

SHELL

L A W Y E R S

December 22, 2008

VIA FACSIMILE (613) 225-7631

Mr. Kris Klein
Barrister & Solicitor
15 Northview Road
Ottawa, ON K2E 6A6

VIA FACSIMILE (613) 542-8202

Mr. Christopher Edwards
Templeman Menninga LLP
401-366 King Street East
Kingston, ON K7L 6Y3

VIA FACSIMILE (416) 591-7333


Mr. James McDonald
Sack Goldblatt Mitchell LLP
20 Dundas Street West, Suite 1100
Toronto ON M5G 2G8

Dear Sirs:

Re: Thompson v. CUPE, Paul Moist, Lesley Swann
Court File No.: 08-CV-41455
Our File: 701049

Please find enclosed a copy of Ms. Swann's Statement of Defence which is served upon you pursuant to the *Rules of Civil Procedure*.

Yours sincerely,


Brian Shell *per a.s.*

Encl.

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

Katherine Thompson

Plaintiff

- and -

Canadian Union of Public Employees, Paul Moist, Lesley Swann

Defendants

**STATEMENT OF DEFENCE
OF THE DEFENDANT LESLEY SWANN**

1. The defendant Lesley Swann (hereinafter “the defendant” or “Swann”) admits the allegations contained in the first half of the sentence in paragraph 4 (Paul Moist is President of CUPE), 5, 9 of the statement of claim.
2. The defendant denies the allegations contained in paragraphs 2, 3, 6, 7, 8, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25 of the statement of claim.
3. The defendant has no knowledge in respect of the allegations contained in the second half of the sentence in paragraph 4 (Paul Moist resides in Ottawa) of the statement of claim.

The Defendant Swann and her Relationship with the Plaintiff

4. The Defendant is the President and highest ranking executive officer of the Air Canada Component (“ACC”) of Canadian Union of Public Employees (“CUPE”).
5. CUPE is the certified bargaining agent for a bargaining unit of flight attendant employees employed by Air Canada. The ACC is a component of CUPE composed of all local unions chartered by CUPE representing flight attendant employees employed by Air Canada and is established pursuant to the CUPE Constitution.
6. As incumbent executive officers of the ACC, both the plaintiff and the defendant were *de facto ex officio* employees of the ACC at all material times.
7. Pursuant to the By-laws of the ACC, the President of ACC is responsible for the protection, promotion and advancement of the interests of the ACC and its membership and is solely responsible for the conduct of the affairs and business of the ACC.
8. The defendant was elected to the office of President of the ACC and commenced a two-year term as President on February 1, 2007.
9. The plaintiff was acclaimed to the position of Secretary Treasurer of the ACC and commenced a two-year term as Secretary Treasurer on February 1, 2007.
10. Pursuant to the By-laws of the ACC, the Secretary Treasurer of the ACC is responsible for supervising, safeguarding and maintaining the financial affairs of the ACC.

11. On or about April 2007, in the exercise of her responsibilities as President of the ACC as set out in the By-laws of the ACC, the defendant appointed the plaintiff to the position of ACC Preferential Bidding System (“PBS”) Committee Chair.

12. The mandate of the PBS Committee is to maintain the system by which flight attendants are awarded their bids for their monthly schedules based on seniority preference and the Company’s operational language and classification requirements. As such, the work of the PBS committee is very important to the membership as it deals with ongoing scheduling issues and makes decisions within its mandate and/or recommendations to the Air Canada Component Executive (“ACCEX”) where necessary.

Invasion of Privacy

13. The plaintiff had no reasonable expectation of privacy with respect to electronic mail (e-mail) sent through the ACC e-mail system and the ACC server.

14. The Officers of the ACC, including the plaintiff, as well as most of the Chairs of the various ACC committees, are provided with computers and e-mail accounts in order to perform the work of the ACC. The computers and e-mail accounts remain the property of the ACC and are to be returned to the ACC when the incumbent in office ceases to be in office or ceases to perform committee work for the ACC. For example, when the defendant assumed her role as Component President, she acquired from her predecessor full access to the e-mail account of her predecessor and all of the information contained therein, for union business purposes.

15. The ACC's e-mail system is part of the ACC server and is the sole and exclusive property of the ACC.

16. Between May 2007 and September 2007, the defendant received reports that between April 2007 and August 2007 (the period when the plaintiff served as PBS Chair) the plaintiff had met with Air Canada officials on her own, not accompanied by other union officials, contrary to the ACC mandate of an ACC committee and contrary to the established practices of the ACC, of which the plaintiff was or should have been fully aware. The ACC committee mandate is that there must always be two committee members present during any discussions with the employer.

17. The defendant was aware that the plaintiff failed to make reports to the defendant in her capacity as President of the ACC, whether orally or in writing, with respect to several of such PBS meetings which the plaintiff attended on her own with Air Canada officials. and/or failed to make reports of such meetings to the ACC Executive.

18. On or about June 15, 2007, the defendant spoke with the plaintiff about the meetings in question and about her failure to make reports about them and about her attendance at them on her own and the defendant discussed with the plaintiff the impropriety of communicating directly with officials of the Employer without the presence of another committee member.

19. The plaintiff assured the defendant, in her capacity as President of the ACC, that the plaintiff would cease and desist from such conduct in the future.

20. At this time, the defendant was also aware, by virtue of her responsibilities as President of the ACC, that the plaintiff had:
- a. Improperly entered direct negotiations with representatives of the Employer;
 - b. Failed to keep the ACCEX informed of her regular meetings with representatives of the Employer; and
 - c. Made unsolicited comments to Employer representatives respecting crew/meal expenses which triggered the Employer's enforcement of unfavourable collective agreement provisions, to the detriment of the membership.
21. On or about September 1, 2007, the defendant decided to remove the plaintiff from the Chair of the PBS Committee because she concluded that the communication style and the plaintiff's pattern of secrecy and the plaintiff's failure to keep all abreast of her meetings with the Employer caused her to mistrust the plaintiff and that the plaintiff's conduct was detrimental to the ACC.
22. On or about mid-end October 2007, after the reasons for the removal of the plaintiff from the PBS Chair position were questioned by the members of the ACC Executive Board during the September 10 through 13, 2007 meeting of the ACCEX, the defendant, in the exercise of her responsibilities as the President of the ACC, conducted a limited and discrete investigation into the conduct of and possible improprieties committed by the plaintiff. The defendant was concerned that the plaintiff continued to communicate with officials of the Employer on her own, without including other committee members and/or without including the President of the ACC and/or the ACC Executive in such communications, all to the detriment of the ACC.

23. This investigation was limited to accessing, on a single occasion and in a one-hour period of time, the plaintiff's e-mails on the ACC server with the assistance of the ACC's Information Technology Consultant, Axel Weltner.
24. The only e-mails reviewed by the defendant were those listed as "sent" in the period between April 2007 and September 2007, the period when the plaintiff served as the PBS Chair. No other e-mails were accessed or reviewed by the defendant or by anyone else to the knowledge of the defendant.
25. The investigation disclosed that on July 30, 2007 the plaintiff had sent an e-mail communication to a third party which referred to confidential information that had not been discussed by the ACC Executive and that had not been discussed with the defendant in her capacity as the President of the ACC. The specific information pertained to in-charge vacation pay issues.
26. On November 24, 2007, the plaintiff requested that defendant Moist investigate the office of the defendant (Swann) for an alleged breach of her privacy by the defendant (Swann).
27. The defendant (Swann) was advised by the office of the defendant Moist that he would address the plaintiff's request after Christmas. Shortly after the Christmas holidays, the defendant (Swann) was advised that the defendant Moist declined to investigate her office.
28. On or about January 15, 2008, the defendant, in her capacity as the President of the ACC made a written request of defendant CUPE President Paul Moist to investigate the conduct of the plaintiff in her capacity as secretary Treasurer of the ACC.

29. On January 24, 2008, defendant Moist offered the assistance of senior retired CUPE servicing representative to conduct a review of the situation and prepare a report and recommendations for the defendant Moist and the ACCEX. The defendant accepted the invitation. The plaintiff declined the offer.
30. On April 17, 2008, defendant Moist offered his direct personal assistance to resolve the issues between the plaintiff and defendant (Swann). The defendant accepted Moist's second invitation. The plaintiff declined the offer.
31. The defendant states that the ACC By-laws and the common law entitle her in the exercise of her responsibilities as President of the ACC to access e-mails of the plaintiff on the ACC server and that in so doing, and in the circumstances present, she was properly discharging her responsibilities as the President of the ACC.
32. Prior to the discrete investigation, the defendant received advice from legal counsel to CUPE, Mona Elhilali, that she was entitled to access the plaintiff's e-mails stored on the ACC server and e-mail system. The defendant received similar advice from then ACC Vice President Stephen Morash, her Office Manager Shirley Greenwood, and the CUPE National Servicing Representative, Humberto Dasilva.
33. In addition, the defendant was advised by her Office Manager and by the ACC's Information Technology Consultant of a "Computer Services and Equipment" policy drafted in 2006. The defendant held an honest belief that the policy was effective and allowed her to gain access to the plaintiff's e-mails stored on the ACC server and e-mail system.

Defamation

34. On January 7, 2008, in the exercise of her responsibilities as the President of the ACC of CUPE, the defendant drafted and released an ACC publication entitled “Special Report to the Membership”.
35. The “Special Report to the Membership” was issued only to the members of the ACC.
36. The “Special Report to the Membership” was issued *after* the plaintiff widely circulated, on December 29, 2007, a message to the membership, and to the ACC Executive, and to all committee members of the ACC and to all of the ACC local unions which alleged that the defendant had “likely broken the law in both a criminal and civil context”.
37. The defendant published the “Special Report to the Membership” in order to correct the misinformation contained in the plaintiff’s circulation and to address membership concerns that may have developed as a result of receiving the plaintiff’s message.
38. The defendant states that the words published in the “Special Report to the Membership” are true.
39. In the alternative, the defendant states that the words were published on an occasion of qualified privilege.

40. As President of the ACC, the defendant was duty bound to report matters to the members and to defend and protect the members' interests and report about interactions between ACC leaders and the Employer.

41. Further, the defendant states that the words were published in an honest belief of the truth of the statements, in good faith and without malice.

No Damages Suffered by the Plaintiff

42. If the defendant is found liable, which is not admitted but strictly denied, the defendant denies that the plaintiff suffered any damages as alleged or at all.

43. The defendant states that the damages claimed are exaggerated and are too remote.

44. The defendant states that the damages claimed do not flow from the defendant's actions or words.

45. If the defendant is found liable, which is not admitted but strictly denied, the defendant states that the plaintiff has failed to mitigate her damages. The plaintiff, using the resources of the ACC and purporting to do so as the ACC secretary-treasurer, published a communication which set out her position respecting the "Special Report to the Membership", including widely circulating her lawyer's "without prejudice" letter dated January 18, 2008 wherein her position and her threat of legal action are described, and the plaintiff published this communication on her personal website: www.katherine-thompson.net.

46. Moreover, if the defendant is found to be liable to the plaintiff, which liability is strictly denied, the defendant states that any alleged losses by the plaintiff have flowed from other causes including the plaintiff's own re-publication, exacerbation and extended maintenance of the alleged defamatory statements and the circumstances surrounding the publication of the alleged defamatory statements on her own website and elsewhere.
47. The defendant states that by widely circulating her lawyer's January 18, 2008 letter, the plaintiff has waived any solicitor-client or other privilege in connection with the January 18, 2008 letter and any privilege respecting the subject matters canvassed in the letter.
48. The defendant states that she acted in good faith in investigating the conduct of the plaintiff and in publishing the "Special Report to the Membership" and that her conduct does not warrant the imposition of any punitive and/or aggravated damages. The defendant states that the plaintiff is not entitled to aggravated or punitive damages, and puts the plaintiff to the strict proof thereof.
49. The defendant states that the facts pleaded in the Statement of Claim do not support a claim against her in her personal capacity.
50. The defendant asks that this action against her be dismissed, with costs.

December 22, 2008

SHELL LAWYERS
672 Dupont Street, Suite 401
Toronto, ON M6G 1Z6

BRIAN SHELL
LSUC No. 19695S

ROSEMARY BASA
LSUC No. 53633B

Tel: (416) 539-0226 ext. 201/204
Fax: (416) 539-0565
brian@shelllawyers.ca /
rosie@shelllawyers.ca

Solicitors for the Defendant Swann

TO: **THE LAW OFFICE OF KRIS KLEIN**
15 Northview Road
Ottawa, ON K2E 6A6

KRIS KLEIN
LSUC No. 41512V

Tel: (613) 225-2906
Fax: (613) 225-7631
kklein@krisklein.com

Solicitor for the Plaintiff

AND TO: **TEMPLEMAN MENNINGA LLP**
401-366 King Street East
Kingston, ON K7L 6Y3

CHRISTOPHER EDWARDS
LSUC No. 41857Q

Tel: (613) 542-1889
Fax: (613) 542-8202
CE@k.templemanmenninga.com

Solicitors for the Plaintiff

AND TO: **SACK GOLDBLATT MITCHELL LLP**
20 Dundas Street West, Suite 1100
Toronto ON M5G 2G8

JAMES McDONALD
LSUC No.17518T

Tel: (416) 979-6425
Fax: (416) 591-7333

Solicitors for the defendants Canadian Union of Public Employees and Paul Moist

