LEADERSHIP UPDATE

Volume 10 *A publication for Alberta's school administrators* *Number 6*

Facing the Consequences of Facebook

Bull, Housser & Tupper LLP

Reprinted with permission from www.bht.com/tw_216, July 31, 2013. Minor changes have been made to fit ATA style.

You can't ignore the fact that Facebook use in Canada is on the rise. According to a recent survey by Media Technology Monitor, 63 per cent of Internet users and 93 per cent of social media users have a Facebook page. Nearly seven out of every ten Internet users identify themselves as regular users of social media generally.

Alongside this increase in social media use is an increase in social-media-related employment litigation. *Perez-Moreno v Kulczycki* is one example.[1] In that case, a golf resort manager filed a human rights complaint about a coworker's Facebook postings. The posts referred to the coworker being written up at work for calling the manager "a dirty Mexican" and stating to other employees, "Now that Mexican is not going to give me anything." The tribunal agreed that the coworker discriminated against him in employment on the grounds of race, ancestry, place of origin, citizenship and ethnic origin, and that the Facebook postings constituted harassment in employment contrary to the *Human Rights Code*.

The tribunal ordered the coworker to complete human rights training as the remedy. Interestingly, the manager neither named the employer as a respondent to the complaint nor sought monetary compensation as a

He is a wise man who does not grieve for the things which he has not, but rejoices for those which he has.

—Epictetus

Council for School Leadership

remedy. Many employers facing these kinds of complaints are not so lucky.

Many employees still think their social media postings are private and personal communications totally unrelated to their employment. Employees owe duties to their employer, including duties of loyalty, fidelity and confidentiality. These duties can extend outside the workplace and into social media.

How, then, should employers deal with employees who haphazardly post their thoughts about coworkers or about the company on the Internet? One effective way is to ensure that everyone in the workplace is, quite literally, brought onto the same page with respect to social media expectations through a social media policy.

This case is a good opportunity to review your social media policies and refresh your employees' training in this area. In doing so, you may want to consider some of the following key elements found in effective policies:

1. Remind employees that employment duties and company policies apply to their activity in cyberspace.
2. Remind employees that social media is not a secure or private form of communication.
3. Set boundaries on the use of social media during business hours that fit your workplace.
4. Address representations: Are the employees representing the company when online?
5. Advise employees that their social media activities may be monitored and reviewed if appropriate.
6. Notify employees that they are responsible for their activities and they may be held accountable. Warn them of the consequences.
7. Obtain a signed employee acknowledgement that they understand and are expected to adhere to the policy.

Employers are ultimately responsible for ensuring that the workplace is free from harassment and discriminatory conduct. This responsibility can extend to off-duty conduct that has a negative effect on the workplace. Being proactive through education will help employers manage these risks.

Note

1. *Perez-Moreno v Kulczycki,* [2013] OHRTD No 1080.

Q & A

GORDON THOMAS
Executive Secretary

Q: I don't yet have permanent certification for teaching in Alberta. What is the process for obtaining it?

A: First, it is important to understand that you will be awarded permanent certification only if you are currently in possession of an interim certificate and if you fulfill the following requirements:

- You have taught for 400 days, or two full school years.
- You have a recommendation for permanent certification from a designated signing authority (typically, the superintendent).

The recommendation for permanent certification must be supported by two evaluations. By August 31 of the year in which the 400 teaching days are completed, the employing district must make a recommendation to the provincial registrar regarding the teacher's suitability for a permanent certificate. The superintendent, or designate, will base this recommendation on an evaluation that indicates that the teacher is meeting the knowledge, skills and attributes described in the Teaching Quality Standard.

Teachers who have worked for more than one district or who have temporary contracts and substitute teacher work need to track their work history and inform their various principals of the need to be evaluated for certification purposes.

Teachers who are teaching under a letter of authority will still need to teach for 400 days after an interim certificate is granted. Work completed while teaching under a letter of authority does not satisfy the time requirement for permanent certification.

Making Social Networks Remediate Defamation Enabled by Their Platforms: *McKeogh v Facebook*

Barry B Sookman, Roland Hung and Sara Tebbutt

Reprinted with permission from www .canadiantechlawblog.com/2013/08/01/ making-social-networks-remediate-defamation-enabled-by-their-platforms-mckeogh-v-facebook/, August 1, 2013. Minor changes have been made to fit ATA style.

Overview

Recently, the Irish High Court came up with a novel solution in a social media defamation case involving an unfortunate young student who was grossly defamed when certain persons wrongly identified him as the man seen in a video posted on YouTube exiting a taxi in Dublin without paying the fare.[1] The decision illustrates the difficulties an innocent person who is defamed on social media can face when trying to have the material removed, particularly where the Internet intermediaries who may have the ability to help refuse to cooperate. In this case, the High Court ordered the experts from Google and Facebook, the Internet intermediaries, to meet with the plaintiff's expert to procure a solution that can be incorporated into a mandatory injunction.

Facts

A taxi driver posted a video clip on YouTube and asked if anyone could identify the young man in question. One person named the plaintiff as the culprit. Thereafter, in the words of the trial judge, "a miscellany of the most vile, crude, obscene and generally obnoxious comments about him appeared on both YouTube and on Facebook."

The plaintiff brought an application for mandatory injunctive relief that all material defamatory of the plaintiff be permanently taken down from Google and Facebook sites on a worldwide basis. Google and Facebook refused any assistance, even after they were asked by the judge to have their experts try to come up with a solution. The task may not have been an easy one, or even possible, but the court strongly believed that Google and Facebook should have done something to help once it became incontrovertible that the accusations were inaccurate and egregiously defamatory, especially since the postings went viral enabled by use of their networks.

Discussion

Since it was an application for interlocutory injunctive relief, the court had to be satisfied that the plaintiff had raised a fair issue to be tried, that damages would not be an adequate remedy for the plaintiff and that the balance of convenience lay in favour of granting the injunction.

The court found that the plaintiff had raised a fair question as to whether the defendants could be liable as publishers of the materials on their websites and that the plaintiff had raised a fair question as to whether Google and Facebook came within a safe harbour under the European Union E-Commerce Directive. The court did not explore these issues further.

The court then turned to the question of whether damages would be an adequate remedy for the plaintiff. The court concluded it would not. Google and Facebook may not have been responsible in the first instance for the publication of the defamatory material. However, their platforms enabled the publication of the defamatory content. As such, they

ought to render assistance. The plaintiff could not take down the materials himself, while the defendants likely had the technical expertise and capability to help. Further, monetary damages could not remedy the damages the plaintiff would suffer if the materials remained online.

The court also decided that the balance of convenience lay in favour of granting a mandatory injunction. However, such orders must be clear as to what is expected of the defendants in order to fully comply with the order. The court did not have enough information to make such an order, so it decided to be "imaginative in trying to fashion an appropriate remedy for the plaintiff." The court took the unusual step of ordering that the parties' experts meet to report on the technical means available to help the plaintiff.

It is not yet known what the experts have come up with. It is worth watching to see what, if any, mandatory injunctive relief is finally ordered or whether the case settles.

Defamation in Canada

In Canadian defamation cases, the plaintiff bears the onus of proving three things:

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.[2] After those elements are established, the onus shifts to the defendant to raise a valid defence.

Nesbitt v Neufeld is one of few Canadian defamation cases involving social media to date.[3] The court discussed the interplay between defamation and the Internet, indicating that "the extent of publication does play a role in determining the seriousness of the defamatory conduct." Further, it noted that Internet communications may create an even greater risk that the defamatory remarks are believed, due to their anonymous and impersonal nature.[4] In *Nesbitt*, the damages were limited because the claimant admitted there had been little personal or professional backlash. There was also no need to consider involving the Internet intermediaries because the defamatory Facebook page was removed by the defaming party once it was reported to the police.

Recently, Brian Burke, former general manager of the Toronto Maple Leafs, began a defamation lawsuit naming 17 online commentators as defendants.[5] The commentators are only identified by their online handles, essentially making them anonymous. This case will be followed by many, not only for public interest but also to see how the court calculates damages, if any.

To date there have been no Canadian cases that involve plaintiffs seeking injunctions against Internet intermediaries as there is in *McKeogh*. It will be interesting to see how the Canadian courts decide this issue when it inevitably arises in Canada.

Notes

1. *McKeogh v Facebook Ireland Limited et al,* Record No 2012/254P, High Court Ireland, July 15, 2013. See http://inforrm.files.wordpress.com/2013/05/141943409-mckeogh-v-doe-and-others.pdf.

2. *Grant v Torstar Corp,* 2009 SCC 61, [2009] 3 SCR 640 at para 28. See www.canlii.org/en/ca/scc/doc/2009/2009scc61/2009scc61.html.

3. *Nesbitt v Neufeld,* 2010 BCSC 1605. See www.canlii.org/en/bc/bcsc/doc/2010/2010bcsc1605/2010bcsc1605.html.

4. *Barrick Gold Corporation v Lopehandia et al,* 239 DLR (4th) 577, 2004 CanLII 12938 (ON CA) at para 31 (cited in *Nesbitt v Neufeld*).

5. *Burke v John Doe,* 2013 BCSC 964. See www.canlii.org/en/bc/bcsc/doc/2013/2013bcsc964/2013bcsc964.html.

To find archived issues of *Leadership Update,* go to www.teachers.ab.ca and click on Publications > Other Publications > School Administrators.

Feedback is welcome. Please contact Konni deGoeij, associate coordinator, administrator assistance, Member Services, at konni.degoeij@ata.ab.ca.

Fierce Conversations

Fierce Conversations Workshop: tackle and resolve challenges, while building an open, direct and respectful culture.

May 15–16 in Calgary (location to be determined)

Due to popular demand, the Council for School Leadership is providing another opportunity for individuals to receive the foundational Fierce Conversations certification training.

Fierce Conversations teaches attendees how to ignite productive dialogue that interrogates reality, provokes learning, resolves tough challenges and enriches relationships. Participants will explore how to shift old paradigms and build a skill set that paves the way for productive, respectful and often difficult conversations. Participants will learn to tackle tough issues with increased confidence and skill and have an opportunity to practise the model during the session.

The components of the program are

- Foundation: Set the stage for change with three ideas and seven principles.
- Team Model: Create and promote genuine buy-in and collaboration, and make the best decisions possible.
- Confrontation/Feedback Model: Strengthen relationships while tackling tough issues and move towards resolution.
- Coaching Model: Build capacity, improve decision-making ability and foster self-discovery.

More information to follow regarding location and registration link.

Please advise Konni deGoeij at konni.degoeij@ata.ab.ca if you are interested in attending, and registration information will be forwarded as logistics are finalized.

2014 Educational Leadership Academy

presents

Leading School Change: Bringing Everyone on Board

with

Dr Todd Whitaker, an internationally recognized speaker on a variety of educational topics, including teacher leadership, instructional improvement, change and leadership effectiveness. Dr Whitaker has published work in all these areas, as well as technology and middle-level practices.

Banff Park Lodge, Banff, Alberta
July 6–10, 2014

This workshop provides a step-by-step approach to successfully implementing the change you want to bring to your school. Leading School Change is perfect for individual leaders, leadership teams or any combination of people whose mission is to effectively lead change throughout their school or district.

Workshop participants will learn how to

- understand the three levels of change—procedural, structural and cultural;
- ensure that the first exposure to the change idea is compelling;
- work with "superstars," "backbones" and "mediocres," and understand who matters most to the change process;
- find and understand the entry points to change;
- learn how to diminish the influence of resisters; and
- look past buy-in to action and make it happen together.

Space is limited; early registration is recommended.

Register online at https://event-wizard.com/events/ELA2014.

For additional information, contact Leslie Kaun at 780-447-9410 (in Edmonton) or 1-800-232-7208 (elsewhere in Alberta); e-mail: ELA@ata.ab.ca.

• A program for those who hold or aspire to leadership positions in schools

LEADERSHIP UPDATE *An ATA/CSL publication for school administrators*

The Alberta Teachers' Association

ISSN 1712-2805 2014 02 COMM-118