MERIZA LACARTE (*Plaintiff*) ..... APPELLANT;

AND

THE BOARD OF EDUCATION OF TORONTO (*Defendant*) ..... RESPONDENT.

1958
*Oct. 28, 29
1959
Mar. 25

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Libel and slander—School teacher dismissed—Statutory duty to communicate reasons to teacher—Defence of qualified privilege—Absence of evidence of malice—The Teachers' Board of Reference Act, 1946 (Ont.), c. 97, s. 2.

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LACARTE
v.
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The plaintiff, a former high school teacher, was dismissed from her employment in 1948 by a letter informing her that, by a resolution, the defendant Board had approved a recommendation of the Advisory Vocational Committee that her employment be terminated "on the ground of lack of co-operation". She sued for damages for libel allegedly contained in her letter of dismissal. The defence pleaded qualified privilege and lack of malice. The trial judge, sitting with a jury, ruled that the publication had been on occasions of qualified privilege and that there was no evidence of malice to go to the jury, and directed a verdict for the defendant. This judgment was affirmed by the Court of Appeal.

Held (Rand and Cartwright JJ. dissenting): The action should be dismissed.

Per Taschereau, Locke and Abbott JJ.: The letter dismissing the plaintiff was written in pursuance of the statutory duty imposed by s. 2 of *The Teachers' Board of Reference Act*, 1946 (Ont.), which provided that every termination of employment of a teacher by a board was required to be by notice in writing indicating the reasons for such dismissal. Such publication of the letter and the carbon copies of it, and of the copies of the resolutions as was made by the defendant, was made upon occasions of qualified privilege and there was no proof of malice in fact. *Toogood v. Spyring* (1834), 1 C.M. & R. 193, *Osborne v. Boulter*, [1930] 2 K.B. 226, 232, and *Edmondson v. Birch*, [1907] 1 K.B. 371, 380, referred to. There was no evidence upon which a jury could properly find that the members of the Advisory Vocational Commitee who recommended the dismissal of the plaintiff, or the members of the Board of Education or their officers who carried out their duty in informing the plaintiff in writing of the reasons for her dismissal, were actuated by any other motive than the due discharge of their duties.

Per Rand and Cartwright JJ., *dissenting*: It would have been open to a properly directed jury to find that certain of the employees of the defendant who, acting within the scope of their duties, furnished the information on which the defendant acted in making the statement complained of were actuated by malice towards the plaintiff. If the jury had reached such a conclusion, the qualified privilege would have been defeated. Where a corporation is under a duty, whether of perfect or imperfect obligation, to publish a statement about a person, and in the preparation of that statement relies on information furnished by one of its employees within the scope of whose employment it is to furnish the information, the malice of that employee in furnishing false and defamatory information which is made part of the statement published will in law be treated as the malice of the corporation, although all members of the boards of directors or of trustees which authorize the publication are individually free from malice. A new trial should be directed.

APPEAL from a judgment of the Court of Appeal for Ontario[1], affirming a judgment of Wells J. in an action for libel. Appeal dismissed, Rand and Cartwright JJ. dissenting.

[1] [1956] O.W.N. 844.

Miss Meriza Lacarte, in person.

D. J. Walker, Q.C., and *D. H. Osborne, Q.C.*, for the defendant, respondent.

The judgment of Taschereau, Locke and Abbott JJ. was delivered by

LOCKE J.:—In this action which was commenced on August 23, 1951, the present appellant claimed damages against the Board of Education for wrongful dismissal, for libel and for other relief, the nature of which is not of importance in the present appeal.

By an order made by the Chief Justice of the High Court on January 12, 1953, it was directed that all issues raised in the pleadings, except that of libel, be tried by a judge without a jury, and that the issue of libel and the assessment of damages for libel only be tried before a jury.

The action in respect of the alleged wrongful dismissal and the claims for other relief was dismissed at the trial. Appeals to the Court of Appeal and to this Court[1] were dismissed.

The action for the alleged libel was tried before Wells J. and a jury. At the conclusion of the evidence given on behalf of the appellant, that learned judge, upon the respondent's motion for a non-suit, directed the jury to find a verdict for the respondent and judgment was entered dismissing the action. That judgment was upheld by a unanimous judgment of the Court of Appeal[2], the reasons for which were delivered by Roach J.A. and it is from the latter judgment that, by special leave, this appeal has been brought *in forma pauperis*.

The contract of employment in respect of the termination of which the action was brought was originally made between the appellant and the respondent on May 2, 1940. The appellant continued in the respondent's employ until June 30, 1948, at which date it was terminated pursuant to a written notice given by the Board to the appellant in a letter dated May 7, 1948. It is in respect of the terms of this letter which, as required by statute, gave the reason for the termination of the contract that the claim for libel

[1] [1955] 5 D.L.R. 369. [2] [1956] O.W.N. 844.

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was made. The letter informed the appellant that, by a resolution, the Board had approved a recommendation of the Advisory Vocational Committee that the agreement be terminated on the date mentioned "on the ground of lack of co-operation with the principal and certain members of the staff of the Danforth Technical School".

By the statement of claim it was alleged that the said "notice" (referring to the letter) was "malicious and unfair to the plaintiff"—that it wrongfully declared the appellant guilty of having failed to co-operate with the principal and members of his staff and that the respondent or the servants of the respondent who were responsible for the form of the notice thereby knowingly and maliciously sought to injure the appellant and to make it impossible for the appellant to secure the recommendation of a principal for future employment in the City of Toronto or the Province of Ontario.

The statement of defence gave lengthy particulars of the reasons which led to the appellant's dismissal and, with these, we are not concerned. As to the claim for libel, the respondent alleged that, by the provisions of the *Teachers' Board of Reference Act*, c. 97 of the Statutes of 1946, it was required that every termination of employment of a teacher shall be by notice in writing which shall indicate the reasons for such dismissal, that the publication or publications complained of, if there were such, were made upon occasions of qualified privilege and without malice, the respondent believing the statement made to be true. Justification was not pleaded to the claim for libel.

The appellant gave evidence on her own behalf at the hearing, proving the fact of the employment and its termination, swearing that she had not failed to co-operate with the principal of the Danforth School or other members of the staff of that school and describing her unsuccessful endeavours to obtain other employment, during the course of which she had exhibited the copy of the letter from the Board of May 7, 1948, to the principals of other schools where she sought employment. She was cross-examined at some length upon the matter of her disagreements with the principal of the Danforth School, a Mr. Ferguson, as to criticisms which she had made of his direction of the school,

of the complaints she had made to the Director of Education, Dr. C. C. Goldring, and to other persons, and as to her application to the Minister of Education, the Honourable George Drew, on May 19, 1948, for a board of reference to enquire into her dismissal. In addition, the appellant called various secretaries, clerks and stenographers employed in the Board of Education, including the secretary of Dr. Goldring, the business administrator of the Board, the chief accountant, Mr. E. H. Silk, Q.C., the senior solicitor for the Attorney General's Department and the Deputy Minister of Education, in an endeavour to prove publication of the letter under circumstances which would defeat the claim of qualified privilege.

The respondent Board of Education was constituted under the provisions of the *Board of Education Act* which, at the time of the occurrence of the matters under consideration, appeared as c. 361, R.S.O. 1937. The Advisory Vocational Committee referred to in the letter to the appellant of May 7, 1948, was the body which, under the provisions of the Vocational *Education Act,* c. 369, R.S.O. 1937, was charged with the management and control of the Danforth High School.

By s. 2 of the *Teachers' Board of Reference Act 1946* every termination of employment of a teacher by a board is required to be by notice in writing which shall indicate the reasons for such dismissal, and it was in pursuance of this statutory duty that the letter of May 7, 1948, was written. As the evidence showed, records were kept of the meeting of the Advisory Vocational Committee held on April 29, 1948, in which the following appears:

> From the Director of Education submitting as requested a further report regarding Miss M. Lacarte, teacher at Danforth Technical School.
>
> Following a review of the case by the Director of Education and the Superintendent of Secondary Schools, the Director of Education recommended as follows:—"That the contract of Miss M. Lacarte be terminated on June 30th, 1948 on the ground of lack of co-operation with the principal and certain members of the staff of Danforth Technical School."
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> After some discussion the recommendation of the Director was adopted on motion of Representative Burns.

A portion of the minutes of a meeting of the Board of Education held on May 6, 1948, at which the resolution referred to in the letter of May 7 was passed was also put

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in evidence. The letter had been dictated to a stenographer, Miss Mary Cartwright, an employee of the Board, and two carbon copies of it were kept with its records. According to Miss Cartwright, these copies were retained in the Board's files, one being bound up in a book, and the other in what were described as the central files. They would, of necessity, be seen by the filing clerk or clerks who attended to such work.

As to the other employees and officials of the Department who gave evidence, none of them said that they had ever seen the letter or a copy of it, though the agenda of the meeting of the Advisory Vocational Committee which was held on April 29, 1948, and of those of the respondent Board held on May 6 had been seen by some of them. While these minutes contained copies of the resolutions which were passed by these respective bodies, since the claim for libel is restricted to the alleged publication of the letter of May 7, this evidence need not be considered. I would, however, add that if any such claim had been made in respect of these minutes, the evidence shows that they were seen only by persons employed by the respondent whose duty it was to deal with such documents in the ordinary course of the respondent's business, or to keep a record of the termination and the reasons for the termination of a teacher's employment.

The appellant, in writing to the Honourable George Drew requesting a reference under the provisions of the *Teachers' Board of Reference Act 1946,* had enclosed a copy of the letter complained of, and this was seen by the Deputy Minister of Education, as well as, presumably, by the Minister and by Mr. Silk, Q.C. of the Attorney General's Department, when certain proceedings were taken by the appellant in regard to the board of reference which was ultimately granted and which considered the appellant's complaint. Since this publication was made by the appellant, it is of no assistance to her contention.

The learned trial judge, in a carefully considered judgment, held that such publication of the letter and the carbon copies of it and of the copies of the resolutions as had been made by the respondent was upon occasions of qualified privilege, a conclusion with which the learned judges of the Court of Appeal have unanimously agreed.

The letter was written and the reasons for the termination of the appellant's services stated for the reasons to which I have referred. In the ordinary course of business, the letter was dictated to a stenographer and copies were undoubtedly seen by the filing clerks. The ground upon which the privilege rests in a case such as this is stated by Baron Parke in *Toogood v. Spyring*[1]. That it is not lost by such communications is shown by the cases referred to by the learned trial judge: *Osborn v. Boulter*[2] and *Edmondson v. Birch*[3], which, in my opinion, accurately state the law. In the last mentioned case it was said by Fletcher Moulton L.J. (p. 382) that if a business communication is privileged, as being made on a privileged occasion, the privilege covers all incidents of the transmission and treatment of that communication which are in accordance with the reasonable and usual course of business.

Such a claim of privilege might, of course, be defeated by proof of malice in fact. The learned trial judge, dealing with this aspect of the matter, referred to a passage from the judgment of Lord Macnaghten in delivering the judgment of the Judicial Committee in *Jenoure v. Delmege*[4], adopting what had been said by Parke B. in *Wright v. Woodgate*[5], reading:

> The proper meaning of a privileged communication is only this: that the occasion on which the communication was made rebuts the inference *prima facie* arising from a statement prejudicial to the character of the plaintiff, and puts it upon him to prove that there was malice in fact—that the defendant was actuated by motives of personal spite or ill-will, independent of the occasion on which the communication was made.

The learned trial judge found that there was no evidence to go to the jury upon which they could properly find malice on the part of the respondent and said that he did not consider that any one could reasonably deduce from the evidence that there was any wrongful motive or intent on any one's part in dealing with the dissemination of the reasons for the appellant's dismissal after the dismissal took place. The learned judges of the Court of Appeal were unanimously of the opinion that there was no evidence

[1] (1834), 1 C.M. & R. 181 at 193, 149 E.R. 1044.
[2] [1930] 2 K.B. 226, 232.
[3] [1907] 1 K.B. 371, 380.
[4] [1891] A.C. 73 at 78.
[5] (1835), 2 C.M. & R. 573 at 577, 150 E.R. 244.

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of malice and that the learned trial judge was right in so holding in directing that a verdict in favour of the defendant be returned.

My consideration of the record in this matter leads me to the same conclusion. I find no evidence upon which a jury could properly find that the members of the Advisory Vocational Committee who recommended the dismissal of the appellant, the members of the Board of Education or their officers who carried out their duty in informing the appellant in writing of the reasons for her dismissal, were actuated by any other motive than the due discharge of their duties.

I would dismiss this appeal with costs if demanded.

The judgment of Rand and Cartwright JJ. was delivered by

CARTWRIGHT J. (*dissenting*):—This is an appeal from a judgment of the Court of Appeal for Ontario[1] dismissing an appeal from a judgment of Wells J. who had dismissed the appellant's claim for damages for libel.

On August 23, 1951, the appellant commenced an action against the respondent in which she claimed, *inter alia,* damages for libel. At the first trial of the action before the late Mr. Justice Anger the jury failed to reach an agreement. Following this the learned Chief Justice of the High Court directed that the issue of libel should be tried separately before a judge and jury and that all other issues raised in the action should be tried by a juge without the intervention of a jury. In this appeal we are concerned only with the claim for damages for libel.

The words complained of were contained in a letter of dismissal dated May 7, 1948, addressed by the respondent to the appellant reading as follows:

THE BOARD OF EDUCATION
155 College Street,
Toronto.

A. V. Ackehurst,
Assistant Secretary,
7 May, 1948.

Miss Meriza Lacarte,
9, Tennis Crescent,
Toronto, 4, Ontario.
Dear Madam:—

[1] [1956] O.W.N. 844.

By Resolution of the Board of Education for the City of Toronto passed on the sixth day of May, 1948, approving a recommendation of the Advisory Vocational Committee of the said Board, made on the twenty-ninth day of April, 1948, I was instructed to, and do hereby, inform you that your agreement as a teacher with the said Board will be terminated on the thirtieth day of June, 1948, on the ground of lack of co-operation with the Principal and certain members of the Staff, of the Danforth Technical School.

This Notice is given pursuant to the terms of the said agreement and Regulations Nos. 10 (ss.4) and No. 29 of the said Board.

Yours truly,
(signed) C. H. R. FULLER
Business Administrator
and Secretary-
Treasurer.

The words of which particular complaint is made are those stating the ground of dismissal as being:
lack of co-operation with the Principal and certain members of the Staff of the Danforth Technical School.
These words were also contained in minutes of a meeting of the Advisory Vocational Committee of the respondent of April 29, 1948, and in the minutes of a private session of the respondent held following its regular meeting on May 6, 1948.

In the statement of claim the appellant alleged that the words complained of were published by the respondent to the Principal of Danforth Technical School and members of his staff, to other members of the respondent's staff, to the Minister of Education for the Province of Ontario, to members of his staff and to members of the staff of the Attorney General for Ontario.

At the opening of the trial before Wells J. it was made plain by counsel for the respondent that there was no plea of justification and that the defence relied on was that the statement was published on occasions of qualified privilege and without malice.

The appellant pleaded a number of innuendoes, but I do not find it necessary to consider these as it is clear that the words complained of are, in their plain and ordinary meaning, defamatory of the appellant and calculated to disparage her in her profession.

The trial occupied several days. At the conclusion of the plaintiff's case counsel for the respondent moved for a non-suit and after hearing some hours of argument the

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learned trial judge granted this motion and directed the jury that as a matter of law they must return a verdict for the defendant.

The learned trial judge was of opinion that it was the duty of the respondent, under s. 2(1) of *The Teachers' Boards of Reference Act* to give the respondent notice in writing indicating the reasons for her dismissal, that the resolutions embodying those reasons, including the statement complained of, were published by the respondent to about twenty persons all of whom were officials, clerks, stenographers, filing clerks or members of the accounting department of the respondent, that the publications were on an occasion of qualified privilege and were not made to any of those persons otherwise than in a reasonable manner and in the ordinary course of business. The learned judge indicated that he had reached this conclusion in regard to the members of the accounting staff only after considerable reflection.

The learned judge went on to hold that there was no evidence upon which the jury could find express malice.

As I have formed the opinion that there must be a new trial I will refer to the evidence only so far as is necessary to make clear the reasons for my conclusion.

On the question whether the publication to the members of the accounting department was covered by the privilege I do not find it necessary to express a final opinion. That question is one to be decided by the judge presiding at the new trial on the evidence before him. Certainly some of the answers made by the witnesses who were questioned on the point indicated that there was no necessity for the members of that department to know the reason for a teacher's dismissal but other answers made in response to questions which while permissible were most leading indicated the contrary.

I have read with care all the evidence given at the trial and in my opinion it would have been open to a properly directed jury to find that some of the employees of the respondent who, acting within the scope of their duties, furnished the information on which the respondent acted in making the statement complained of were actuated by malice towards the appellant.

The evidence bearing on this question is chiefly that of the appellant herself, which was uncontradicted and not seriously shaken on cross-examination. From all the evidence it appears to me that the jury might reasonably have taken the following view of the facts:—(i) that the statement that the appellant had failed to co-operate with the Principal and certain members of the staff of Danforth Technical School was false, not merely because falsity is presumed in the absence of a plea of justification but because the falsity was proved by the appellant's evidence; (ii) that the principal was irritated by the fact that the appellant made repeated complaints about various matters, such as, for example, minor discourtesies to which she was subjected by other members of the staff and the lack of specific instructions as to the circumstances under which teachers including the appellant should be asked to give private tuition; (iii) that the most serious of her complaints was in regard to the fact that, while her outstanding qualifications as a teacher of French were admitted, she was without cause diverted from the teaching of that subject to others which were not only less congenial to her but in which she was not so well qualified; (iv) that her complaints were justified but she was given no redress; (v) that her request to the Superintendent of Secondary Schools that she be recommended for transfer to another collegiate in which she could teach French was refused without cause, was resented by the principal and resulted only in the latter suggesting that the appellant should resign if she was unwilling to carry on with the teaching programme outlined for her; (vi) that the appellant at all times carried out her duties and obeyed the instructions given to her by the principal; (vii) that the irritation mentioned above ripened into dislike and resulted in a desire to get rid of the appellant; (viii) that instead of stating what he knew to be the true reason for seeking her dismissal which was irritation at the repeated complaints, all of which the jury might have found to be justified, the principal represented that she was failing to cooperate.

I wish to make it clear that I do not say the jury ought to have made these findings but in my view it was open to them to do so and to draw from them the inference that the principal, at least, was actuated by express malice.

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In reaching their conclusion the jury were entitled to consider that the respondent in whose knowledge, i.e., in that of its officials and employees, these matters lay did not see fit to tender evidence in contradiction of that of the appellant.

On the assumption that the publication was protected by the occasion of qualified privilege, as held by the learned trial judge, the onus of proving express malice was of course on the appellant, but, as in all civil cases, the jury might find it proved if all the evidence raised a preponderance of probability of its existence. As was said by Lord Atkin in Perrin v. Morgan[1]:

> To decide upon proven probabilities is not to guess but to adjudicate.

If the jury reached the conclusion that the principal was actuated by express malice, I am of opinion that the qualified privilege which would otherwise have protected the respondent would be defeated. It is a permissible inference that the statement made by the respondent that the appellant had failed to co-operate with the principal was founded on reports from the latter and that in making whatever reports he made he was acting within the scope of his employment.

The applicable principle of law may, in my opinion, be stated as follows. Where a corporation is under a duty, whether of perfect or imperfect obligation, to publish a statement about X, and in the preparation of that statement relies on information furnished by one of its employees within the scope of whose employment it is to furnish the information, the malice of that employee in furnishing false and defamatory information which is made part of the statement published will in law be treated as the malice of the corporation, although all members of the board of directors or of trustees which authorizes the publication are individually free from malice.

I am assisted in reaching this conclusion by the reasoning of McArthur J. in *Falcke v. The Herald and Weekly Times Ltd*[2]., a case in which the question arose whether the

[1] [1943] A.C. 399 at 414, 1 All E.R. 187.
[2] [1925] V.L.R. 56.

defence of fair comment relied on by the defendant corporation was defeated by a finding that the writer of the comment was actuated by malice. At pages 72 and 73 the learned Judge says:

> The next question is whether the dishonesty of MacDonald in writing the article is imputable to the defendant so as to make the comment, which was published by the defendant and not by MacDonald, an unfair comment. As far as I am aware, this precise point has never been decided, though there are a number of authorities showing that the principal, whether a corporate body or an individual, may be liable for the malice or fraud of his servant or agent acting within the scope of his authority, and in particular for the malice of his servant or agent in *publishing* a libel. It seems to me that the same principle should apply in the case of the servant or agent *writing* a defamatory comment for the purpose of being published and which is published by the defendant. The wrong complained of by the plaintiff is the printing and publishing of and concerning him certain defamatory words. Those defamatory words are not written by the defendant himself, but by a writer who was employed by the defendant to write a comment. The defendant might have written the comment himself, and if he had done so, and did not honestly believe in the opinions expressed he would, on publication, undoubtedly be liable. Instead of writing the comment himself he employs a servant or agent to write it for him. "Qui facit per alium facit per se." It seems to me that he must be responsible for both the acts and the state of mind of his servant or agent. It is true that, until the words are published, the plaintiff has no cause of action, but once they are published, and once the question arises as to whether or not they are fair comment, the circumstances under which the words were *written* become important, and if it be shown that they were written dishonestly or maliciously by the servant or agent employed by the defendant to write them, then it seems to me that that dishonesty or malice is imputable to the defendant so as to destroy the fair comment. It may be put perhaps more simply, and somewhat differently, thus:—A defamatory comment has been published by the defendant of the plaintiff; for that the defendant is *prima facie* liable in damages to the plaintiff; to defeat that *prima facie* liability the defendant endeavours to prove that it was fair comment. But in endeavouring to do this he proves (or it appears in the course of the case) that the comment was a dishonest comment made by his servant or agent whilst acting in the scope of his authority. Surely this does not amount to proof of fair comment?
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> The defendant cannot escape liability by saying—"I did not know it was unfair when I published it. I did not know that my servant or agent, whom I employed to write an opinion, wrote a dishonest opinion."
>
> I am, therefore, of opinion that the defendant has not succeeded in its defence of fair comment.

I do not find it necessary to deal with any of the other points which were raised in argument before us.

In the result I would allow the appeal, set aside the judgments in the Courts below and direct a new trial of the action in so far as it relates to the claim for damages

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for libel. At the trial counsel for the appellant urged the learned trial judge to take the verdict of the jury so as to avoid the possible necessity of a new trial but this course was not followed. Under all the circumstances I would direct that the appellant recover the costs of the abortive trial and of the appeal to the Court of Appeal from the respondent. In this Court the appellant will recover the costs to which she is entitled having regard to the fact that the appeal was brought *in forma pauperis*.

Appeal dismissed with costs if demanded, Rand *and* Cartwright JJ. *dissenting.*

Solicitor for the defendant, respondent: D. Hillis Osborne, Toronto.

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*PRESENT: Rand, Locke, Cartwright, Abbott and Martland JJ.