



# What's New in HR Law

## Employers Should Tread Carefully When Disclosing Employee Information to Regulatory Bodies

November 15, 2018

### **BOTTOM LINE**

A new Ontario Court of Appeal case provides both guidance and caution to employers in regulated industries when disclosing facts or making complaints to a regulator against former or departing employees.

### **The Facts: An investment firm filed a defamatory Notice of Termination on its regulator's database**

The CEO of Hampton Securities (the Employer) took the position that the proprietary trader, Christina Dean, owed Hampton Securities money as a result of certain trading losses. The next day, Ms. Dean resigned, alleging constructive dismissal. Hampton Securities then issued a claim against Ms. Dean for those trading losses.

Hampton Securities then filed a Notice of Termination on the database maintained by its regulator: IIROC, or the Investment Industry Regulatory Organization of Canada. In the Notice, Hampton Securities stated that Ms. Dean was terminated for cause for failing to follow trading policies and for engaging in unauthorized trading.

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The trial judge found that Ms. Dean, who counterclaimed for damages for constructive dismissal and defamation, had been constructively dismissed and awarded six months of damages. The trial judge also awarded punitive damages of \$25,000 as compensation for the Notice, which he found was defamatory. The Employer appealed this decision.

### **The Determination: Employers will not be protected by the defence of qualified privilege when disclosing facts to a regulator if they have exceeded the limits of a duty to report**

The Ontario Court of Appeal affirmed the trial judge's finding that while the Notice filed with IIROC would normally be protected by the defence of qualified privilege, that privilege did not apply in this case.

In certain circumstances, a party may defend against a defamation claim on the basis that the defence of qualified privilege applies. Qualified privilege arises when a communication is made in the discharge of a legal, social or moral duty, *or* on a matter where there is a common interest between the party making the statement and the party receiving it.

For example, qualified privilege may arise when giving information to someone investigating a crime or in reporting to a regulatory body—such as IIROC, the Ontario Securities Commission, or the Chartered Professional Accountants of Ontario. The defence of qualified privilege will not apply if the dominant motive for publishing is malice, or the statement exceeds the limits of the duty giving rise to the privilege.

The Court of Appeal affirmed the trial judge's finding that the defence of qualified privilege did not apply to the Notice. The Employer's statements in the Notice exceeded the legitimate purposes of the duty to report all internal disciplinary matters to IIROC. The information in the Notice was "untrue and wholly unsubstantiated".

The award of punitive damages, based on the Employer's decision to file the defamatory Notice, was also appropriate based on the breach of the duty of good faith.

The Court noted:

Providing misleading statements to IIROC clearly exceeded the scope of the duty to report all internal discipline matters or the duty to warn of potential risks that registered individuals may create. [...] The damages were modest and do not come close to fully compensating Ms. Dean for the devastating consequences of Hampton's conduct.

### **Check the Box**

When disclosing information about a former employee or making a complaint to a regulator, employers should:

- Consider whether you are under a legal duty to file such information with a regulatory body.

- Ensure that any information about a former or departing employee in a report or complaint to a regulatory body is truthful and substantiated. Consider whether it is appropriate to initiate an internal investigation before making such a report or complaint.
- Seek advice from legal counsel when filing information with a regulatory body regarding a departing or former employee. In some cases, it may be mandatory to report to the regulator. In other cases, it may make sense to make a complaint to a regulatory or professional body. Legal counsel can help guide you through the process of making that complaint while mitigating any risks associated with such a report or complaint.

**Date:** November 9, 2018

**Forum:** Ontario Court of Appeal

**Citation:** [Hampton Securities Limited v Dean, 2018 ONCA 901](#)

### Need more information?

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