

## ***The Truth Can Hurt and That's Okay: Providing Negative Employment References***

The Supreme Court of Canada recently denied hearing an appeal of the Ontario Court of Appeal's decision in *Kanak v. Riggan*, ("*Kanak*"), which confirmed that an employer can provide a negative employment reference in particular circumstances.

In *Kanak*, an employee sued her former manager for defamation for what she felt was a particularly unfair employment reference that prevented her from obtaining new employment. When called to provide an oral reference, the employee's former manager said the employee did not handle stress or take direction well and that he would not re-hire her in her previous position, but would hire her for another position, among other comments.

The above comments were considered defamatory by the trial judge who initially heard the case. However, having been made in the context of an employment reference, the comments were protected by something called "qualified privilege", which is a legal principal which provides immunity to acts committed in the performance of a legal or moral duty provided there was no malice – an intention to cause harm. Essentially, to prove defamation in this context, the employee had to prove her former employer or manager intended to cause her harm in making the comments. Based upon the evidence, there was no malice behind the statements and the trial judge, and then the Court of Appeal, dismissed the employee's claims.

### **Takeaways**

While we typically encourage employers to focus on the positive attributes of a former employee when giving a reference, this case does confirm that an employer can provide negative employment references where there is no intent to cause harm, even if harm is caused. Often times it is advantageous to help a former employee obtain new employment so if negative statements are unavoidable, we strongly recommend, where possible, to strike a balance between a former employee's positive and negative attributes.

If you have any questions about employee references, please do not hesitate to contact us to speak to an e2r® Advisor.