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(Winnipeg Centre)

COURT OF KING'S BENCH OF MANITOBA

B E T W E E N:

KEN HAHLWEG and DR. KEN HAHLWEG MEDICAL CORPORATION, plaintiffs, - and - WOMEN'S HEALTH CLINIC INC., defendant.	)	Troy P. Harwood-Jones Jeffrey D.H. King for the plaintiffs Cynthia L. Lazar Kelby R. Loeppky Allison Kilgour for the defendant Judgment Delivered: July 19, 2024

CHAMPAGNE J.

I. INTRODUCTION

[1] Doctor Ken Hahlweg ("Dr. Hahlweg" or "the plaintiff") is a family physician with expertise in abortion care. Dr. Ken Hahlweg Medical Corporation is his business. For the most part, he works for and is paid by his business. Payment through the professional corporation provides Dr. Hahlweg with income tax advantages.

[2] On June 17, 2010, Dr. Hahlweg and the Women's Health Clinic Inc. ("WHC" or "the defendant") entered into an agreement for services contract ("the contract"). The contract formalized the working relationship between the parties. WHC provides a properly equipped facility for the provision of abortion services and Dr. Hahlweg agreed to provide Therapeutic Abortion services ("TAs") as an *independent contractor* on a fee-for-service basis.

[3] For the most part, WHC is publicly funded to provide TAs. The level of funding allows WHC's abortion program to offer TAs two days per week.

[4] In 2010, two doctors provided TAs for WHC. Dr. Hahlweg and Doctor Suzanne Newman ("Dr. Newman") had signed similar if not identical contracts. Both physicians were represented by Allison Crolly ("Ms. Crolly"), a lawyer and chief negotiator for Doctors Manitoba.

[5] In 2010, the doctors were each scheduled one procedure day (also referred to as "slates") per week. On average, Dr. Hahlweg had approximately 52 slates per year.

[6] In an effort to begin succession planning and in anticipation of Dr. Newman's retirement or in the event of a reduction in her hours, WHC engaged the services of Doctor Nadin Gilroy ("Dr. Gilroy") in June 2015, Doctor Adelicia Yu ("Dr. Yu") in April 2018, and Doctor Aleesha Gillette ("Dr. Gillette") in May 2019 as abortion providers.

[7] The increase in physicians providing TAs resulted in a decrease in the number of slates for Dr. Hahlweg and Dr. Newman. It is clear Dr. Hahlweg was unhappy with the

reduction in slates and he claims WHC breached the terms of the contract as they changed the number of slates without consulting with him.

[8] The plaintiff also claims WHC breached the contract by failing to provide annual reviews where concerns could be addressed. Further, he claims WHC breached the terms of the contract by failing to implement the procedures for dispute resolution. Although he claims these concerns amounted to breaches of the contract, he continued to provide TAs for WHC pursuant to the 2010 contract that was renewed by mutual agreement and continued in force until it was terminated by WHC.

[9] The contract had a 90-day notice provision. On July 23, 2020 WHC provided Dr. Hahlweg with a 90 days' notice of termination. Dr. Hahlweg worked and was paid for the 90 days of service which ended on October 20, 2020.

[10] On December 1, 2020 Dr. Hahlweg filed his statement of claim against WHC. The claim is complicated and sets out numerous causes of action. It appears the thrust of the claim is breach of contract, wrongful termination and defamation. The claim also asserts breaches of statute and breach of fiduciary duties. At the conclusion of the trial, counsel for the plaintiff confirmed they were no longer advancing any claim for breach of statute or breach of fiduciary duty.

[11] The claim describes Dr. Hahlweg as a *dependent contractor.* Counsel for the plaintiff went further and described the relationship between Dr. Hahlweg and WHC as one of *employer and employee*. The nature of the relationship of Dr. Hahlweg and WHC is important as legal rights and obligations of the parties vary depending on the nature of the working relationship.

[12] The plaintiff claims he was constructively dismissed and/or wrongfully terminated by WHC and therefore entitled to reasonable notice or pay-in-lieu of notice of termination. The plaintiff submits 90 days of notice set out in the contract is unreasonable and he is entitled to 18 to 24 months payment-in-lieu of notice along with a host of other damages.

[13] The plaintiff identifies five communications that he claims amount to defamation. He claims WHC created and disseminated libelous, slanderous and otherwise untrue and harmful statements that have caused irreparable damage to his reputation.

[14] WHC denies any breaches of the contract and if there were breaches, they were condoned by Dr. Hahlweg. WHC maintains Dr. Hahlweg was an independent contractor as described in the contract. The terms allowed either party to terminate the contract upon giving 90 days' notice. WHC gave proper notice and Dr. Hahlweg was paid for his 90 days of service.

[15] WHC denies the content of the communications amount to defamation. WHC takes the position there was no publication of the communications and if they were published, the communications were justified, covered by qualified privilege and the content was true. WHC says the entire claim should be dismissed.

II. THE EVIDENCE, ISSUES AND ANALYSIS

[16] There was a voluminous amount of evidence in this trial. The plaintiff testified and called six additional witnesses, while WHC called three witnesses. In addition, the parties filed several exhibits. The first exhibit contains seven volumes of agreed book of documents amounting to 2,772 pages. The second exhibit is an agreed statements

of fact. The third exhibit is a supplemental agreed statements of fact. The final exhibit contains read-ins transcribed from the examination of Kemlin Nembhard, interim executive director of WHC starting at the end of July 2020.

[17] Dr. Hahlweg describes himself as a full-service "cradle to grave" family physician. In 1995 he began his family practice in Teulon, Manitoba. He had permission from the Teulon Hospital Board to provide abortion services out of the Teulon Hospital. From 1995 to 2001, he worked in Teulon and in a satellite clinic in Woodlands, Manitoba.

[18] Around 2001, he and his family moved to Winnipeg. The transition was gradual as he continued to work in Teulon. In Winnipeg, he took on a variety of positions. He worked for the Northern Medical Unit doing fly-ins for northern communities particularly around Island Lake. He also practiced at Aikins Street Community Health Centre where he was the medical director. He also provided personal care home services at Fred Douglas Lodge and would become the medical director for that facility.

[19] When the contract was signed in 2010, Dr. Hahlweg was the attending family physician for the Northern Connection Medical Centre ("NCMC"). He continues to operate his family medicine practice at NCMC. Throughout most of his medical career, he has taught at the Department of Family Medicine at the University of Manitoba.

[20] In about 2001, he happened to run into Dr. Newman at a grocery store. They were old friends. At the time, she was the sole provider of abortion services at the Morgentaler private abortion clinic (the "Morgentaler clinic"). She knew Dr. Hahlweg had provided abortion services in Teulon and she invited him to join her. The

Morgentaler clinic was operated out of a house on Corydon Avenue in Winnipeg. For the most part, only women with financial means could access TAs as there was no public funding. At the start, Dr. Hahlweg worked one day every other week, providing TAs approximately 26 days of the year at the Morgentaler clinic.

[21] Dr. Newman was a fierce advocate for women's reproductive health and pushed to have the provision of TAs covered by public funds. The provision of abortion services in Canada and around the world is not without controversy. The Morgentaler name has a long history in Canada and it became clear that the government of the day would not provide public funds in support of the Morgentaler clinic.

[22] Dr. Newman persisted and based on information she gathered she hoped the government would financially support a new abortion clinic. She and the head nurse bought the Morgentaler clinic from Dr. Morgentaler and it became Jane's Clinic Inc. in March 2004. Discussions led to a memorandum of understanding with the Winnipeg Regional Health Authority that saw Jane's Clinic Inc. receive block funding to support the provision of TAs in a clinic rather than a hospital setting.

[23] The proposal included a transition phase that would ultimately see the provision of TAs in a clinic being provided as a program through WHC. In April 2006, WHC became responsible for providing TAs as one of several health programs they offered. As the provision of TAs transitioned from the Morgentaler clinic to Jane's Clinic Inc. to WHC, the addition of public funding provided more access resulting in two days per week scheduled for the provision of the service. In 2006, Dr. Newman and

Dr. Hahlweg each worked one day per week amounting to each performing 52 slates per year.

[24] The WHC provides numerous health programs. The abortion program is operated out of a non-descript anonymous location designed to address safety and security issues of staff and their patients. The change from a private clinic to a publicly funded clinic is not without organizational challenges. As the abortion program progressed, WHC continued to work on administrative aspects of the program. The contract signed on June 17, 2010 formalized the work relationship between the plaintiff and the defendant. The plaintiff now claims numerous breaches of the contract.

Breach of Contract

[25] The plaintiff alleges several breaches of contract. None of the alleged breaches of contract had the effect of voiding or terminating the contract as the plaintiff acknowledges that the contract remained in force until October 20, 2020. Dr. Hahlweg continued to work as scheduled to the very last day of the contract. His conduct would suggest any breaches, if they occurred, were of a minor nature and he condoned any alleged breach by his actions. He chose to continue his work and provide TAs for WHC.

[26] The first breaches are alleged to have occurred beginning in 2015 when Dr. Gilroy joined the abortion program and continued until the plaintiff was given notice of termination in 2020. The first allegation of breach relates to paragraph two of the contract (Exhibit 1, Vol. 1, tab 6, at p. 0070) which states:

> 2. Procedure days shall be scheduled consistent with the past practice of the parties, provided that there is sufficient demand for the services. The procedure days shall be scheduled in consultation between the Physician and the WHC Team Manager, Health Services. In the event that WHC wishes to propose significant changes to the schedule to respond to changes in service demand and/or improve the resilience of the program by engaging another physician, WHC shall consult with the Physician with regard to the requirement for such changes and the anticipated effect on the Physician's hours and days of service.

[27] This condition of the contract is somewhat unclear but was intended to address several concerns. Dr. Newman and Dr. Hahlweg were the two abortion providers at WHC when the contract was signed. They each worked approximately one day per week. They had a set day of the week for providing TAs. This allowed them to confidently schedule their own clinics for the rest of the week. This condition was important so that their other work was not disrupted.

[28] A scheduling protocol was developed that saw a draft schedule produced and shared by email communication. WHC requested input from the doctors on which days they could or could not work. There was many examples of this consultation and Dr. Hahlweg agreed that he received the emails to set the schedule.

[29] WHC was provided limited public funding for TAs. If the funding increased or decreased, the doctor's schedule would change. This condition of the contract ensured there would be notice and discussion about such changes. The main concern for the plaintiff was to maintain 52 slates as a minimum number per year.

[30] The plaintiff acknowledges the contract never provided a guaranteed minimum number of slates. Prior to the contract being signed on June 17, 2010, there was discussion about the number of slates and the possibility of other doctors joining the

program. The possibility of adding another physician is also set out in the contract. It was understood that the number of slates could change. Ultimately the number of slates did change. Over time, new doctors were hired but the funding remained unchanged. The result was fewer slates for the plaintiff. He claims this condition of the contract was breached because there was insufficient consultation. I disagree.

[31] On February 17, 2015, Dr. Hahlweg knew WHC was pursuing another doctor to join the abortion program. He wrote to Ms. Crolly requesting that she join a scheduled meeting and advised Ms. Crolly that WHC was trying to figure out how to integrate another care provider into the program (Exhibit 1, Vol. 1, tab 34, at pp. 200-201). There were many discussions between Dr. Hahlweg, Dr. Newman and Ms. Crolly about a third doctor joining the program and about signing a new contract. It is clear from the documents that Ms. Crolly had been having ongoing discussions with WHC on behalf of the doctors as she was their representative. There was even discussion about a new contract that might provide a guaranteed minimum number of slates. Clearly, the past practice did not guarantee the doctors a minimum number of procedure days, rather, the past practice involved scheduling the doctors to the available slates.

[32] Dr. Hahlweg chose not to sign a new contract. The 2010 contract remained in effect after Dr. Gilroy joined the program in 2015. To now say the contract was breached because of the addition of Dr. Gilroy took place without consultation is nonsense. Dr. Hahlweg testified he accepted Dr. Gilroy to the program as he wanted to "play nice in the sandbox".

[33] The same can be said about the addition of Dr. Yu in 2018 and Dr. Gillette in 2019. There were ongoing email communications to all five doctors regarding availability and scheduling. In cross-examination, Dr. Hahlweg was taken through all the email communications, and he conceded there were ongoing discussions about scheduling the slates amongst the available physicians.

[34] On March 3, 2020, Dr. Hahlweg wrote to Blandine Tona ("Ms. Tona"), the director of the clinical abortion program at the time, to advise he did not agree with the distribution of slates for the upcoming fiscal year. He requested the matter be added to the agenda of the next physician's meeting.

[35] Ms. Tona wrote back the same day and copied Ms. Crolly to advise the issue would be on the agenda as requested (Exhibit 1, Vol. 2, tab 105).

[36] The slate/schedule was agenda item five for the April 8, 2020 physician's meeting. It was to be the last item for discussion and the agenda notes Nadine Sookermany ("Ms. Sookermany"), the executive director for WHC at the time, would join the discussion for 30 minutes. Prior to the meeting taking place, Dr. Hahlweg wrote to Ms. Crolly noting the agenda and asked for Ms. Crolly's input. Ms. Crolly wrote back to advise she asked that agenda item five be cancelled (Exhibit 1, Vol. 2, tab 111).

[37] Dr. Hahlweg testified that Ms. Crolly did that on her own with no input from him. I do not believe him. The documents and testimony demonstrate that Dr. Hahlweg often sought the advice of Ms. Crolly. He wanted to have this issue discussed since he asked for it to be placed on the agenda. I do not believe Ms. Crolly would cancel this

agenda item without his permission. It was April 8, 2020 at 1:40 p.m. when Ms. Crolly wrote to Dr. Hahlweg advising agenda item five was cancelled. Dr. Hahlweg responded to Ms. Crolly within one hour thanking her. It is inconceivable that he would thank her for removing agenda item five if he did not authorize it. In any event, it is just one more example of the opportunity for consultation about changes to the schedule.

[38] To be clear, Dr. Hahlweg did not like having his number of slates reduced but he did not repudiate the contract. He continued to work as scheduled. I conclude this condition of the contract was not breached, and if it was, Dr. Hahlweg condoned the breach by his actions. He understood that additional doctors were being added to the abortion program and he understood there would be a reduction in his slates. He made an informed choice. He chose to continue providing TAs as scheduled.

[39] Dr. Hahlweg alleges there were breaches of sections 16(iii) and 16(v) of the contract (Vol.1, tab 6, at p. 0072). These sections read:

> 16. The parties shall participate in annual reviews of the Physician's performance and compliance with this Agreement, as follows:
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> . . .
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> iii. The Physician shall be provided with the opportunity to raise questions or concerns about WHC's compliance and obligations under the terms of the Agreement.
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> . . .
>
> v. In the event that a party fails at any time to fulfil her/his/its duties and responsibilities as set out in the Agreement, the other party may provide notice in writing of the areas of deficiency and required improvements.
>
> . . .

[40] There were no annual reviews of the physician's performance. Dr. Hahlweg's main concern with WHC was about the reduction in the number of his slates. He raised

this concern many times through his representative during negotiations and on his own with WHC management. As previously stated, he was unhappy about the reduction in slates, but he continued to work as scheduled.

[41] Section 16 provided Dr. Hahlweg an opportunity to raise questions or concerns. However, he never asked for an annual review and he certainly never provided WHC with a notice in writing setting out deficiencies and required improvements. There were other avenues to raise concerns about the abortion program. Concerns about the abortion program could and were raised at physician's meetings.

[42] I am not surprised that he never sought to avail himself of section 16 of the contract because his main concern about slates was being addressed by other means.

[43] If Dr. Hahlweg had any serious concerns that section 16 was breached, he knew the remedy. He could terminate the contract on 90 days' notice, but he chose not to do so. I conclude there was no breach of section 16 of the contract and if there was, he condoned it.

[44] The final area that the plaintiff alleges breach of contract relates to reasonable efforts to resolve disputes. Section 21 of the contract (Vol. 1 tab 6, at p. 0073) reads:

> 21. In the event a dispute arises between the parties to this Agreement, reasonable efforts will be made to resolve the dispute as follows:
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> a. The Team Manager, Health Services and/or the Medical Director will discuss the matter in dispute with the Physician and attempt to bring it to resolution.
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> b. If the matter remains unresolved in the opinion of the Physician, Team Manager or Medical Director, it will be referred to the Executive Director for review and attempted resolution.

[45] Counsel for Dr. Hahlweg initially identifies two disputes that he says were not considered or referred to this dispute resolution mechanism therefore breaching these terms of the contract. The first relates to an allegation that Dr. Hahlweg breached doctor-patient confidentiality and the second relates to a complaint letter email (the "complaint letter") authored by A-M A-P ("A-P"). I have initialized her name to offer some protection of personal health information. Both disputes relate to the relationship of Dr. Hahlweg and A-P.

[46] To understand these two concerns, further background is required. Sometime during the evening of February 15, 2024, the plaintiff subpoenaed A-P to be a witness in this trial. She was required to attend court the next morning, February 16, 2024, for 10:00 a.m. A-P attended as required by the subpoena. She appeared surprised and somewhat bewildered as she entered the courtroom. She was directed to take the witness box.

[47] The court clerk explained that she had a choice on how to bind her conscience to tell the truth. A-P is an Indigenous woman who was clearly moved and put at ease when she was advised she could bind her conscience and provide her testimony in the presence of the sacred Eagle Feather.

[48] Counsel for the plaintiff proceeded to take the witness through some background information. A-P explained she has been a registered nurse for over 10 years with a strong background in community and public health. She has several degrees including a master's degree in natural resource management focusing on land-based health and healing.

[49] She was employed as team leader for WHC's abortion program for a brief time starting in February 2019. She left the abortion program by the end of August 2019. She continued to work for WHC in other programs but the nature of her work changed with the onset of the COVID-19 pandemic.

[50] Team leader was not a clinical role. A-P's role was to support operations of the abortion program. She would ensure staff and clients had safe access to the building. Part of the role as team leader was to recruit staff and schedule nurses. This was challenging as the abortion program was only operational two days per week and only required part time staff.

[51] To be clear, she was not a manager or executive in terms of human resources for WHC. She was a part time unionized employee working for WHC at the abortion clinic for approximately six months.

[52] A-P explained she had a long relationship with Dr. Hahlweg. He was one of her favorite people. He was her personal physician for several years. In addition, he would oversee the doctors in training at NCMC who sometimes treated her. He knew her medical history and she shared personal history with him as she had a lot of trust and confidence in his abilities as a doctor.

[53] During her direct examination, counsel for the plaintiff invited A-P to review her written complaint about Dr. Hahlweg regarding a respectful workplace violation (Exhibit 1, Vol. 2, tab 87). A-P read the complaint letter and confirmed her memory was refreshed. Counsel then asked her questions about the complaint letter. A-P responded to the questions and explained what she meant by "bullying behavior" from

Dr. Hahlweg. I note A-P was very measured in her responses to counsel's questions, at one point asking, "you want me to answer?". Counsel insisted, so she explained how she came to believe Dr. Hahlweg had breached her trust when he spoke to Ms. Sookermany. A-P explained Dr. Hahlweg knew everything about her as he was her doctor. He even knew information about her that her husband did not know.

[54] Counsel for the plaintiff sought permission to cross-examine his own witness claiming the testimony was adverse to their case. I refused the request as A-P is not an adverse party to the litigation. She was not part of management for WHC and she is not a named defendant. ***The Court of King's Bench Rules***, M.R. 553/88 explain when a party may call an adverse party and seek cross-examination of that party:

> CALLING ADVERSE PARTY AS WITNESS
>
> **Securing attendance**
>
> **53.07(1)** A party may secure the attendance of a person who is,
>
> (a) an adverse party;
>
> (b) an officer, director or sole proprietor of an adverse party; or
>
> (c) a partner in a partnership that is an adverse party;
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> as a witness at a trial by,
>
> (d) serving the person with a subpoena; or
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> (e) serving on the adverse party or the lawyer for the adverse party, at least 10 days before the commencement of the trial, a notice of intention to call the person as a witness;
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> and at the same time paying or tendering attendance money calculated in accordance with Tariff B.
>
> **Former officers, etc.**
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> **53.07(2)** A party may secure the attendance of a person who is a former officer, director, sole proprietor or partner of an adverse party by serving the person with a subpoena under rule 53.04.

When adverse party may be called

53.07(3) Where a person referred to in subrules (1) or (2) is in attendance at the trial, a party may call the person as a witness without previous subpoena or notice or the payment of attendance money, unless,

(a) the person has already testified; or

(b) the adverse party or the party's counsel undertakes to call the person as a witness.

Cross-examination by party calling a witness

53.07(4) A party calling a witness pursuant to subrules (1) or (2) may cross-examine him or her, unless, in the case of a party referred to in subrule (2), the court otherwise orders.

[55] A-P is not an adverse party so plaintiff's counsel had no right to cross-examine her pursuant to the court rules. The other avenue for cross-examination of your own witness is provided by section 19 of ***The Manitoba Evidence Act***, C.C.S.M. c. E150.

[56] This section requires the party seeking to cross-examine their own witness obtain leave of the court. Leave may be granted if the court determines the witness is adverse. In my opinion, A-P was not adverse. She attended court on extremely short notice to testify about events that had occurred over four years ago. She had no time to prepare. She did her best to respond to all questions asked. There was no evidence that she was a hostile witness. She was cooperative and respectful throughout her testimony. She gave measured, thoughtful and honest responses.

[57] The plaintiff's counsel continued to question A-P for clarification about her complaint letter. She described an incident regarding one patient she believed required an application of an equity consideration to move up in the schedule for the day. This incident occurred approximately six weeks prior to the complaint letter. She explained

the normal policy of the abortion program was to serve patients on a first come first-served basis. Dr. Hahlweg was a firm believer in this policy.

[58] A-P believed that there could be exceptions to this policy when applying an equity lens to the line-up of patients. She explained an equity lens involves a situation requiring extra considerations. The equity lens approach could consider race, gender, medical issues, social economic status and other factors.

[59] A-P explained this incident involved a patient in distress who was throwing up in her purse and piddling in her pants, while sitting in the waiting room with all the other patients. A-P insisted the patient would be next. Dr. Hahlweg disagreed stating, "This isn't your call this is my call". A-P was insistent and the patient jumped ahead of other patients in the queue.

[60] Several witnesses testified about the working conditions at the abortion program. The evidence described problems with staffing, scheduling as well as shortages of medication and supplies. These issues seemed to arise during the transition from Morgentaler's clinic to Jane's Clinic Inc. to the WHC abortion program. As noted earlier, there were organizational challenges with the transition. It appears these challenges were ongoing and were never fully addressed which fueled negative commentary.

[61] Some witnesses pointed the finger at A-P suggesting she was in over her head. Others called it a toxic work environment. A-P believed there was abundant gossip and rumors floating around the abortion clinic that needed to be addressed. She attended the clinic early one day, obtained the respectful workplace policy and copied it for all

staff to read, understand and acknowledge before the workday would commence. She handed it out in person to those that were present or left it for others with a note about her expectations.

[62] She left a copy of the policy for Dr. Hahlweg at his station with a note asking him to read and acknowledge the policy. When she checked back, he said he did not need to read it and was not going to read it. A-P explained it became obvious that her relationship with Dr. Hahlweg was broken and there was tension. He was short with her in conversations but she made it clear that he was never rude or mean.

[63] With that background explained, I return to the alleged breaches of section 21 of the contract. These sections of the contract provide for two levels of dispute resolution. A dispute would involve one party taking a position on an issue and the other party taking an adverse position resulting in a dispute. A complaint by one person is not necessarily a dispute.

[64] Reading section 21 on its own or combined with all sections of the contract, the condition is clear. The dispute contemplated is one between the parties to the contract. The types of disputes to be considered under this section are those that pertain to the contract. Complaints or concerns made against WHC or Dr. Hahlweg regarding matters outside of the contract are not subject to section 21. Disputes that might arise and relate to the contract could be disagreements about the fee for service structure, the timing and payment of fees, the calculation of administrative fees deducted from remuneration or the amount of remuneration for matters unrelated to procedure days.

[65] The first dispute identified by the counsel for the plaintiff involves a breach of doctor-patient confidentiality.

[66] While attending a medical conference, Dr. Hahlweg disclosed to Dr. Gilroy that he had previously been A-P's physician. This disclosure is a breach of doctor-patient confidentiality. Dr. Gilroy immediately identified the disclosure as a breach and refused to discuss it further. This was not a dispute regarding the contract. It was not a dispute at all, as Dr. Gilroy quickly ended the discussion. It was a breach of doctor-patient confidentiality that probably should have been reported to the College of Physicians and Surgeons.

[67] The second dispute identified by the plaintiff relates to the complaint letter filed by A-P regarding a respectful workplace. This was not a dispute between the parties to the contract. It was a complaint filed by A-P who was a unionized employee of WHC, not a party to the contract. I conclude, the complaint from A-P about Dr. Hahlweg is not a dispute contemplated or captured by section 21 of the contract.

[68] The plaintiff identified other disputes he claims should have been subject to section 21 of the contract. Counsel pointed to complaints set out in the termination letter from July 23, 2020 (Exhibit 1, Vol. 2, tab 127).

[69] The termination letter describes incidents that took place during a physician's meeting. Those incidents involved concerns identified by Dr. Gilroy and Dr. Gillette, about the plaintiff's conduct at the April 8, 2020 physician's meeting. These concerns were not a dispute between parties to the contract. Rather, these were personnel issues that do not engage section 21 of the contract.

[70] I conclude there was no breach of section 21 of the contract and if there was any breach, Dr. Hahlweg condoned it by his decision to continue his work at the abortion program.

Independent or Dependant Contractor?

[71] The next issue to be determined is the working relationship between Dr. Hahlweg and WHC. In Canada, there are three categories of workers. The categories include employees, independent contractors and dependent contractors.

[72] The Ontario Court of Appeal reviewed the distinction between employees and dependent and independent contractors in ***McKee v. Reid's Heritage Homes Ltd.***, 2009 ONCA 916. The court provided a helpful approach to making this determination. First, I am to determine if Dr. Hahlweg was an employee of WHC. If he was not an employee, I go on to determine if he was a dependent contractor or independent contractor.

[73] Dr. Hahlweg testified and made it clear that he was not an employee of WHC. He described himself as a contractor. My task is to determine if he was an independent or dependant contractor when performing services for WHC. A dependant contractor may be entitled to additional notice for termination if reasonable notice is not set out in the contract.

[74] The onus is on Dr. Hahlweg to prove on a balance of probabilities that he was a dependant contractor. In ***McKee***, the court explained dependent contractor status as a non-employment relationship in which there is "a certain minimum economic

dependency, which may be demonstrated by complete or near-complete exclusivity" (at para. 30).

[75] The first factor I consider in determining the work status of Dr. Hahlweg is the contract signed on June 17, 2010. I previously noted that Dr. Hahlweg and Dr. Newman were both represented by Ms. Crolly. WHC was represented by Joan Dawkins ("Ms. Dawkins") who was their executive director at the time.

[76] There is no suggestion that Dr. Hahlweg was underrepresented or taken advantage of during contract negotiations. Dr. Hahlweg sought Ms. Crolly's advice throughout the term of his contract with WHC. The final version of the 2010 contract took considerable negotiations that went on for some time. There is an email from Ms. Crolly to Dr. Newman and Dr. Hahlweg on August 25, 2009 regarding contract negotiations that demonstrates discussions about the contract had already been ongoing at that point in time (Exhibit 1, Vol. 1, tab 20, at p. 0126).

[77] The issue of work status was discussed between Ms. Crolly, Dr. Newman and Dr. Hahlweg. On August 25, 2009, Ms. Crolly emailed the doctors to advise paragraphs 22-24 of the contract are standard clauses used to define physicians as independent contractors and not employees in case of a Revenue Canada audit (Exhibit 1, Vol. 1, tab 20, at p. 026).

[78] Ms. Crolly had written to Ms. Dawkins the previous day to request paragraphs 22-24 be included in the contract to acknowledge the physicians were independent contractors and not employees for purposes of Revenue Canada (Exhibit 1, Vol.1, tab 21, at p. 0137).

[79] The three paragraphs were included in the final version of the contract signed by Dr. Hahlweg on June 17, 2010 (Exhibit 1, Vol. 1, tab 6, at pp. 0073-0074) and stated as follows:

> 22. The parties intend and agree that the Physician is a professional acting as an independent contractor in the provision of services pursuant to this Agreement. It is understood and agreed that as an independent contractor the Physician is not subject to the control or direction of the WHC as to the means and methods of performing services unless he/she fails to comply with the professional standards applicable to the provision of such services.
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> 23. As an independent contractor the Physician shall not, for any purpose, be deemed to be an employee of the WHC nor be entitled to or receive from the WHC any rights or benefits of the WHC or its employees. The WHC shall carry no workers' compensation insurance or any health or accident insurance to cover the Physician. The WHC shall not make any contributions to the Canada Pension Plan or any other pension plan, Employment insurance, the Physician's annual CMPA (or any other liability insurance), Doctors Manitoba, CPSM, continuing medical education or other professional expenses/fees or withhold any income taxes, nor provide any additional compensation for services delivered on statutory holidays, not provide any other contributions or benefits, including but not being limited to paid vacation, statutory holidays, sick or continuing medical education leave.
>
> 24. The Physician is not an employee of the WHC, and the Physician shall bear sole responsibility for the discharge of any professional liability, income tax liability, and any other liability imposed by law arising from the Physician's professional work and any other business expenses arising from such professional work. The Physician shall, be responsible for collecting and remitting any applicable goods and services tax or any Employment Insurance or Canada Pension Plan remittances required by law or desired by the Physician.

[80] On the face of it, the contract seems to confirm that Dr. Hahlweg is an independent contractor. I acknowledge that calling a person an independent contractor does not necessarily make them so. Dr. Hahlweg submits there are factors that demonstrate he meets the test in ***McKee***.

[81] He points to the business integration test, the control test and other factors, such as the duration of the work relationship to suggest he was a dependent

contractor. Dr. Hahlweg performed TAs for 10 years under the contract and approximately four years prior to the contract. He submits WHC had control over the provision of the work by scheduling patients and providing the operating room with all the equipment and support staff. He relied on their support and the work relationship was exclusive as there are few places in the province that provide TAs. These types of factors have been found to support a finding of dependent contractor (***Western Fashion Group Inc. v. The Richman Consulting Group Inc. c.o.b. as Richman Group et al.***, 2018 MBQB 186).

[82] He submits these and other factors meet the test in ***McKee*** as his work at WHC had "a certain minimum economic dependency, which may be demonstrated by complete or near-complete exclusivity" (at para. 30). With respect, I disagree.

[83] Out of necessity, WHC did have some control over the provision of TAs. It would be impossible to provide the service without a safe and secure facility, a properly equipped operating room, counsellors, nurses and administrative staff. However, the evidence is clear, Dr. Hahlweg had complete control of his slate days. He called several witnesses to testify about his character and skills. They all testified that he ran his slate days. He was in charge. They told me his days were more efficient because of the way he controlled the day.

[84] There was evidence about the toxic work environment of the abortion program. All personnel for the abortion program were asked to read and sign the respectful workplace policy. The policy existed since 2009 and was amended in 2013 (Exhibit 1,

Vol. 7, tab 193). The contract signed by Dr. Hahlweg had a condition he abide by WHC policies. Section 15(a) of the contract (Exhibit 1 Vol. 1, tab 6, at p. 0071) states:

> 15. The Physician shall:
>
> a. be bound by all applicable WHC policies as set out in the Policy Manual, including the WHC Code of Practice;
>
> . . .

[85] Dr. Hahlweg exercised his independence and defiance of the contract when he refused to acknowledge or sign the respectful workplace policy stating he was not an employee.

[86] WHC asked Dr. Hahlweg to attend his slate days for 8:30 a.m. Patients arrived much earlier. There was pre-operation work to be done that included such things as a session with a counselor, medical tests for the patient and preparation of the operating room. Dr. Hahlweg was not involved in any of those preparations. The first patient would not be ready for him until approximately 9:30 a.m. He often did not arrive until 9:00 a.m. or 9:15 a.m. stating there was nothing for him to do. Again demonstrating his independence and control over his workday.

[87] At its core, my task is to determine the true nature of the relationship based on all the circumstances.

[88] Dr. Hahlweg has always been and continues to be, a family physician providing care from "cradle to grave". He worked at most one day per week providing TAs. To be clear, that one day of work was very lucrative but it does not meet the test for a finding of dependent contractor. From 2010 to 2020 his billings from WHC ranged from

a high of 45.31 per cent of his annual income in 2017 to a low of 23.30 per cent of his annual income in 2020. Removing 2020 from the calculation as his contract terminated before year end, the average percentage of annual income from his work at WHC during the length of the contract was approximately 40 per cent of his annual income.

[89] The Ontario Court of Appeal has made it clear that "'near-exclusivity' necessarily requires substantially more than 50% of billings. If it were otherwise, exclusivity – the "hallmark" of dependent contractor status – would be rendered meaningless" (***Thurston v. Ontario (Children's Lawyer)***, 2019 ONCA 640, at para. 30) (emphasis added).

[90] After considering the totality of the circumstances, I do not hesitate in concluding Dr. Hahlweg was an independent contractor as described in the contract.

Constructive Dismissal

[91] As I understand it, Dr. Hahlweg claims WHC changed the terms of his working conditions and he was constructively dismissed. I conclude, there is no evidence to support this assertion. Constructive dismissal is an employment law concept that relates to employers and employees. The concept involves disputes where the employee leaves the employment and it must be determined if the employee resigned or was essentially forced out. Justice Gonthier explained in ***Farber v. Royal Trust Co.***, 1997 CanLII 387 (SCC), [1997] 1 S.C.R. 846, at para. 24:

> 24. Where an employer decides unilaterally to make substantial changes to the essential terms of an employee's contract of employment and the employee does not agree to the changes and leaves his or her job, the employee has not resigned, but has been dismissed. Since the employer has not formally dismissed the employee, this is referred to as "constructive dismissal". …

[92] There may be examples of constructive dismissal, where the worker does not necessarily leave the job, such as an indefinite paid suspension, but it remains a concept that applies to an employer-employee relationship. In these cases, an employee has a choice to make. The Supreme Court of Canada explains in ***Potter v. New Brunswick Legal Aid Services Commission***, 2015 SCC 10, (CanLII), [2015] 1 S.C.R. 500, at para. 30,

> [30] When an employer's conduct evinces an intention no longer to be bound by the employment contract, the employee has the choice of either accepting that conduct or changes made by the employer, or treating the conduct or changes as a repudiation of the contract by the employer and suing for wrongful dismissal. This was clearly stated in *Farber*, at para. 33, the leading case on the law of constructive dismissal in Canada. See also *In re Rubel Bronze and Metal Co. and Vos*, [1918] 1 K.B. 315, at p. 322. Since the employee has not been formally dismissed, the employer's act is referred to as "constructive dismissal". The word "constructive" indicates that the dismissal is a legal construct: the employer's act is treated as a dismissal because of the way it is characterized by the law (J. A. Yogis and C. Cotter, *Barron's Canadian Law Dictionary* (6th ed. 2009), at p. 61; B. A. Garner, ed., *Black's Law Dictionary* (10th ed. 2014), at p. 380).

[93] I conclude Dr. Hahlweg was an independent contractor not an employee. The legal construct is not engaged. The contract remained in force until October 20, 2020, the last day of the 90-day notice. Dr. Hahlweg never contemplated leaving the abortion program nor did he leave the program. He chose to remain and work until the very last day. It was only when WHC terminated the contract by providing the 90-day notice that the work relationship came to an end. There was no constructive dismissal.

Wrongful Termination

[94] The plaintiff claims the contract was wrongfully terminated. I disagree. Sections 19 and 20 (Exhibit 1, Vol.1, tab 6, at p. 0073) explain when the contract may be terminated:

> 19. Either party may terminate this Agreement at any time by giving 90 days notice in writing to the other party or immediately where the other party has committed a substantial and fundamental breach of this agreement.
>
> 20. WHC may terminate this agreement in writing, without prior notice, if in the reasonable opinion of the WHC, the Physician:
>
> a. is negligent or reckless in the performance of his/her duties;
> b. becomes incapable of providing the services;
> c. fails to hold a valid licence from the College of Physicians and Surgeons of Manitoba; or
> d. fails to maintain professional liability insurance.

[95] The contract allowed for termination by either party upon giving 90-days' notice in writing. Upon giving 90-days' notice, the party is not required to demonstrate just cause for termination.

[96] Dr. Hahlweg had the benefit of representation when the contract was signed. In part, reasonable notice is meant to ensure a worker has a reasonable amount of time to find work. I would expect the plaintiff and the chief negotiator for Doctors Manitoba to have some idea of available work for doctors in the province. They agreed 90 days was sufficient time to find work when the contract was signed. Dr. Hahlweg knew it was a reasonable amount of time. He had no problem finding work as he simply added another day for patients at his clinic. The transition to fulltime work at NCMC was seamless.

[97] WHC properly terminated the contract as contemplated in section 19. I conclude there was no wrongful termination.

Defamation

[98] The plaintiff has identified five communications he claims are defamatory. The communications include an email sent by Dr. Gilroy to Ms. Sookermany on May 6, 2019. The email describes Dr. Hahlweg breaching doctor-patient confidentiality.

[99] The second communication is the complaint letter authored by A-P and sent to Ms. Sookermany on May 22, 2019. I have explained that A-P is not part of WHC management and not a party to this litigation. WHC received this complaint letter but did not publish it as it was never shared with anyone else.

[100] The third communication is an email sent by Ms. Sookermany to Dr. Hahlweg on February 10, 2020. The email contained a performance review with written notice placing the plaintiff on a period of probation. The email was copied to Dr. Gilroy and Ms. Tona.

[101] The fourth communication is an email sent on March 5, 2020, by Ms. Sookermany to Jill Brown ("Ms. Brown") and copied to Ms. Crolly. Ms. Brown is Ms. Crolly's assistant. The email was sent in response to a letter from Ms. Crolly. Ms. Sookermany was providing an explanation to Ms. Crolly about Dr. Hahlweg's performance review outlined in the February 10, 2020 communication.

[102] The final communication is the termination letter sent by Ms. Sookermany to Dr. Hahlweg on July 23, 2020. The letter provides Dr. Hahlweg with 90-days' notice. The letter was copied to Dr. Gilroy, Ms. Tona and Susan Polz ("Ms. Polz"), who is a lawyer from Shared Health who was providing human resource advice to WHC.

[103] The law of defamation is explained in ***Grant v. Torstar Corp.***, 2009 SCC 61 (CanLII), [2009] 3 S.C.R. 640, at paras. 28-34:

> [28] A plaintiff in a defamation action is required to prove three things to obtain judgment and an award of damages: (1) that the impugned words were defamatory, in the sense that they would tend to lower the plaintiff's reputation in the eyes of a reasonable person; (2) that the words in fact referred to the plaintiff; and (3) that the words were published, meaning that they were communicated to at least one person other than the plaintiff. If these elements are established on a balance of probabilities, falsity and damage are presumed, though this rule has been subject to strong criticism: see, e.g., R. A. Smolla, "Balancing Freedom of Expression and Protection of Reputation Under Canada's *Charter of Rights and Freedoms*", in D. Schneiderman, ed., *Freedom of Expression and the Charter* (1991), 272, at p. 282. (The only exception is that slander requires proof of special damages, unless the impugned words were slanderous *per se*: R. E. Brown, *The Law of Defamation in Canada* (2nd ed. (loose-leaf)), vol. 3, at pp. 25-2 and 25-3.) The plaintiff is not required to show that the defendant intended to do harm, or even that the defendant was careless. The tort is thus one of strict liability.
>
> [29] If the plaintiff proves the required elements, the onus then shifts to the defendant to advance a defence in order to escape liability.
>
> [30] Both statements of opinion and statements of fact may attract the defence of privilege, depending on the occasion on which they were made. Some "occasions", like Parliamentary and legal proceedings, are absolutely privileged. Others, like reference letters or credit reports, enjoy "qualified" privilege, meaning that the privilege can be defeated by proof that the defendant acted with malice: see *Horrocks v. Lowe*, [1975] A.C. 135 (H.L.). The defences of absolute and qualified privilege reflect the fact that "common convenience and welfare of society" sometimes requires untrammelled communications: *Toogood v. Spyring* (1834), 1 C.M. & R. 181, 149 E.R. 1044, at p. 1050, *per* Parke B. The law acknowledges through recognition of privileged occasions that false and defamatory expression may sometimes contribute to desirable social ends.
>
> [31] In addition to privilege, statements of opinion, a category which includes any "deduction, inference, conclusion, criticism, judgment, remark or observation which is generally incapable of proof" (*Ross v. New Brunswick Teachers' Assn.*, 2001 NBCA 62, 201 D.L.R. (4th) 75, at para. 56, cited in *WIC Radio*, at para. 26), may attract the defence of fair comment. As reformulated in *WIC Radio*, at para. 28, a defendant claiming fair comment must satisfy the following test: (a) the comment must be on a matter of public interest; (b) the comment must be based on fact; (c) the comment, though it can include inferences of fact, must be recognisable as comment; (d) the comment must satisfy the following objective test: could any person honestly express that opinion on the proved facts?; and (e) even though the comment satisfies the objective test the defence can be defeated if the plaintiff proves that the defendant was actuated by

> express malice. *WIC Radio* expanded the fair comment defence by changing the traditional requirement that the opinion be one that a "fair-minded" person could honestly hold, to a requirement that it be one that "anyone could honestly have expressed" (paras. 49-51), which allows for robust debate. As Binnie J. put it, "[w]e live in a free country where people have as much right to express outrageous and ridiculous opinions as moderate ones" (para. 4).
>
> [32] Where statements of fact are at issue, usually only two defences are available: the defence that the statement was substantially true (justification); and the defence that the statement was made in a protected context (privilege). The issue in this case is whether the defences to actions for defamatory statements of fact should be expanded, as has been done for statements of opinion, in recognition of the importance of freedom of expression in a free society.
>
> [33] To succeed on the defence of justification, a defendant must adduce evidence showing that the statement was substantially true. This may be difficult to do. A journalist who has checked sources and is satisfied that a statement is substantially true may nevertheless have difficulty proving this in court, perhaps years after the event. The practical result of the gap between responsible verification and the ability to prove truth in a court of law on some date far in the future, is that the defence of justification is often of little utility to journalists and those who publish their stories.
>
> [34] If the defence of justification fails, generally the only way a publisher can escape liability for an untrue defamatory statement of fact is by establishing that the statement was made on a privileged occasion. However, the defence of qualified privilege has seldom assisted media organizations. One reason is that qualified privilege has traditionally been grounded in special relationships characterized by a "duty" to communicate the information and a reciprocal "interest" in receiving it. The press communicates information not to identified individuals with whom it has a personal relationship, but to the public at large. Another reason is the conservative stance of early decisions, which struck a balance that preferred reputation over freedom of expression. In a series of judgments written by Cartwright J. (as he then was), this Court refused to grant the communications media any special status that might have afforded them greater access to the privilege: *Douglas v. Tucker*, 1951 CanLII 54 (SCC), [1952] 1 S.C.R. 275; *Globe and Mail Ltd. v. Boland*, 1960 CanLII 2 (SCC), [1960] S.C.R. 203; *Banks v. Globe and Mail Ltd.*, 1961 CanLII 6 (SCC), [1961] S.C.R. 474; *Jones v. Bennett*, 1968 CanLII 126 (SCC), [1969] S.C.R. 277.

[104] Court document 12 contains the particulars of the five communications the plaintiff claims amount to defamation. I have carefully reviewed the communications contained in the particulars and conclude all the statements are true and the defence of

justification, if needed, applies. In addition, the communications authored by WHC are all protected by qualified privilege.

1. Email dated May 6, 2019 (Exhibit 1, Vol. 2, tab 83)

[105] Dr. Gilroy, medical director for the abortion program at WHC, and Dr. Hahlweg happened to attend the same medical conference on May 6, 2019. The email was written by Dr. Gilroy on the same day of the conversation. Dr. Hahlweg sought out Dr. Gilroy. He acknowledged that Dr. Gilroy did not want to discuss the abortion program, but he insisted. The conversation was brief but concerning and caused Dr. Gilroy to send this email to Ms. Sookermany.

[106] The email described that Dr. Hahlweg insisted on discussing the abortion program. The email stated, "He did out himself as [A-P's] MD, and implied he knew things because of that". Dr. Gilroy then explained how she shut down the conversation. The plaintiff claims this statement is false and malicious. I disagree. I believe Dr. Gilroy's evidence that the content of the email is an accurate account of what was said.

[107] The evidence proves Dr. Hahlweg was previously A-P's physician. Dr. Hahlweg's evidence on this point is troubling. I found him to be evasive. At first, the plaintiff told me he did not say he was A-P's physician. Rather, he suggested she was just a patient at NCMC. Later in cross-examination he told me he did see A-P as a supervisor to medical residents and as a physician. Later in his testimony, he did admit that he told Dr. Gilroy that he had been A-P's physician. The agreed statement of facts confirms he was her doctor at NCMC (Exhibit 2, at para. 24).

[108] A-P told me she knew Dr. Hahlweg and trusted him. He had been her physician for several years. She told me he knew more about her than anyone else including her husband. In addition, he would supervise medical residents at NCMC who attended to her. I conclude Dr. Hahlweg told Dr. Gilroy he had been A-P's physician. There was no need to breach doctor-patient confidentiality if he was only sharing concerns about the abortion program. He went further and told Dr. Gilroy that he had concerns about A-P's mental health. I accept he told Dr. Gilroy that he knew things about A-P because he had been her doctor.

[109] Dr. Hahlweg admitted that revealing that a doctor and patient relationship exists is disclosing medical information. Dr. Hahlweg agreed that Dr. Gilroy was not within A-P's circle of care. Therefore, disclosing the relationship to Dr. Gilroy was a breach of doctor-patient confidentiality. In any event, he admitted that he made the disclosure to protect himself, not to protect A-P, so the disclosure was a breach and inappropriate.

[110] I conclude the content of the email is true and the defence of justification applies. In addition, Dr. Gilroy had a duty to report the concern to the executive director and Ms. Sookermany had a reciprocal duty to accept the communication. Therefore, the communication is protected by qualified privilege.

2. Complaint Letter dated May 22, 2019 (Exhibit 1, Vol. 2, tab 87)

[111] This complaint letter was emailed by A-P to Ms. Sookermany and it is copied to Dr. Gilroy. In the complaint letter, A-P identifies several workplace policy violations she believes were committed by Dr. Hahlweg. In her evidence, A-P explained she and

Dr. Hahlweg had disagreements over the priority of patients and acknowledging the respectful workplace policy. She described their relationship as broken and tense.

[112] Counsel for the plaintiff submits A-P is part of WHC management and therefore the defendant is responsible for publishing this complaint letter.

[113] A-P was employed by WHC to be the team leader for the abortion program. A-P filled the position from the middle of February 2019 until the end of August 2019. It was a part-time unionized position. I conclude A-P was an employee of WHC and not part of WHC management. She is not named as a defendant. If A-P was part of WHC management or a named party to this litigation, I would have expected a counterclaim for defamation.

[114] On September 26, 2019 Dr. Hahlweg sent an email to Dr. Gilroy (Exhibit 1, Vol. 2, tab 93, at p. 0535). In the subject line were the words "The smoking gun". I pause to note the phrase, *the smoking gun,* has an everyday, common meaning that relates to damning evidence that usually provides proof beyond a reasonable doubt in a criminal matter.

[115] In the email, Dr. Halweg described receiving information from a nurse. The information related to a matter a few weeks earlier. He described a tourniquet and empty vials of naloxone as well as two sets of narcotic drawer keys found hidden in two separate locations in A-P's office. He suggested A-P was responsible for the missing narcotics. The subject line and the content of the email leaves the impression that A-P is a thief and drug addict. The information provided by Dr. Hahlweg is second or third hand as he admitted he had no first-hand knowledge of the incident. This

email seems to confirm the relationship between Dr. Hahlweg and A-P was broken beyond repair. The timing of the email was approximately one month after A-P left the abortion program. It could be suggested the email was sent out of spite and malice toward A-P.

[116] I conclude A-P is not a party to this litigation and the defendant did not publish this complaint letter. If A-P was part of management, the communication would be protected as qualified privilege as A-P followed the process set out in the respectful workplace policy and the executive director had a duty to accept the communication.

3. Email dated February 10, 2020 (Exhibit 1, Vol. 2, tab 100)

[117] The subject line of this email is "Performance follow up – written notice". The email was sent by Ms. Sookermany to Dr. Hahlweg on February 10, 2020 and copied to Dr. Gilroy and Ms. Tona. The email described two performance concerns and advised that the plaintiff was being placed on probation.

[118] The first concern raised was about Dr. Hahlweg's attendance and punctuality. Ms. Sookermany recounted previous discussion about this issue and set out the times Dr. Hahlweg was late for his procedure days. The email described the impact from this concern that includes fatigue of staff, morale issues and overtime costs. I note the particulars do not claim this part of the communication to be defamatory.

[119] The second concern related to a respectful workplace culture. The email described ongoing concerns about rumors and gossip in the workplace. Ms. Sookermany cautioned Dr. Hahlweg about his participation in this problem by taking second and third-hand information and acting on it without knowing all the

facts. She identified a concern about emails that he has sent to management sharing information that he has not witnessed. She explained that behaviour reinforced an unhealthy culture and work environment.

[120] I conclude this communication is not defamatory. WHC had a duty to provide the plaintiff with written notice of their concerns and was acting in good faith. Disagreement about the concerns does not make the communication defamatory. A reasonable person would see the communication for what was written – there was a concern that Dr. Hahlweg was a contributor to a potentially toxic workplace culture.

[121] The evidence supports the concern of WHC. I accept the evidence that Dr. Hahlweg would speak to people and gather information that was second and third hand and then approach management voicing concerns of others. He was cautioned about doing this because he did not have all the information. He continued to raise concerns without any direct knowledge. The September 26, 2019 email referencing the smoking gun is a stark example of Dr. Hahlweg contributing to an unhealthy work environment.

[122] I conclude this communication is not defamatory and if it is, WHC is protected as it was justified as it is true. It is also protected as qualified privilege. As stated, WHC had a duty to advise the plaintiff of their concerns.

4. Email dated March 5, 2020 (Exhibit 1, Vol. 2, tab 107)

[123] After receiving the written performance review placing him on probation, Dr. Hahlweg shared it with Ms. Crolly. On February 24 2020, Ms. Crolly wrote to Ms. Sookermany to address the performance review. In response to Ms. Crolly, the

executive director wrote back on March 5, 2020. The email by Ms. Sookermany was to Ms. Brown and it was copied to Ms. Crolly. Ms. Brown is Ms. Crolly's assistant.

[124] Ms. Sookermany was responding to Ms. Crolly. Although the plaintiff would not admit Ms. Crolly was a lawyer, she is a lawyer and she represented the plaintiff for over 10 years. Responding to a lawyer is not a publication. Writing to a lawyer is no different than communicating with the plaintiff himself. The communication was not sent to a third party.

[125] There is nothing in the communication that amounts to defamation. A reasonable person would see the communication for what is written. Ms. Sookermany is providing an explanation to the plaintiff's lawyer. There is nothing in the communication that would lower the plaintiff's reputation in the eyes of a reasonable person.

[126] As explained earlier, there is nothing untrue in the communication. Dr. Hahlweg had been cautioned about contributing to a toxic workplace culture. He was at a meeting with Ms. Sookermany and Dr. Gilroy on April 12, 2019. The meeting was to address his concerns about A-P. The meeting minutes reflect the discussion at the meeting (Exhibit 1, Vol. 6, tab 155).

[127] To be clear, I find as fact that Dr. Hahlweg was told not to engage in second hand information. He was told to speak from his direct experience as a number of his concerns came from second-hand sources or gossip. He agreed to do better going forward. As previously noted, the smoking gun email is another example of using second hand information to lodge a concern. I note his sources of information later

told him the vials of medication were unopen. This demonstrates the serious problem of rumor and gossip. The information is untrue, yet the damage is done. There is no doubt he contributed to a toxic work environment.

[128] I conclude that responding to a lawyer is not a publication. If it is, the communication is justified as it is true and it is protected by qualified privilege as WHC had a responsibility to respond.

5. Letter dated July 23, 2020 Sent by Email (Exhibit 1, Vol. 2, tab 127)

[129] This email contains the termination letter sent by Ms. Sookermany in her role as executive director of WHC. The termination letter was sent to Dr. Hahlweg and copied to Dr. Gilroy as medical director of the abortion program, Ms. Tona who was now the director of programs and partnership and Ms. Polz who was the provincial medical staff contract specialist with Shared Health.

[130] Ms. Polz is a lawyer for Shared Health and she had taken over contract negotiations on behalf of Shared Health. Ms. Sookermany explained that Ms. Polz was now providing WHC with human resource services and legal advice on contract negotiations.

[131] The letter explained that the plaintiff refused to meet on three occasions. This part of the letter is not defamatory as the communication would not lower the plaintiff's reputation in the eyes of a reasonable person. In addition, it is true. The evidence supports the conclusion that Dr. Hahlweg was doing everything he could to avoid the meeting.

[132] The next paragraph of the letter recounts the physician's meeting on April 8, 2020. The evidence fully supports the description of the meeting set out in the letter as being true. The remainder of the letter recounts the performance review that raised concerns about the plaintiff contributing to a toxic work environment. There is nothing in the letter that is untrue. The communication is justified and it is a protected communication as qualified privilege. WHC had a responsibility to provide written notice of termination pursuant to the contract. The communication was sent to the plaintiff and properly communicated to WHC executive management and counsel.

[133] I have carefully considered the communications and conclude all the statements alleged to be defamatory are true and the defence of justification, if needed, applies. In addition, the communications authored by WHC are all protected by qualified privilege.

[134] The plaintiff's claim for defamation is dismissed.

III. CONCLUSION

[135] Dr. Hahlweg's claim sets out numerous causes of action. The onus is on the plaintiff to prove his case on a balance of probabilities. He claims WHC breached the terms of the contract signed on June 17, 2010.

[136] Dr. Hahlweg was represented by Ms. Crolly, who is a lawyer and chief negotiator for Doctors Manitoba. He had her assistance prior to signing the contract, throughout the 10 years of the contract and after he was provided the 90-days' notice of termination on July 23, 2020. He alleges the breaches began when WHC hired Dr. Gilroy in 2015 and possibly at an earlier time.

[137] I have concluded there were no breaches of contract by WHC. If there were any breaches of contract, Dr. Hahlweg clearly condoned the breaches as he had ample time to consider any alleged breach and do something about it. He made a choice. He chose to continue to provide TAs until his last day of service on October 20, 2020.

[138] Dr. Hahlweg claims he is a dependent contractor and is entitled to reasonable notice of termination. He claims the 90-days' notice is unreasonable. I have concluded that he was an independent contractor as his legal counsel requested and was provided for in the contract. The 90-days' notice was reasonable.

[139] I have concluded that constructive dismissal does not apply to an independent contractor. In any event, there was no constructive dismissal. WHC terminated the contract pursuant to the terms of the contract. The 90-days' notice was part of considered negotiations and deemed appropriate by both parties. WHC gave the 90-days' notice in writing as required and paid the plaintiff for the 90 days of service. There was no wrongful termination.

[140] The plaintiff identified five communications that he claims amount to defamation. He claims WHC created and disseminated libelous, slanderous and otherwise untrue and harmful statements that have caused irreparable damage to his reputation.

[141] As I have explained, one of the communications, the complaint letter from A-P, was not created or disseminated by WHC. I am satisfied the content of the remaining four communications are true and WHC can rely on justification. In addition, all the communications are protected by qualified privilege.

[142] The plaintiff has failed to discharge his onus and the entire claim is dismissed.

[143] WHC is the successful party in this action and is entitled to costs. If the parties are unable to agree on costs, they may schedule a time to appear before me.

_____J.