# SUPREME COURT OF QUEENSLAND

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| CITATION: | *Thomson v Broadley & Ors* [2002] QSC 255 |
| PARTIES: | **GREGORY RONALD THOMSON**<br>(Plaintiff)<br>**JOHN KENNETH BROADLEY**<br>(First Defendant)<br>**RODERICK JAMES BROADLEY**<br>(Second Defendant)<br>**ADAM JOHN BROADLEY**<br>(Third Defendant)<br>**APTOGA PTY LTD (ACN 010 345 034)**<br>(Fourth Defendant) |
| FILE NO/S: | 116 of 1999 |
| DIVISION: | Trial |
| PROCEEDING: | Claim |
| ORIGINATING COURT: | Supreme Court at Cairns |
| DELIVERED ON: | 20 June 2002 |
| DELIVERED AT: | Cairns |
| HEARING DATE: | 31 January 2002 |
| JUDGE: | Jones J |
| ORDER: | **1. That the plaintiff recover against the first and fourth defendants $80,000 damages for defamation.**<br>**2. That the plaintiff recover against the fourth defendant $122,960 damages for wrongful dismissal together with interest on that sum at 10% per annum from 11 June 1997.**<br>**3. The fourth defendant pay the plaintiff's costs of and incidental to the action, including reserved costs (if any) to be assessed on the standard basis and the first defendant be jointly and severally liable for three quarters of those costs.** |
| CATCHWORDS: | EMPLOYMENT LAW – CONTRACT OF EMPLOYMENT – WRONGFUL DISMISSAL – where misconduct of employee alleged – whether requisite misconduct made out by employer as a question of fact – whether damages available to a wrongfully dismissed employee should be limited only to pecuniary loss suffered by reason of the employer's failure to give proper notice. |

EMPLOYMENT LAW – CONTRACT OF EMPLOYMENT – IMPLIED OBLIGATION OF EMPLOYEE NOT TO DISCLOSE MATERIALS OBTAINED IN THE COURSE OF HIS EMPLOYMENT – where employee disclosed alleged illegal activities to the Department of Consumer Affairs – whether public interest in the disclosure outweighed the public interest in the preservation of private and confidential information.

EMPLOYMENT LAW – CONTRACT OF EMPLOYMENT – IMPLIED OBLIGATION OF MUTUAL TRUST AND CONFIDENCE – where employer alleged to have acted illegally – where dismissed employee claiming damages for loss of health and employment prospects – whether employer in breach of implied obligation of mutual trust and confidence – whether in accordance with ordinary contractual principles, the employee's action for damages should succeed.

DEFAMATION – STATEMENTS AMOUNTING TO DEFAMATION – where employer published alleged defamatory imputations about an employee to the media – whether these imputations were defamatory.

DEFAMATION – PUBLICATION – RE-PUBLICATION - where employer had made allegedly defamatory communications to the personnel of television stations and stations had broadcast this material – whether the employer was liable for this publication and re-publication.

DEFAMATION – PUBLICATION – RE-PUBLICATION – JUSTIFICATION – where the defences of imputations having been made in truth and for the public benefit, in good faith and as fair comment claimed by the employer – whether employer could satisfy the requirements of these defences.

DEFAMATION – DAMAGES – ASSESSMENT OF DAMAGES – where plaintiff employee sought general damages and exemplary damages – whether specific amounts of damages under separate headings should be awarded.

*Defamation Act* 1889 (Qld) s 13(1)(a), s 14 (1)(a) s 14(1)(b), s 14(1)(h), s 16(1)(c), s 16(1)(g), s 16(1)(h)

*A v Hayden* (1984) 156 CLR 532 applied
*Malik v Bank of Credit and Commerce International SA* (In compulsory liquidation) (1997) 3 WLR 95
*Renouf v Federal Capital Press of Australia Pty Ltd* (1977) 17 ACTR 35

*Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 185

COUNSEL: P.J. Favell for the plaintiff
The first defendant appeared on his own behalf
No appearance for the second, third and fourth defendants

SOLICITORS: Williams, Graham & Carman for the plaintiff
The first defendant appeared on his own behalf
No appearance for the second, third and fourth defendants

[1] On or about June 27 1994, the fourth defendant employed the plaintiff as its finance and insurance business manager. He commenced duties on 1 July, 1994 and worked continuously in that position until 11 July, 1997. His remuneration package included salary, incentive bonuses and the provision of a fully maintained car.

[2] The fourth defendant (previously using the corporation name, Broadley Auto Group Pty Ltd) was the owner and operator of a number of automotive businesses in Cairns. It held the franchise for the sales and service of such vehicle makes as Ford, LandRover, Honda, Hyundai, Kia and Suzuki.

[3] The first defendant was the managing director and controlling mind of the fourth defendant. He believed at the time of trial that the fourth defendant had been deregistered.[1] On 20 September 1991, the first defendant had applied for the voluntary deregistration of the fourth defendant, pursuant to s 601A of the *Corporations Act*.[2] Having done so he declared, inter alia, that the fourth defendant was not a party to legal proceedings. This statement was incorrect. I am satisfied that the process initiated by that application never resulted in the company being deregistered. An ASIC current company extract (Ex 11) tendered pursuant to s 1274B of the *Corporations Act* makes clear that the fourth defendant remained a registered company.

[4] The fourth defendant did not appear at the hearing to defend the plaintiff's claim nor to pursue its counterclaim. As a consequence the counterclaim by the fourth defendant will be struck out with costs relating thereto payable by the fourth defendant.

[5] No claim was ever pursued against the second and third defendant who in fact were never served with the pleadings. Notices of discontinuance have been filed in respect of the claims made against each of them.

[6] As a result the only causes of action requiring determination in these proceedings are as follows:-

(i) The plaintiff's claim against the fourth defendant for damages for unlawful termination of his contract of employment;

(ii) The plaintiff's claims against the first and fourth defendants for damages for defamation; and

(iii) The first defendant's counterclaim against the plaintiff for damages for defamation.

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1 Transcript p 2

2 See ex 16

**Background facts**

[7] From the commencement of his employment in 1994 through to 1996 the plaintiff consistently performed well in meeting the sales targets set by the fourth defendant. For example, in 1995, he won an incentive award initiated by the fourth defendant. [3] In 1996 he won the *Professional Business Manager Award* initiated by Ford Credit Australia Limited[4]

[8] In January 1997 there was a reorganisation of the responsibilities for various franchises within the fourth defendant's business. The result of this was that sales relating to the Hyundai franchise were passed to Ms Regina Cotton. Before this reorganisation the Hyundai franchise provided some 45% of the sales upon which the plaintiff derived commission.

[9] Ms Cotton, whom the plaintiff had trained over the previous six months, was thus advanced to a new level, but the plaintiff did not oppose this change. However he expected that the agreed commission percentages in his salary package would be adjusted so that he would not suffer any reduction in remuneration.

[10] It was the failure by the first defendant to respond to the plaintiff's request for this adjustment which caused tension between him and the plaintiff. The plaintiff gave evidence that this tension had been festering for some time before he confronted the first defendant on the showroom floor. There was no-one else present at the time. The plaintiff described what happened in the following terms:-

> "Well, you spoke to Mr. Broadley about it? – I spoke to Mr. Broadley and he continued to fob me off, and it came to the stage where I thought, "This is going nowhere, I've got to find out what's going on here." We were trying to manage our lives and it was severely being disrupted. I ran into him on the showroom floor when no-one was around and I asked him what he was doing about my package and he said, he said he had other priorities and I hadn't entered into mind. I had been pursuing him for four to six weeks on the matter – it's the end of February here, so it's at least two months. And he signalled to me that my priorities with him were basically – he put his hand to the floor and said my priorities is down to ground level. And for someone who had been such a high level performer, it was very – it was a big snub. So I persisted with him and I asked he should give me more priority than that, and his first response to me was, "What, do you want to resign?" I asked him again and he said that to me again, "Well, resign." I think I said it a third time and he just said it again – I couldn't believe it. And as he walked away, he turned and said, "Well, I'll get to it as soon as I can." And at the time I was very wild and I said, "Well, make it f'ing quick", and that's the end of the conversation then.
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> And what happened, he walked away? – He walked upstairs. I think he rang me later in the day and called me upstairs and I don't recall what happened in that conversation upstairs. And then he rang a

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[3] See ex 3 docs 14 and 16

[4] See ex 3 doc 8

> third time in the day to say that he'd had legal advice and if there's any more repeated language, I'd be instantly dismissed.
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> How did you come to get the letter that you've got in front of you? – I think he hit it to me at that third meeting on that day."[5]

[11] The first defendant sent a letter to the plaintiff dated 1 March 1997[6] which fixes the date of the above exchange as 21 February 1997. The plaintiff says that was the first time he had used such language. Apart from the first defendant the only persons who may have heard these words were a Mr. Fishburn and a Mr. Oastler. In cross-examination a further incident concerning the use of language was put to the plaintiff but he denied it. The first defendant did not lead any evidence about any such incident. Mr. Oastler said in his evidence that he had never heard the plaintiff use bad language.

[12] I accept the plaintiff's evidence about the event on the showroom floor and the circumstances which gave rise to his outburst.

[13] Of more significance is the fact that about this time the plaintiff was providing information to the Consumer Affairs Department to disclose what he believed were illegal practices in the conduct of the fourth defendant's business. The allegations related to odometer tampering, falsifying valuations and roadworthy certificates and providing misleading information for finance applications. The plaintiff claims he provided this information because of his wish "to stop illegal acts being perpetrated on customers".[7]

[14] On or about 28 May 1997 the departmental staff of the Consumer Affairs visited the fourth defendant's premises. The next day the first defendant inquired of the plaintiff whether he was supplying information to the Department. Similar interrogations occurred on three or four further occasions between then and 11 July 1997. The plaintiff made no admissions that he had so acted.

[15] On 11 July 1997 the plaintiff was called to the first defendant's office. In the presence of Mr. Vince and Mr. Oastler the plaintiff was summarily dismissed after the first defendant accused him of handing over to the Department files belonging to the fourth defendant's business.

[16] Later that day in a hand-delivered letter from its solicitors[8], the fourth defendant advised the grounds for that dismissal as follows: –

(i) Concerns about the plaintiff's attitude and performance; and
(ii) The removal of confidential documents and records from its premises

A further letter from the fourth defendant's solicitors dated 24 July 1997[9] clarified that the previous reference to poor conduct and performance was considered as being of background relevance only.

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5 Transcript p 35/10
6 See ex 9
7 Transcript p 32/10
8 See ex 3 doc 4
9 Ex 5

[17] These matters were raised in public on 28 October 1997 when a Member of the Legislative Assembly, Mr. Pat Purcell, relying on information from the plaintiff's brother, spoke about them in the Queensland Parliament. The first defendant responded by alleging in media interviews that the plaintiff had made the information available to the Member of Parliament, that he was dishonest in providing this information; and that he had acted in a spiteful and malicious way because his employment had been terminated.

[18] I shall turn then to the plaintiff's claim for unlawful termination of employment.

**Was the plaintiff's dismissal wrongful?**

[19] The claim for unlawful termination of employment is a claim made at common law. It requires first a finding that the plaintiff's dismissal was indeed wrongful.

[20] It is not in dispute that the first defendant, on behalf of the fourth defendant, summarily terminated the plaintiff's employment without notice. However such summary dismissal need not be wrongful if the fourth defendant is able to justify having taken such action. However the fourth defendant has chosen not to defend the plaintiff's claim.

[21] The first defendant has sought to do this, citing the plaintiff's poor performance, use of bad language and poor attitude to his work as constituting the necessary grounds of misconduct but the first defendant does not appear on behalf of the fourth defendant and his allegations are relevant only to the defamation proceedings between the plaintiff and himself.

[22] Whether the requisite misconduct has been made out is a question of fact. The answer to this question depends upon whether the acts complained of can properly be regarded as being such as to strike at an essential element in the contract of service. This general test has been applied in many diverse situations and each case must be decided in the light of its own particular facts.

[23] The use of objectionable language may constitute misconduct. The plaintiff has admitted using bad language on only one occasion whilst employed with the fourth defendant. That single incident alone could not be found to have justified dismissal.

[24] The defendant has alleged that the plaintiff's performance had deteriorated to the point of its being poor. Evidence adduced at the trial suggests the contrary. I find that the plaintiff's performance was well above the norm, even in adverse economic conditions and despite the duress he was suffering as a result of the defendant's having taken away from him, without any financial compensation, the most lucrative element in his sales portfolios.

[25] The plaintiff has admitted disclosing information to the Consumer Affairs Department. He has stated he did so in the public interest. But the public interest in disclosure of iniquities does not necessarily outweigh the public interest in the preservation of confidential information.

[26] In *A v Hayden* [10] Gibbs CJ said:-

> "The Court will refuse to exercise its discretion in favour of granting equitable relief, such as an injunction, to enforce an obligation of confidentiality when the consequence would be to prevent the disclosure of criminality which in all the circumstances it would be in the public interest to reveal. In *Gartside v Outram* (60) it was held that it would be an answer to a bill for an injunction to restrain the defendant, a former servant, from disclosing materials obtained in the course of his employment, that the materials showed that the business had been fraudulently conducted…
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> In *Allied Mills Industries Pty Ltd v Trade Practices Commission* (68), Sheppard J., after a careful review of the authorities, concluded that "the public interest in disclosure…of iniquity will always outweigh the public interest in the preservation of private and confidential information". That is too broad a statement, unless "iniquity" is confined to mean serious crimes. The public interest does not, in every case, require the disclosure of the fact that a criminal offence, however trivial, has been committed. And the administration of justice, although a fundamental public interest, is not an exclusive public interest…."[11]

[27] In this instance it seems to me the breaches identified in the evidence of Ms Musemeci and Mr. Paynter were not trivial. In circumstances where the fourth defendant chose not to appear to challenge them. I am satisfied that, in this case, the public interest did require the disclosures which the plaintiff made.

[28] I find that the requisite misconduct alleged against the plaintiff has not been made out and that the summary termination of his employment without notice was unlawful.

**What is the appropriate measure of damages?**

[29] In *Addis v Gramophone* [1909] AC 488, it was decided that the damages available to a wrongfully dismissed employee should be limited to any pecuniary loss suffered by reason of the employer's failure to give proper notice. The main significance of this case that the House of Lords refusal to recognise that an employee may suffer loss or damage, additional to the wages foregone during the proper notice period, as the natural and probable consequence of the wrongful termination. The *Addis* principle has been criticised but, as was observed by the Full Court of the [then] Industrial Relations Court in *Burazin v Blacktown City Guardian* (1996) 142 ALR 144 at 151:-

> "…the High Court rejected the opportunity in *Baltic Shipping* to throw over the constraints imposed by *Hamlin* and *Hadley v Blaxendale* and their successors. It approved the awarding of damages for distress only in a limited range of cases [that is where disappointment and distress proceed from physical inconvenience caused by the breach or unless the contract is one the object of which

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10 (1984) 156 CLR 532

11 (supra) at p 544-546

> is to provide enjoyment, relaxation or freedom from molestation – *Baltic Shipping Company v Dillon* (1993) 176 CLR 344 at 365] *My insert*. Although there was some difference in the precise formulations put forward by their Honours, none was broad enough to cover distress resulting from a wrongful dismissal. If such damages are to be awarded it must be after rejection, at High Court level, of the *Addis* conclusion that employment contracts are to be treated like other commercial contracts for the purposes of the rules in *Hadley v Blaxendale."*

[30] But if damages are to be limited to any pecuniary loss suffered by reason of the employer's failure to give proper notice, what is proper notice? The contract specified no period of notice, so a reasonable period is implied. This again depends on the facts of the particular case. The authorities suggest that cognisance should be taken of such matters as the status and salary of the position from which the employee has been wrongfully dismissed, the length of the employee's service in that position, the employee's age and educational qualifications, whether the employee had given up a secure job to take up the position and eligibility for superannuation benefits. Counsel for the plaintiff has argued for 12 months as being the proper period of notice. This is not contested by the fourth defendant and I see no reason why that should not be regarded as a proper basis for the assessment. I will award the plaintiff $116,000 together with $6,960 for loss of superannuation. I award interest on the total sum of $122,960 calculated at 10% per annum from 11 July 1997 to the time of judgment.

**Was there breach of the implied obligation of mutual trust and confidence?**

[31] Summary termination of the employment contract without notice is not the only ground on which the plaintiff seeks damages. In paragraph 7 of his Amended Statement of Claim the plaintiff seeks damages for breach of the implied obligation of mutual trust and confidence. This claim includes damages for "loss of health, suffering significant stress, exacerbation of asthma, disturbance in appetite, significant weight loss and anxiety and depression…" [12]

[32] For more than a decade case law in Britain and New Zealand has recognised the existence of an implied obligation of "mutual trust and confidence" between employer and employee. More recently the principles relating to such an obligation were stated in *Malik v Bank of Credit and Commerce International* SA (In compulsory liquidation) [13].

[33] The case of *Malik* concerned two ex-employees of a bank. The bank had perpetrated such notorious fraud upon its customers and creditors that the two had found it almost impossible to gain other employment after they had been made redundant. They had learned of the bank's corrupt activities only after they had been laid off. The case was decided on questions which were approached after focussing on the particular conduct of the organisation of which complaint was made. The bank operated its business dishonestly and corruptly. It was not a case where one or two individuals, however senior, were behaving dishonestly. The

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12 Para 17(c)

13 (1997) 3 WLR 95

point had been reached "where the bank itself could properly be identified with the dishonesty. This was a dishonest business, a corrupt business".[14]

[34] In this case the first and fourth defendant deny they were ever engaged in any corrupt activity. Counsel for the plaintiff relied on UCPR Rules 189 and 190 to argue that such corrupt activities should be taken to have been admitted.

[35] Beyond the admissions, which are deemed to have been made, sufficient further evidence has been adduced concerning activities such as falsifying odometer readings; misrepresenting to loan financiers through $1 trade-ins, the financial status of would-be vehicle purchasers; and various other breaches of the *Auctioneers and Agents Act* 1971. The scope of these activities was however quite limited. They involved only a small number of vehicles and the subsequent investigations by the Consumer Affairs Department have not led to significant prosecutions. The fourth defendant has pleaded guilty to a number of breaches relating to the employment of unlicensed salespersons and to the failure to provide purchasers of vehicles with proper forms. The more significant behaviour relating to odometer tampering has not been pursued to this time.

[36] The plaintiff seeks to link his inability to gain new employment to the breach by the fourth defendant of this implied obligation. It is the case that the plaintiff has been unsuccessful in attempts to gain re-employment in a position for which he is eminently qualified. In this he is suffering continuing financial losses which in certain circumstances may be the result of a breach of the implied obligation. In *Malik* the following passage appears:-

> "Exceptionally, however, the losses suffered by an employee as a result of the breach of the trust and confidence term may not consist of, or be confined to, loss of pay and other premature termination losses. Leaving aside injured feelings and anxiety, which are not the basis of the claim in the present case, an employee may find himself worse off financially than when he entered into the contract. The most obvious example is conduct, in breach of the trust and confidence term, which prejudicially affects an employee's future employment prospect. The conduct may diminish the employee's attractiveness to future employers…
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> There is here an important point of principle. Are financial losses of this character, which I shall call "continuing financial losses", recoverable for breach of the trust and confidence term? This is the crucial point in the present appeal. In my view, if it was reasonably foreseeable that a particular type of loss of this character was a serious possibility, and loss of this type is sustained in consequence of a breach, then in principle damages in respect of that loss should be recoverable….
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> ….there can be nothing unfairly onerous or unreasonable in requiring an employer who breaches the trust and confidence term to be liable if he thereby causes continuing financial loss of a nature that was reasonably foreseeable…

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[14] See *Malik* (supra) per Lord Nicholls at p 98

> The damages in such a case ought, in principle, to be the same as they would be if the employer had expressly dismissed the employee."[15]

[37] I am not persuaded that the business of the fourth defendant here was such that it could be fairly described as dishonest or corrupt. There have been proven certain infringements of the statutory requirements of the *Auctioneers and Agents Act;* and there has been established on the evidence dishonest behaviour in the winding back of the odometer in cars, but only in a small number relative to the vehicle turnover of the business. This is not in my view sufficient to establish that it was a corrupt or dishonest business which would give rise to the cause of action identified in *Malik*. Further I am not persuaded that there is any causal link between the rather limited corrupt activities identified in the evidence and the plaintiff's failure to regain employment.

[38] Thus it is not open to me, on the evidence adduced in this case, to find that it was the fourth defendant's corrupt activities which caused the plaintiff injury to his reputation or impacted deleteriously on his health. There is evidence of the plaintiff's future employment opportunities having been compromised and of his having suffered ill-health, but these events might equally have been due to other factors such as his dismissal.

[39] Therefore, in accordance with ordinary contractual principles, the plaintiff's action for damages for breach of mutual trust and confidence must fail.

**Was the plaintiff defamed?**

[40] The plaintiff alleges that on 30 October 1997 the first defendant published to representatives of WIN Television station and Channel 10 Television station words which were defamatory of him. The first defendant did so knowing that it was a natural and probable consequence that each television station would republish his remarks. The republication in fact occurred on 30 and 31 October 1997. The defamatory words as pleaded[16] and as revealed in the evidence were as follows:-

> "Allegations made by Greg Thompson against Broadley Ford are a pack of lies and are part of a pay-back vendetta. They do not deserve this malicious slight on their characters. They're all good reliable hard working citizens."

[41] The offending words were republished in the context of remarks made in the Queensland Parliament concerning the fourth defendant's business. The republished words also included allegations that "a malicious campaign had been orchestrated by the Thompsons"[17] and that the plaintiff "was sacked for poor performance and bad language…"[18]

[42] The imputations which are alleged to flow from these words are set out in paragraph 44 of the Statement of Claim and are some 20 in number.

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15 *Malik* (supra) at pp 101-2

16 Further Amended Statement of Claim para 18

17 Further Amended Statement of Claim para 31

18 Further Amended Statement of Claim para 40(10)

[43] Where a person makes a defamatory communication to the staff of a media organisation, that person is liable for republication of the material, if the republication is a natural and probable consequence of the conduct and the republished material adheres to the sense and substance of the original. A comparison of the relevant paragraphs of the Statement of Claim and the videotapes (ex 4) indicate an adherence to the sense and substance of the words of the first defendant as recorded. I find that the publication of the material by the respective television stations, in this case, was clearly a natural and probable consequence of the defendant's conduct. In addition I find that the republished material did adhere to the sense and substance of the original in respect of the alleged defamatory imputations of dishonesty; ill-will and claimed reasons for dismissal.

[44] The *Defamation Act* (Qld) 1899 provides in s 5(1) that a person defames another if that person "…by spoken words or …by words intended to be read….publishes any defamatory imputation about that person." S5(2) provides that publication is effected, in the case of spoken words, by "… the speaking of such words… in the presence and hearing of any other person than the person defamed…" A defamatory imputation is exhaustively defined by the Act in s 4(1) as "Any imputation concerning any person….by which the reputation of that person is likely to be injured, or by which the person is likely to be injured in the person's profession or trade, or by which other persons are likely to be induced to shun or avoid or ridicule the person…" "The unlawful publication of a defamatory imputation is an actionable wrong" (*Defamation Act* (Qld) 1899 s 7).

[45] By paragraph 2 of the Amended Defence and Counterclaim the defendants do not admit either the publication or the republication. However I find that the first defendant was the source of the publication and is therefore liable for the publication and republication.

[46] There were three imputations claimed by the plaintiff to be defamatory. In the first of these, certain statements attributed to the plaintiff making allegations against the fourth defendant were described as "a pack of lies …and part of a payback vendetta" (see Statement of Claim para 18). The secondary defamatory imputation, in effect, alleged malice on the part of the plaintiff (S/C para 27), whilst the third defamatory imputation claimed he had been dismissed for bad language and poor performance (S/C para 36).

[47] Each of these alleged defamatory imputations was subsequently republished: the first on Win Television News on 30 October 1997; the second on Ten Television news on 31 October 1997 and the third on 30 October 1997, again on Ten Television news (see paras 22, 31 and 40 of the Amended Statement of Claim respectively).

[48] I am satisfied also that the first defendant was speaking on behalf of the fourth defendant of which he was a director. The words which he used indicated that he was speaking on behalf of the fourth defendant and his reference to the plaintiff's dismissal by the fourth defendant confirms this. No attempt has been made in the Amended Defence and Counterclaim to distinguish between either the defences made or the claims raised on behalf of both defendants. Therefore I find that the fourth defendant is liable for the publication of the words by the first defendant

[49] I find that these imputations as to the plaintiff's dishonesty, ill-will and poor conduct in the workplace were defamatory. They were likely to injure the plaintiff's reputation for honesty, good-will and good conduct in the workplace.

**Were these defamatory imputations published unlawfully?**

[50] By paragraph 5 of the Defence the first defendant raises provisions of ss 13, 14, 15 and 16 of the *Defamation Act* 1889 to contend that the publications were lawful. Of course he bears the onus of making out such defences which are that the publications were:-

(a) Made in truth and for the public benefit (s 15);
(b) Made in good faith in order to answer or refute defamatory matter published by the person defamed (s 16(1)(g));
(c) Made in good faith for the information of the public a report of proceeding in the legislative assembly (ss 13 and 14);
(d) Made in good faith for the purpose of discussion of a subject of public interest (s 16(1)(h));
(e) Made in good faith for the protection of the interests of the first defendant (s 16(1)(c)); and
(f) Made in good faith for the public good (s 16(1)(c)).

[51] No evidence was led specifically to establish these grounds of defence. Nor did the first defendant himself give evidence which would have been the most effective means of establishing whether he had acted in "good faith".

**Good faith**

[52] Section 17 of the *Defamation Act* provides that "When any question arises whether a publication of defamatory matter was or was not made in good faith, and it appears that the publication was made under circumstances which would allow lawful excuse for the publication if it was made in good faith, the burden of proof of the absence of good faith lies upon the party alleging such absence".

[53] I consider the burden of proof of good faith was on the first and fourth defendants. The first defendant imputed dishonesty and malice to the plaintiff, not to protect any legitimate interest of his or of some other person or for the public good, but rather to protect from exposure, to the extent that he could, the alleged illegal or unethical activities referred to above.

[54] The *Defamation Act* also provides that a publication is made in good faith "… if the matter published is relevant to the matters, the existence of which may excuse the publication in good faith of defamatory matters; if the manner and extent of the publication does not exceed what is reasonably sufficient for the occasion; and if the person by whom it was made is not actuated by ill will to the person defamed, or by way of any other improper motive, and does not believe the defamatory matter to be untrue". [19]

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[19] See subsection (2) s 16

[55] I am not persuaded that the first defendant did, in fact, act in good faith. The first defendant was clearly angered by the remarks made in Parliament about the fourth defendant's business. They came at a time when he was endeavouring to sell the business and was concerned about the impact the disclosures in Parliament could have on the sale price. He believed that the plaintiff was the source of the information which was presented to Parliament and he set out to discredit the plaintiff. I am satisfied that in making the remarks to representatives of the television stations, the first defendant was in fact actuated by ill-will towards the plaintiff and consequently I find that the defences based on publications made in good faith have not been made out.

**Fair comment**

[56] By its defence the defendant seeks to rely on the *Defamation Act* (Qld) (1899 s 13(1)(a) to raise the defence of fair comment as allowed in s 14(1)(a)(b) and (h) of that same Act.

[57] Which party should bear the burden of proof in an issue of fair comment has not been free from controversy. But that is of no consequence in this case where the evidence clearly shows that the comments made by the first defendant simply do not fit requirements of the relevant sections. First and foremost I am satisfied, by the deemed admissions set out in ex 2 and the evidence of Ms Musemeci and Mr. Paynter,[20] that illegal conduct such as odometer tampering, misrepresentation of trade-in values and the presentation of false vehicle certification did occur. I am satisfied these matters were known to the first defendant. Further I do not find that the plaintiff had conducted a malicious campaign against the first defendant or the fourth defendant's business. He behaved in a responsible way bringing what he saw as breaches of the law to the attention of the proper authorities. I have already found that the plaintiff's use of bad language whilst employed was confined to a single incident and that his work performance was above the norm. On the evidence put before me I find that it was not the case that he was sacked for the reasons stated by the first defendant.

[58] The defendant also seeks to rely on ss 16(1)(c), (g) and (h) of the *Defamation Act*, essentially claiming that his defamatory imputations were not published unlawfully because they were made in good faith or for the public good, or were published to refute defamatory matters published by the plaintiff about him, or were published in the course of, or for the purposes of, the discussion of some subject of public interest which is for the public benefit and fair comment.

[59] These defences similarly in my view are not made out. For reasons set out above the first defendant's allegation that the plaintiff published "a pack of lies" was not in fact true. As a consequence the requirements to establish defences based on ss 13, 14 and 15 have not been satisfied.

[60] The defendant has failed to discharge the burden of proving good faith and hence cannot claim the lawful excuse for his publication and republication of defamatory matter for which s 16(1)(c) provides. Further, in the light of my findings, the defendant cannot claim the lawful excuse for the publication of defamatory matter

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20 Transcript pp 95-98; and pp 147-150

allowed by s 16(1)(g). The defendant cannot impute dishonesty, malice and poor conduct at work to the plaintiff to refute some other defamatory matter published by the defendant concerning himself or his company, because there were no defamatory matters to refute. I find that the plaintiff spoke the truth. The defendant has failed to prove good faith on the issue. His publication of defamatory matters is not protected by s 16(1)(g). As he has failed to discharge the burden of proving good faith the first defendant cannot be lawfully excused for the publication of defamatory and his defence under s 16(1)(h) must also fail.

[61] I find then that the first and fourth defendants are liable for the unlawful publication and republication of the stated defamatory matters concerning the plaintiff.

**Damages**

[62] In an action for defamation, the wrongful act is damage to the plaintiff's reputation. Assessing damage to reputation must be a matter of judgment rather than calculation. (*Renouf v Federal Capital Press of Australia Pty Ltd* (1977) 17 ACTR 35, Blackburn J at 50). Compensation by damages operates to vindicate the plaintiff to the public and to console him for the wrong done. "Compensation is here a solatium rather than a monetary recompense for harm measurable in money" (*Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 185 per Windeyer J at 150).

[63] The first defendant maintained throughout the trial that he was entitled to make the defamatory statements. The consequence was that the defamatory material was necessarily repeated in the court proceedings and in the publication of those proceedings. The plaintiff suggested this was evidence of malice and that such conduct should be met with an award of aggravated damages. These factors can be reflected in the award of general damages in this case without applying specific amounts under separate headings such as "aggravated damages". See *Timms v Clift*[21].

[64] I am satisfied that the plaintiff should be awarded damages for his loss of reputation and for his own evident outrage and distress and the impact the defamation may have had in his re-employment. I am of the view that no additional sum should be awarded for exemplary damages.

[65] I assess damages at $80,000.

**Conclusion**

[66] The fourth defendant failed to appear on the hearing. The plaintiff has proven his claim against it and he is entitled to have the fourth defendant's counterclaim struck out pursuant to Rule 476 of UCPR with costs.

[67] On the question of costs I take into consideration the fact that the first defendant had no personal interest in the wrongful dismissal claim which was undefended, but that it was his defence of the defamation proceedings which resulted in the trial continuing for a second day. I shall order that the fourth defendant pay all costs of the action and that the first defendant be jointly and severally liable for three quarters of all costs.

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[68] My orders therefore are as follows: –

1. The plaintiff recover against the first and fourth defendant $80,000 damages for defamation.

2. The plaintiff recover against the fourth defendant $122,960 damages for wrongful dismissal together with interest on that sum at 10% per annum from 11 June 1997.

3. The fourth defendant pay the plaintiff's costs of and incidental to the action, including reserved costs (if any) to be assessed on the standard basis and the first defendant be jointly and severally liable for three quarters of those costs.