

reasons that follow, I am persuaded that she sent the email with more than just ill will, but also improper motive towards the plaintiff.

57. The defendant's ill will towards the plaintiff was obviously generated by the history of the workplace tensions that had subsisted between the parties. The form and content of the email persuades me that the defendant had crafted her remarks carefully rather than recklessly. I am persuaded to that view because of the degree of premeditation that accompanied the email. In this regard, not only did the defendant prepare notes for the email, and then dictate them, indicating the content of the email was not as a result of some spur of the moment or fleeting decision, but she also ensured that the email was disseminated widely amongst the branches of the company, making it highly probable that it would have a wide readership amongst the plaintiff's colleagues.

58. Something more than just the existence of ill will must be shown for a finding of malice to be made: *Roberts v Bass* [2002] HCA 57; 212 CLR 1, per Gaudron, McHugh and Gummow JJ at [76].

59. In my view, what the defendant did in this instance, metaphorically speaking, was to not only simply let off some steam she had developed with regard to workplace grievances she had harboured against the plaintiff. She also went a step further and ensured that her crafted written criticisms of the plaintiff would be published or disseminated widely to managers and work colleagues in the company where the plaintiff worked. I conclude from the circumstances that the defendant did so with the intention of causing the plaintiff to suffer harm to his reputation in the eyes of his employer and his colleagues, and to harm his prospects for continued employment with that employer. In my view, that course of conduct on her part, demonstrated an improper motive.

60. Accordingly, I consider that one of the factors or necessary ingredients to establish malice, namely the improper motive of intending to cause the plaintiff to suffer harm, has been demonstrated. In my view there is no other plausible rational explanation for the defendant sending such an email about the plaintiff to work colleagues in a distribution that went way beyond the plaintiff's immediate supervisors or managers. In my view this demonstrates not only proof of ill will on the part of the defendant towards the plaintiff, but also demonstrates that the

defendant was actuated by an improper motive, which is a sufficient basis for a finding of malice: *Roberts v Bass,* at [76].

61. In coming to that view I am mindful of the high onus on the plaintiff to overcome the presumption of honest belief that the defendant believed the content of the email was true: *Roberts v Bass,* at [96]-[97], [104].

62. In my view, evidence of the lack of honest belief on the part of the defendant is provided by the lack of particularisation of the bullying allegation, the resort to the plural in the fifth paragraph of the email by which the defendant sought to imply that other members of staff shared her views of the plaintiff concerning his alleged "*lying, laziness and theft*", again, without particularity, and asserting the plaintiff had inabilities as a manager, also without particularity. Further, the slur on the plaintiff of "*questionable and dishonest character*" was snide and unsubstantiated by particularised facts. In addition, the assertion of harm to the employer's business was a serious and unsubstantiated allegation. No identified loss of custom as asserted was identified.

63. In my view, the manner in which the defendant juxtaposed these unparticularised allegations together in the context and distribution of her email, heavily and compellingly tips the scales in favour of the conclusion that she was actuated by improper motive, and was therefore activated by malice. If the defendant was simply wishing to indicate her intention to resign and to give her contractual notice, she could simply have just said so without more, and without launching the tirade of criticisms she included about the plaintiff in her email. In my view the inclusion of the criticisms demonstrates them to be the dominant purpose of her email, thus confirming the existence of malice on her part: *Roberts v Bass* at [104].

64. The specificity, range and unparticularised extent of the defendant's tirade against the plaintiff reveals it to go well beyond any mere carelessness of expression, thus further confirming an indicia of malice: *Roberts v Bass,* at [103].

65. The contrary view, namely simply letting off steam, albeit with ill will, but with an honest belief of truth, just does not ring true. If the defendant was truly concerned about the plaintiff's shortcomings on the matters she identified in her email, she would have particularised them and /or spoken to someone in authority about them

in a constructive way. I am comfortably satisfied that the publication of the defendant's email was actuated by malice. In my view the matters I have identified, overwhelmingly displaces any presumption that the defendant's actions proceeded according to a presumed honest belief on her part.

66. I do not accept the defendant's submission that the plaintiff has provided insufficient particulars of malice. In my view the nature of the malice is self-evident in the email. In the circumstances where the defendant knew where the email had been sent by her, and having sent it without particularising the criticisms she made, it cannot be reasonably said that the defendant was not appraised of the facts, matters and circumstances to know the case she was required to meet on the issue of malice. As such, in my view, any claimed irregularity of pleading of express malice in the pleaded reply filed on behalf of the plaintiff does not nullify the position or the entitlement of the plaintiff to rely upon express malice: ss 62(1) and 62(3) of the *Civil Procedure Act* 2005.

67. I am satisfied that the defendant's email demonstrated high-handed action aimed at humiliating the plaintiff, and as such, it transcended any ordinary human fallibility, thus giving rise to an entitlement for aggravated damages : *State of NSW v Riley* [2003] NSWCA 208; (2003) 57 NSWLR 496, per Hodgson JA at [131]. If the plaintiff were entitled to an award of damages, in my view such an award should also include a component for aggravated damages.

Republication assertion

68. On 28 April 2010, orders were made in these proceedings rejecting an application by the defendant for the trial of this case to take place with a jury: *Bristow v Adams* [2010] NSWDC 64, Gibson DCJ, at [1]-[12]. Paragraph [2] of that decision recited the imputations that were raised for decision in this case. Although there is no evidence as to when that decision was posted for publication on the NSW Caselaw website, the decision was, from the time it was delivered, available for public review and comment, including by the public and by various organs of the media. As a result of these events, on 30 April 2010, on page 5 of the Newcastle Herald, an article appeared that made reference to that judgment, as well as to the parties and to the imputations with which these proceedings are concerned.

69. The plaintiff submitted that event constituted a relevant republication for which the defendant should be held liable in these proceedings.

70. There are circumstances where a media report of statements can constitute a relevant republication: *Hepburn v TCN Channel Nine Pty Ltd* (1983) 2 NSWLR 664 and *Sims v Wran* (1984) 1 NSWLR 317.

71. However, actionable republication does not occur when the media report simply provides a fair and accurate report or comment on a judgment delivered by a court. This principle is compelling, and is one for which the plaintiff has no answer in this case. I therefore reject as fanciful, the claim that there was an actionable republication in the Newcastle Herald on 30 April 2010. I do so because I consider that article constituted a fair and accurate report of the judgment of a court.

Was the plaintiff defamed?

72. The ultimate question that arises is whether the tort of defamation has been perfected on the evidence adduced. The plaintiff submitted that the plaintiff's cause of action was perfected on the evidence of Mr Schaeffer, which proved publication. The defendant submitted that for the tort to be established, the plaintiff must prove that relevant harm had been incurred. In this regard, reliance was placed upon the decision of the High Court in *Dow Jones and Company Inc v Gutnick* [2002] HCA 56; 210 CLR 57, where at [26], it was stated:

> "Harm to reputation is done when a defamatory publication is comprehended by the reader, the listener, or the observer. Until then, no harm is done by it. This being so it would be wrong to treat publication as if it were a unilateral act on the part of the publisher alone. It is not. It is a bilateral act - in which the publisher makes it available and a third party has it available for his or her comprehension."

73. Mr Schaeffer gave evidence to the effect that the email did not cause him to think ill of the plaintiff because he did not believe the allegations the defendant had made against the plaintiff in the email.

74. The defendant submitted that since Mr Schaeffer did not believe the adverse assertions and comments made in the email as they referred to the plaintiff, it must follow that the plaintiff has not proven that he has suffered any relevant harm to his

reputation, because there was no relevant evidence of a comprehension of harm : *Dow Jones*, at [26].

75. In this regard, it was submitted that the plaintiff has failed to establish by permissible hearsay, including calling evidence consisting of out of court declarations by persons not called as witnesses, that he had been approached and told by such persons that they had read the defamatory material, and that they had then vented their feelings about it, or about him, to suggest that his reputation had become harmed by identifying him with the defamation : *Mirror Newspapers Ltd v Fitzpatrick* (1984) 1 NSWLR 643, at 656, per Samuels JA.

76. I consider that there is force in that submission and I accept it. I have not been referred to any authority to the contrary. The consequence of the acceptance of that submission is that the plaintiff's case must fail, as an essential ingredient of the tort has not been established.

Defences

77. Although I have concluded that the plaintiff's case should not succeed because of the absence of proof of any harm to his reputation, for completeness I shall briefly review the other substantive defences. I do so in accordance with convention, to allow for the possibility of a successful appeal from that finding. I propose to deal with the remaining defences, but in a shorter form than would have been the case if the plaintiff had proven that he had suffered relevant harm. The remaining defences relied upon are truth, contextual truth, qualified privilege, honest opinion, fair comment concerning the expressions of opinion relating to matters of public interest in a public document, and a claim of no harm or triviality.

Truth assertion

78. A potential defence of truth arises pursuant to s 25 of the *Defamation Act* 2005. The onus is on the defendant to establish that defence. The defendant did not give any evidence. There was no suggestion that she was obliged to do so. The evidence which was tendered, and that which was obtained from the plaintiff by way of answers to questions in cross-examination, in my view fell far short of justifying any of the imputations that were conveyed. Each such imputation requires review.

A – bully assertion

79. In my view, there was no evidence which justified a defence of truth of the claimed imputation the plaintiff was a bully. The evidence of Mr Kane and Mrs Wallis does not sustain that assertion, and the evidence of the plaintiff rebuts it. I accept that rebuttal. The closest the defendant gets to sustaining the bully assertion is the fact of, and the content of, the plaintiff's letter to the defendant dated 1 June 2010 which was sent in the lead-up to the trial, and which I have cited at paragraph [29] of these reasons.

80. Whilst the letter dated 1 June 2010 is expressed in strong and assertive terms, and foreshadows possible bankruptcy and the possible loss of her home as a consequence of the defendant suffering a judgment against her, I consider it falls into a special exclusionary category. I find it was sent on the advice of the plaintiff's solicitor at the time, Mr Goldsmith. It was aimed at resolving the litigation. In that sense, any element of bullying that might be thought to arise from within that letter lacks a temporal connection with any workplace behaviour of the plaintiff, which was the gravamen of the defendant's gripe about the plaintiff. I find that the plaintiff's actions in placing a nickname label on the defendant's desktop stapler to be a harmless workplace prank, for which the defendant apparently reacted out of proportion to the event. It did not constitute bullying. Accordingly, I reject the defence of truth with regard to the claimed imputation the plaintiff was a bully.

B – dishonest conspiracy assertion

81. In my view, there was nothing in the evidence that sustained the imputation that the plaintiff had conspired with others to take over the defendant's sales territory, dishonestly or otherwise. I reject the defence of truth regarding the assertion in the imputation that the plaintiff dishonesty conspired, as alleged.

C – unprofessional as a manager assertion

82. In my view, there was nothing in the evidence that sustained the imputation that the plaintiff was unprofessional in his conduct as a manager. At best, the defendant seeks to draw inferences from the flimsiest of material in an attempt to sustain that

imputation. The employment and disciplinary records of the company that the defendant relies upon, without more, do not support or prove the assertion that the plaintiff was unprofessional as a manager. I consider that internal managerial banter relied upon by the defendant from within the internal company communications concerning the plaintiff after he had tendered his own resignation to be simply poorly framed or expressed humour, and unproven gossip. Without explanatory evidence I do not consider the suggestion the plaintiff was going to be sacked if he had not resigned should be taken to be probative of that fact, given the context of the light-hearted emails that followed the plaintiff giving his notice to his employer. That material does sustain a truth defence, as is sought here.

D – liar assertion

83. The defendant sought to prove the imputation that asserted the plaintiff to be a liar. The defendant sought to do so by comparing passages in the plaintiff's evidence. The plaintiff denied the proposition put to him that he was a liar. In my view the examples employed by the defendant to seek to establish the truth of the imputations were contrived, and unreasonably distorted the true effect of the evidence in question.

84. In answers to cross-examination, the plaintiff denied that he had threatened to make the defendant bankrupt. He was taken to his letter that comprised Exhibit "J" in which the potential remedy in bankruptcy was foreshadowed. When the context and content of the whole of that letter is taken into account, including the fact that the letter was drafted by a solicitor in the course of litigation, together with the lack of particularity of the "*liar*" question, I do not consider that the comparison sought to be drawn, demonstrates the truth of the proposition that the plaintiff is a liar.

85. The defendant sought to elevate the evidence of the plaintiff taking bags of cement from his employer and his evidence of paying for them a second time, when he could not find the receipt for the first payment, as evidence of the plaintiff being a liar. I accept the plaintiff's explanation of not finding the receipts as reasonable, and in the absence of contradictory evidence, I decline to draw the inference sought by the defendant. This is so particularly since there were no subpoenaed business records identified that could possibly have thrown light on such matters.

86. Similarly, I consider the defendant's attempt to sustain the liar assertion based on the evidence that the plaintiff had borrowed fans from his employer, as an unreasonable characterisation of the events. The plaintiff stated he borrowed the fans with the intention of using them and then paying for them. In my view, that was not necessarily an inherently unreasonable thing for a person in a managerial position to do, although onlookers may have formed a different view, for example, Mrs Wallis. I considered the defendant's attempt to impute turpitude to the plaintiff over that issue, failed to demonstrate the plaintiff to be a liar.

87. I reject the submission made by the defendant to the effect that the plaintiff repeatedly lied to the court. I am reinforced in that rejection by the failure of the defendant to call any positive evidence at all on such matters, preferring instead to seek to impute or infer such a conclusion.

E – thief assertion

88. The defendant sought to establish the truth of the imputation that the plaintiff was a thief by drawing attention to the plaintiff's regular use of money in the amounts of $10 and $20 from the till in order to purchase refreshments for employees, that is, for the amenity of the staff. The oral evidence of Mrs Wallis confirmed that from time to time sums of minimal value were taken from petty cash for morning tea and other items that benefited the workers at the Muswellbrook office of the company. Whilst there was evidence that ultimately, the employer determined that this was an unacceptable practice, and one for which the plaintiff was warned he should discontinue, in my view it unreasonably stretches credulity to elevate that matter to constitute justification of an assertion the plaintiff was a thief.

89. In my view, in the context of the cross-examination, the plaintiff's agreement in principle with the proposition that on subsequent reflection, taking money to which he was not entitled was dishonest, did not amount to a concession that he was a thief. To sustain an allegation that the plaintiff was a thief the defendant had to show the plaintiff took money with the requisite intent, that is, at the time the money was taken, and not as a hindsight reflection. In my view, it was to the plaintiff's credit that he acknowledged the force of the question, but that did not prove he was a thief. The use of the till money for amenities appeared to be a management practice issue,

and not theft by the plaintiff, as alleged by the defendant. In my view the defendant's construction of events to the contrary effect should be rejected.

F – not suitable for position of manager assertion

90. I have declined to strike out as rhetorical, the claimed imputation the plaintiff was not suitable for the position of manager. I have found the imputation arises directly from the defendant's choice of words in the sixth paragraph of her email letter of resignation. No evidence has been called to sustain the truth of that imputation.

G – dishonesty assertion

91. The defendant argued that because all thieves are dishonest, and because the plaintiff "*misappropriated money*", it therefore follows the imputation he was dishonest has been shown to be true. That argument invoked the same evidence and arguments as for imputation E, in which the assertion was made that the plaintiff was a thief. For the same reasons that I have identified in my rejection of the truth defence in connection with imputation E, I also reject the truth of the assertion that the plaintiff was dishonest.

H – deterioration of the employer's business assertion

92. The claimed imputation that the employer's business had deteriorated as a result of alleged failures of the plaintiff was no longer pressed. The defendant nevertheless devoted 3 paragraphs of its written submissions to this non-issue at pp 17-18 of her written submissions. I do not need to give further consideration to a truth defence directed at an imputation that I was informed had been abandoned during the trial.

Claim of truth based on after acquired knowledge – rule in Maisel's case

93. On 21 June 2010, after the close of the evidence, a letter was written to the defendant on behalf of the plaintiff by the plaintiff's then solicitor, Mr Goldsmith. In that letter, a statement was made to the effect that unless the defendant could provide reasons for not doing so, the instructions of the plaintiff were to refer the defendant to the police over an alleged perjury. Although a copy of the letter dated 21 June

2010 was appended to Mr Evatt's written submissions, the letter itself did not form any part of the evidence in these proceedings.

94. The purported perjury referred to in that letter related to an affidavit sworn by the defendant in connection with answers to interrogatories, which was also not in evidence in the proceedings. The defendant submitted that the letter in question could be used by her in these proceedings to establish the truth of the assertion that the plaintiff is someone who engages in "*bullying and intimidation*".

95. In support of that proposition reference was made to the decisions in *Maisel v Financial Times Limited* [1915] 3 KB 336 and *State of NSW v Deren* [1999] NSWCA 22, per Priestley JA at [96].

96. The rule in *Maisel* was considered in *Chase v Newspapers Limited* [2002] EWCA Civ 17, where at [53], Brooke LJ stated:

> "53. There has for a long time been a rule that if a publication contains general aspersions on a claimant's character, a plea of justification may include reliance on subsequent events if they happen within a reasonable time from the date of publication (see *Maisel v Financial Times Ltd* [1915] 3 KB 336). This rule was vividly restated by Lord Denning MR in *Cohen v Daily Telegraph Ltd* [1968] 1 WLR 916, 919F-G:
>
> > '… if a libel accuses a man of being a 'scoundrel', the particulars of justification can include facts which show him to be a scoundrel, whether they occurred before or after the publication.' "

97. In *Chase*, it was also stated that the admissibility of subsequent events in support of a plea of justification must depend upon the nature of the defamation and the nature of the subsequent acts: per Brooke LJ, at [54].

98. In my view the rule in *Maisel* has no relevance in the circumstances of this case, other than to reinforce the need for any application of the rule to be dependent upon evidence. In this case, in connection with the letter dated 21 June 2010, the consideration does not get to first base, because the letter sought to be relied upon was not in evidence in the proceedings. It does not get to second base either, because of the disconnection in time between the defamatory email dated 10 June 2009, and the letter dated 21 June 2010. In my view this was not a reasonable basis upon which to invoke the rule.

99. Even if the rule in *Maisel's* case applied to the circumstances of this case as was submitted, there are a number of other problems inherent within the defendant's submission that compels me to nevertheless reject it.

100. *First,* the letter in question was not the plaintiff's letter, but that of Mr Goldsmith, the plaintiff's solicitor at the time. Further, in order to derive a "*bullying and intimidation*" conclusion, it would be necessary to evaluate the full surrounding circumstances of the letter. This was not possible on the evidence.

101. *Secondly*, accepting for the purpose of argument, that Mr Goldsmith was the agent of the plaintiff for the purpose of sending the correspondence in question, further evidence would still be required before it would be reasonable to infer, or to find, that such agency should extend to an improper purpose, such as the asserted "*bullying and intimidation*".

102. *Thirdly,* an assertion to the effect that perjury had occurred, and that this warranted investigation by the police, is not of itself improper. On the contrary, members of the public are expected, as a matter of civic duty, to draw the attention of authorities to a breach of the criminal law.

103. *Fourthly*, the evidence had already concluded by the time this matter was raised. There was no application made by the defendant to re-open her case in order to ventilate the proposition now sought to be relied upon.

104. *Fifthly*, it is a grotesquery that such a suggestion should be made in litigation without beforehand observing the requirements of fairness to the person adversely affected by the submission. This would necessarily require, as a pre-requisite to the submission, that the foundation question had been put to the plaintiff in cross-examination, in order to provide him with the opportunity to comment on it and rebut it before it was raised against him in submissions. If there is an exclusionary rule of practice that applies to defamation cases, and which excuses non-observance of that fundamental precept, it is not a rule of which I am aware, nor is it one to which I have been referred in submissions.

Contextual truth

105. A defence of contextual truth arises where a defendant proves that some of the imputations claimed by the plaintiff are true, but not others: s 26 of the *Defamation Act* 2005. As the defendant has failed to establish the truth of any of the imputations claimed by the plaintiff, a consideration of a claim of contextual truth does not arise in this case.

Qualified privilege

106. The defence of common law qualified privilege can arise to protect a defendant who makes false defamatory statements. This applies where there is a reciprocity of duty or interest in existence between the communicator and the recipients of an impugned communication. The duty arises where there is a commonality of interest between the communicator and the recipients.

107. In the context of this case, where the defendant was communicating the fact of the termination of her employment to her manager, as would have been the expected line of communication of such a termination, in my view, any communication of that fact, combined with the other commentary complained of within the email, was gratuitous to that purpose. In my view it therefore fell outside the reciprocity or commonality of purpose contemplated by common law qualified privilege.

108. The defendant has submitted that it was unarguable that the defendant's email exhibit "M" was published on an occasion of common law qualified privilege. For the reasons I have outlined, I reject that submission.

Honest opinion or comment

109. To establish a defence of statutory honest opinion or comment, the onus is on the defendant to show the imputations in question were an expression of opinion by the defendant, and were not statements of fact and that the expressed opinion related to a matter of public interest and was based upon proper material: s 31 of the *Defamation Act* 2005.

110. I do not consider that a fair reading of the email in question indicates that the defendant was merely expressing her opinion about the plaintiff. The commentary went well beyond that, and extended into seeking to give examples of the defendant's alleged behaviour to seek justification for the negative views she was conveying about him. Further, the fact that the defendant ensured dissemination of her comments far and wide within the employer's organisation, demonstrates that the email was not just the expression of opinion. I consider the email contained purported statements of fact by her.

111. Nor do I consider the "*I Quit*" email communication of the resignation of an employee within a large company, or the content of such an email, to be a matter of public interest. In view of my earlier rejection of the proposition that the publication occurred on an occasion of claimed qualified privilege, it follows that the opinions in question were not based on proper material. In my view, no such proper material existed. If such material was within the knowledge of the defendant, then it was not the subject of evidence from her side of the record. I do not consider that the employer's records that were tendered have the hallmark of "*proper material*" in this context. Accordingly, I reject the defence based on an assertion of statutory honest opinion or comment.

Publication of a public document

112. A defence has been raised based on the republication of the imputations in the form of the Newcastle Herald article published on 30 April 2010. As I have found that the publication in that newspaper article constituted a fair report of court proceedings, it is not necessary that I give any consideration to a public document defence that might otherwise be enabled by s 28 of the *Defamation Act* 2005.

Triviality

113. As a defence to the plaintiff's claim, the defendant submitted that the publication of defamatory material in the email in question was trivial and was such that the plaintiff was unlikely to suffer any harm arising from it: s 33 of the *Defamation Act* 2005.

114. I reject that defence for the reasons that follow. In my view, the circumstances of the publication and dissemination throughout the company could hardly or reasonably be described as involving triviality. The occasion of the parting shot resignation chosen by the defendant contained sustained criticisms of the plaintiff, his integrity and his work performance. An employer could readily have chosen to act on such an email and could have proceeded to terminate his employment. For a family man with a mortgage, such a course could have had potentially serious consequences for the plaintiff, in the form of not only leading to a loss of his job, but also consequential impaired prospects for gaining another job without a proper or reference from his former employer. In my view, it is simply incorrect to assert, as was submitted, that in the circumstances, the plaintiff was unlikely to sustain any harm as a result of the publication.

Concluded view on defences

115. The foregoing review leads me to conclude that the defences relied upon by the defendant are not sustained or established, and would not have assisted the defendant to resist a damages award that would have been a necessary consequence of a proof of injury to the plaintiff's reputation.

Damages

116. Although I have concluded that the plaintiff has failed to establish an entitlement to damages because a relevant injury to his reputation has not been established by evidence, in order to allow for the possibility that on an appeal, I may be found to have erred in my findings on the primary question of such an entitlement, convention requires that I proceed to briefly outline the approach I would have taken, if I were to have proceeded to assess damages.

Compensatory damages

117. At the conclusion of the evidence, during argument I indicated to counsel that I had formed a preliminary, although not a final view, that if the plaintiff were to succeed on the primary issues, compensatory damages would appear to be in the range of $5,000 to $7,000, and I invited submissions from counsel in that regard.

118. On behalf of the defendant, Mr Evatt submitted that any entitlement of the plaintiff to damages would be of the order of the lowest coin in the realm. In making that submission he lamented the passing of the farthing. On behalf of the plaintiff, Mr Duncan submitted, in what I took to be an ironic or wry understatement, that although this was not the biggest defamation case to come before the court, the plaintiff should nevertheless be compensated for the harm and hurt that he contended he had suffered. On quantum he submitted that although the indicative range I had invited submissions upon was not out of contention, he submitted that it was at the lower end of a range, and that the amount of $20,000 represented the high end of the range.

119. In approaching the question of damages, I have had regard to the plaintiff's oral evidence and his written statement that comprised Exhibit "G". I have also had full and undiscounted regard to the matters I have recorded at paragraph [20] of my reasons, and which need not be repeated here.

120. I am unable to conclude that these events were just a "*work place spat*," as was argued on behalf of the defendant. If all of the elements of the tort had been established, such a conclusion would call for a damages award. However, there was no evidence called to show or suggest that the plaintiff had suffered anything more than hurt feelings, such as proven injury to his reputation. The only evidence that was called from a recipient of the email was from Mrs Wallis and Mr Schaeffer, who did not believe the assertions that had been made against the plaintiff. That evidence fell well short of what was required to prove injury to reputation, as distinct from hurt feelings, for which there can be no award of damages. In making these observations I do not intend my remarks to be read as diminishing or making light of the hurt the plaintiff has suffered to his feelings.

121. In considering the issue of damages it is relevant to record the fact that an apology was tendered to the plaintiff in open court. In noting the apology, it is also relevant to record that an apology does not constitute an express or implied admission of fault or liability for defamation: s 20, *Defamation Act* 2005.

122. On 10 June 2010, which was the fourth day of the trial, on behalf of the defendant, Mr Evatt read the following apology:

> "EVATT: Your Honour, there's just one further matter before your Honour rises. I'm instructed by Ms Adams, your Honour, to offer the plaintiff Mr Bristow an unreserved apology for any hurt or upset that has been occasioned to him by reason of the email of 10 June 09, your Honour. Ms Adams has instructed me that she humbly and sincerely apologises to Mr Bristow. I think that's enough. Thank you."

123. As the trial continued after the tender of the apology, I infer that the plaintiff was unmoved by that apology. Having regard to the timing of the apology and its terms, he could be excused for thinking it to be somewhat underwhelming. Nevertheless, whilst not an answer to a claim in defamation, even if the apology is belated, it is still a matter that can be taken into account in ameliorating a defamation. Having regard to the timing and circumstances of the apology, I consider it to have very little ameliorating effect.

124. Returning then to the notional question of damages, in the light of the foregoing review, including the limited significance of the apology, if damages were called for, I consider Mr Evatt's formulation of the lowest coin in the realm, 5 cents, to be contemptuously low, and so low as to require rejection, in favour of a higher amount.

125. Similarly, on my analysis of the evidence of this case, I consider the sum of $20,000 that was submitted on behalf of the plaintiff to be too high and well outside the bounds of a sound discretionary judgment.

126. On reconsidering the indicative view of damages that I had earlier identified to counsel during final submissions, I am confirmed in that earlier expressed provisional view that an appropriate sum for compensatory damages should be in that range, but at the higher end of the range I had nominated, namely $7,000.

Aggravated damages

127. As I have found that malice has been proven, if relevant harm had been proven, the issue of aggravated damages would have arisen for assessment. Although I have indicated that the plaintiff is not entitled to damages because there has been no proof of relevant injury to his reputation, for completeness, I record my view that an amount of $10,000 would have an appropriate upper limit for aggravated damages on the evidence and circumstances of this case. However, ultimately, in final submissions, the plaintiff did not ardently press the claim for aggravated damages.

Disposition

128. The plaintiff has not succeeded in his proceedings against the defendant, with the result that there must be a verdict and judgment entered in favour of the defendant. Ordinarily, subject to exceptional circumstances, the losing party will be ordered to pay the costs of the winning party. However, in this case there are some other circumstances that may require consideration.

Costs

129. As I have observed although the plaintiff has not succeeded in his case that is not the only consideration on the issue of costs.

130. There was a cross-claim that remained current until it was abandoned on the fourth day of the trial. Another consideration to be taken into account on the question of costs is the manner in which the proceedings were conducted by the parties, including the apparent failure of the parties to comply with an order of the court to convene a mediation before the trial. If they had availed themselves of the opportunity for a mediation, and if it had succeeded, this would have saved them both a great deal of money in costs.

131. In the circumstances, subject to hearing from the parties on the issue, I have identified a view, not to be regarded as my final view, that it might be appropriate for each party to pay their own costs after 23 October 2009, which was when the order for mediation was made. Before making any costs orders, I propose to hear the parties on the appropriate order for costs in the circumstances.

132. A further matter relating to costs is the flagged submission to the effect that there should be a further hearing on costs to determine whether part of those costs should be borne by, or at least absorbed by, the solicitor who was appearing for the plaintiff during the course of the trial. In this regard, at T144.35 – T144.45, on behalf of the plaintiff, Mr Duncan submitted:

> "… Had everybody been rational about this case and it settled - these are just ordinary people, they don't have huge amounts of money. It would be a terrible tragedy if the unfortunate error that the defendant has managed to commit by sending, what upon

> any view of this really is a silly email, both silly and hurtful - it would be terrible if that was compounded by her suffering enormous economic penalties as a result of it.
>
> Having looked through the transcript in the last 24 hours, it's my submission that at least two days of the trial were wasted with waffle and that some account should be taken - as your Honour has already noted - my client has paid an enormous amount of money so far."

133. In this regard, the evidence discloses that the costs paid by the plaintiff to his solicitor, at least up to 1 June 2010, amounted to in excess of $50,000. That was an amount for which he and his wife had to take out a mortgage.

134. Mr Duncan's submission which I have cited above was also reflected in a submission made on behalf of the defendant, by Mr Evatt, at T154.43:

> "… this is a case that shouldn't have been brought, and one can feel sorry for the plaintiff for not getting - one can feel sorry for the plaintiff for getting into this mess, this action. One can feel sorry for the defendant, both of these are workers. They're both married people, working class, who've got dragged into this, neither of them can afford it - and it may be Mr Bristow has some remedy, but his remedy is not a verdict for defamation in this Court."

135. The circumstances that have been identified show that when parties head for the courtroom in order to seek remedies in defamation without proof of harm, the results can be potentially ruinous, especially where all that can be demonstrated is hurt to feelings, which on the applicable authorities, is not enough to sustain an action for defamation.

136. In the circumstances, I will refrain from making any costs orders until an application is made by a party to the litigation. If there is to be an application for costs that might affect a third party to the litigation, as I have indicated in discourse with counsel for the plaintiff when that matter was raised as a submission, such an application requires that appropriate notice and particulars should be given to the person likely to be affected by such an application : T145.30.

137. With regard to the apparent non-compliance of a court order made on 23 October 2009 for a date to be sought for a mediation to take place, at present it is not clear as to which party was at fault, if any, or both, for the mediation not taking place.

138. A number of possibilities suggest themselves, including that one party, or both parties, did not comply. Whatever the position, the fact remains that the parties, or at

least one of them, were obliged to re-list the matter for further directions once it became apparent that there was, or was likely to be, non-compliance with a procedural court order. Such non-compliance may possibly have some influence on the appropriate order to be made for costs in the proceedings.

139. For reasons that at present remain unexplained, a re-listing was not requested by either of the parties. Given the range of possible explanations, I will not speculate further on the point. If any party seeks to establish cost consequences for such non-compliance, I will await an application in that regard, which should proceed with supporting evidence.

Orders

140. I make the following orders:

(a) Verdict and judgment for the defendant;

(b) I will hear the parties on the appropriate order for costs and in the meantime, I make no order as to costs pending a party making an application for an order for costs;

(c) The exhibits may be returned;

(d) Liberty to apply on 7 days notice if further orders are required.

I CERTIFY THAT THIS AND THE PRECEDING 36 PAGES CONSTITUTE A TRUE COPY OF THE REASONS FOR DECISION OF HIS HONOUR JUDGE LEONARD LEVY SC DELIVERED IN THESE PROCEEDINGS.

Associate
24 March 2011