Newsletter
Stephens Lawyers & Consultants

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Legal Traps: the Internet & the Office - Employer Liability for Employee Internet misuse

Overview

In the modern workplace, employers are being held liable for a wider range of employee misconduct. In particular, the potential for abuse of email and Internet facilities provided at the workplace is virtually limitless and could have severe legal ramifications for employers. Furthermore, the rise of social networking sites such as Facebook and Twitter further exacerbates these problems. The employer's obligation to provide a safe work environment free from discrimination, harassment, victimisation and bullying extends to Internet and email usage by staff.

Employers must have appropriate policies and procedures in place regulating and monitoring email and Internet usage. Ongoing training and supervision of employees is also critical to avoid liability or prosecution under anti-discrimination, occupational health and safety and other laws.

This update provides an overview of some of the areas of risk to employers.

Vicarious Liability - Basic Principles

Pursuant to the common law doctrine of vicarious liability, employers may be held liable for employee conduct, where employees have committed acts in the course of their employment or while acting as an agent of the employer. The High Court has held that an employer may be vicariously liable for intentional, criminal acts on the part of an employee when there is 'a sufficiently "close connection" between the employer's enterprise' and the employee's offending conduct, even if the conduct is not authorised by the employer. [1]

Employee Internet Usage

In the context of employee Internet usage, an employer may be liable for employee misconduct on the Internet where Internet access is provided in the workplace (particularly unrestricted usage) and the risk of misuse is considered to be 'inherent to the employment'. [2]

Discrimination & Harassment

Employers have been successfully sued under the doctrine of vicarious liability where their employees have harassed other employees in the workplace, leading to the payment of fines and damages. Email and Internet availability increases the methods by which employees can be harassed or discriminated against. Compounding this, some workers perceive email as a more informal mode of communication, escalating the risk of inappropriate or offensive "jokes" being sent without consideration of the consequences. Misuse of the email and Internet system by employees storing, sending or receiving sexually explicit, offensive or discriminatory material may expose an employer to prosecution for breach of anti-discrimination legislation and breach of workplace health and safety obligations to provide a safe workplace.

The *Equal Opportunity Act 1995 (Vic)* prohibits sexual harassment, discrimination and victimisation in the workplace. Sections 102 and 103 establish that acts of sexual harassment, discrimination and victimisation by an employee in the workplace can constitute a vicarious act of the employer unless the employer took reasonable precautions to prevent it.

In practice, this means that if employees send emails or display screensavers depicting offensive or harassing material to other employees and vicarious liability is established, the employer will be facing the harassment charges alongside the errant employees.

Workplace Bullying - Panlock case (February 2010)

Employer and company director liability for workplace bullying and harassment was placed under the spotlight in Victoria in February 2010 in the wake of the *Panlock* case. Brodie Panlock, a waitress at Café Vamp in Melbourne committed suicide as a result of "relentless bullying" by co-workers. Under the *Occupational Health and Safety Act 2004* (Vic) ('OHS Act'), WorkSafe was successful in prosecuting the:

- company as employer: convicted and fined $110,000 under section 21(2a) of the OHS Act for failing to provide a safe system of work and $110,000 under section 21(2e) of the OHS Act for failing to provide employees with training and supervision to prevent risks;
- company director: convicted and fined $15,000 under sections 21(2a) and 144 of the OHS Act (liability of officers of bodies corporate for actions of its officers) and $15,000 under sections 21(2e) and 144 of the OHS Act.
- Manager and two employees: convicted and fined $45,000 and $30,000 and $10,000 respectively, under section 25(1)(b) of the OHS Act for failing to take reasonable care for the health and safety of fellow employees affected by their actions. [3]

Whilst the case involved physical and face-to-face harassment, its implications may be applicable to all forms of bullying including cyber-bullying. Significantly, the case emphasises that liability and substantial penalties can arise for both employers and company directors where there is a failure to provide a safe workplace or train managerial staff on how to handle bullying behaviour amongst employees.

Webb v State of Queensland [2006] QADT 8 (23 March 2006).

In a case before the Queensland Anti-Discrimination Tribunal in 2006, Ms Webb successfully established that whilst employed with Queensland Health, she was sexually harassed by a male co-worker whose unwanted conduct included the sending of pornographic emails. Webb had informed her employer of the harassment, but was told no action could be taken until she lodged a formal complaint.

Under the Anti-Discrimination Act 1991(Qld) (the equivalent of the Victorian *Equal Opportunity Act*) employers can avoid being held vicariously liable for employee acts if they can establish "on the balance of probabilities" that they took "reasonable steps" to prevent the worker from contravening the Act. [4] Queensland Health was found to be vicariously liable for its employee's harassing conduct even though a sexual harassment policy was in place. The Tribunal emphasised that *employers will be unable to point to promulgated harassment policies and the existence of a formal complaints mechanism to escape liability in cases where the employer was made informally aware of workplace bullying, but failed to act.*[5]*In the present case, the employer was ordered to pay Webb $14,665 in compensation.*

Although untested in Australia, social networking sites such as Facebook, Twitter, MySpace and YouTube, *could raise new discrimination issues in the workplace. Could an employer be liable for abusive or offensive comments "posted" by an employee on a co-worker's Facebook wall? Such a scenario is not unforeseeable, particularly if an employer permits workers to access these sites during work hours. However, there is also the potential for employers to be held vicariously liable, even when employees engage in offensive online behaviour outside working hours. In the United States, social networking platforms have been construed as an extension of the workplace; in Blakey v Continental Airlines ,* [6] *illegal employee activity on a company blog was attributed back to the employer.*

Copyright Infringement

An employer who merely provides the electronic means for an employee to infringe copyright and fails to prevent the employee from doing so, could face legal action for copyright infringement.

Subject to the fair dealing exceptions contained in the *Copyright Act 1958* (Cth), copyright is infringed by a person who, not being the owner of the copyright and without the licence of the owner of the copyright, does ***or authorises the doing of*** *in Australia any act comprised in copyright.* ***[7]*** Sections 31, 85(1) and 86 of the *Copyright Act 1958 (Cth)* set out the acts comprised in copyright. [8]

If a person authorises the doing of any of the acts comprised in copyright of a protected work without the licence of the copyright owner, they themselves infringe the copyright in that work. In determining whether a person has authorised the doing of an act comprised in copyright without the licence of the copyright owner, the following matters have to be taken into account:

- the extent of the person's power to prevent the doing of the act concerned
- the nature of any relationship existing between the person and the person who did the act concerned
- whether the person took any reasonable steps to prevent or avoid the doing of the act including complying with any industry codes of practice.

(Sections 36 (1A) and 101(1A) *Copyright Act 1968*).

Examples of where Australian courts have found cases of authorisation of copyright infringement include a hotel hosting a band which plays copyright protected songs and a University which provides photocopiers for students who are infringing copyright by photocopying too much of a textbook.

In the High Court case of *University of NSW v Moorhouse* (1975) 133 CLR 1, the University was held to have authorised infringement of copyright when a student made a copy of a book on a University library photocopier. The High Court declared that the University had authorised the infringement because the University provided the photocopying machines used to reproduce the book, allowed unsupervised access to the machines and took no reasonable steps to prevent the infringement. This was held despite the fact that the student was making the copy for himself alone and the University was unaware of his copyright infringement. The Court interpreted "authorise" to mean "sanction, approve, countenance".

Where an employer provides Internet access to employees and those employees then infringe copyright by downloading music or video onto a company's computers, the employer faces the risk of being sued for authorising copyright infringement if the employer has not taken reasonable steps to prevent or avoid the infringement by its employees. Web 2.0 sites such as *Facebook*, *Myspace* and *You Tube* have further exacerbated these risks for employers. These sites allow users to upload photographs and videos, which may have been

obtained online without the copyright owner's permission. If these activities occur during the course of employment or using the employer's Internet and computer facilities, vicarious liability for the employer may arise.

Defamation

Defamation is a common law tort whereby a communication occurs between two or more people which tends to cause a third party's reputation to be negatively affected. This communication could be expressed verbally, in writing or as pictures, such as a cartoon or doctored photograph.

A defamatory communication can be identified by its tendency to lower a party in the eyes of others or injure the reputation of a party. It is easy to imagine how a "joke" email authored by an employee could contain material which disparages a colleague, customer or business rival. It is easier still to imagine such an email being forwarded through an entire organization within minutes. In this scenario, what may have begun as a thoughtless comment or joke about someone's work or personal life within a social email between colleagues, could reach the person who is the subject of the comment and quickly develop into a defamation action.

Defamation in the Workplace

Although the primary responsibility for a defamatory publication falls on the publisher, a party who authorises the publication is also liable. An employer can be held vicariously liable for the defamatory publication of its employees where it is held to have authorised the publication or where the publication was made in the normal course of employment. Knowingly allowing employees to regularly send "joke" emails of an offensive or defamatory nature could be interpreted by a court as authorising such emails, leaving employers open to vicarious liability suits for defamation.

Defamatory publications made in the normal course of employment could also lead to employer liability for defamation. Publications made in the normal course of employment could conceivably include employees creating or updating intranet or external internet pages. As with harassment and copyright infringement, new social media sites serve only to enlarge the scope of employer liability for employee defamatory statements. Frustrated or disgruntled employees may turn to Twitter or Facebook, to publicly complain about co-workers or even competing businesses. If these acts are done in the course of employment, or using work facilities, the employer may be implicated in the publication of the defamatory comments.

Internet and Email Usage Policies: Helping Employers Limit Liability

Devising and implementing a comprehensive Internet and email usage policy and providing employee training will assist employers in limiting liability for employee Internet and email misuse.

The Australian Privacy Commissioner provides extensive guidelines for employers to develop a workplace email and web browsing policy. [9] These guidelines encourage employers to consider the privacy implications of an Internet usage policy. It is particularly important the employees are made aware of the extent to which their web browsing will be monitored.

The Internet usage policy should also:

- be explicit as to what activities are permitted and forbidden when employer electronic resources are being used;

- be widely and easily available to staff;
- clearly set out what information is monitored and which members of staff have access to staff email or browsing logs;
- outline how the organisation intends to monitor or audit staff compliance with the policy;
- provide a regime for reporting and handling incidents of non-compliance;
- specify the consequences for staff breach or non-compliance with the policy; and
- be reviewed regularly to ensure that it up to date with developments in technology and social media. [10]

The policy should give special consideration to the extent that use of social and networking media sites such as *FaceBook, MySpace, Twitter and blogs* is allowed by staff and the type of usage and behaviour that is prohibited.

Employers also have the option of filtering or blocking specific websites, which may be a practical solution in very large workplaces. In addition to implementing and enforcing these policies, employers should provide ongoing training for employees to reinforce acceptable behaviour standards.

Whilst the existence of a policy cannot completely safeguard an employer from liability, courts may consider the absence of such a policy as evidence that the employer authorised or sanctioned the employee's misconduct.

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[1]*New South Wales v Lepore and Another; Samin v Queensland and Others; Rich v Queensland and Others* 195 ALR 412 (2003) 195 ALR 412, at 481 per Kirby J.

[2]*New South Wales v Lepore and Another; Samin v Queensland and Others; Rich v Queensland and Others* 195 ALR 412 (2003) 195 ALR 412, at 481 per Kirby J.

[3] For more information on the WorkSafe action please see, http://www.cisv.com.au/documents/press-releases/080210_bullying_panlock_cafe_vamp.pdf.

[4]*Anti-Discrimination Act 1991* (Qld) s 133(2).

[5]*Webb v State of Queensland* [2006] QADT 8 (23 March 2006), [53].

[6]*Blakey v Continental Airlines*, 751 A.2d 538, 2000 WL 703018 (N.J. June 1, 2000).

[7] Section 36(1): Infringement of copyright in literary, dramatic, musical or artistic works.

Section 101(1): Infringement of copyright in subject matter other than works (sounds recordings, cinematograph films, television and sound broadcasts).

[8] Section 36(1)(a): For a literary, dramatic or musical work, copyright is the exclusive right to:

- reproduce the work in a material form;
- publish the work;
- perform the work in public;
- communicate the work to the public;
- make an adaptation of the work.

Section 31(1)(b): For an artistic work, copyright is the exclusive right to:

- reproduce the work in a material form;
- publish the work;
- communicate the work to the public.

Section 85(1): For a sound recording, copyright is the exclusive right to:

- make a copy of the sound recording;
- cause the recording to be heard in public;
- communicate the recording to the public;
- enter into a commercial rental agreement in respect of the recording.

Section 86: For a cinematograph film, the copyright is the exclusive right to:

- make a copy of the film;
- cause the film, insofar as it consists of visual images, to be seen in public, or, insofar as it consists of sounds, to be heard in public;
- to communicate the film to the public.

[9]*Office of the Privacy Commissioner*, 'Guidelines on Workplace Email, Web Browsing and Privacy', available at http://www.privacy.gov.au/materials/types/guidelines/view/6056.

[10]*Office of the Privacy Commissioner*, 'Guidelines on Workplace Email, Web Browsing and Privacy', available at http://www.privacy.gov.au/materials/types/guidelines/view/6056.