

DATE: 2020 11 24

SUPERIOR COURT OF JUSTICE

HEARD: July 30 and August 6, 2020

L. SHAW J.

Introduction

[1] Black Lives Matter. During the past year, this has become a familiar phrase. It is a phrase that reflects a movement seeking to dismantle anti-Black racism. In this case, the defendant posted comments on social media that the plaintiffs did not support the Black Lives Matter movement (“BLM movement”) and were racists. The plaintiffs strenuously deny these allegations. They have commenced an action seeking damages from the defendant, a former employee, for these and other allegedly defamatory statements posted by her on social media.

[2] The plaintiffs seek an interim injunction requiring the defendant to remove specific social media postings and to refrain from republishing such postings pending the trial of the action. The statement of claim was issued on July 28, 2020 and was served after the motion record seeking injunctive relief was served. When this motion was heard, the defendant had not yet filed a defence to the claim.

[3] The evidentiary record before me for this motion includes affidavits from the two owners of Sole Cleaning Inc. (“Sole”), Levi-Evan Shantz and Stefan Gregoriou, and from Samantha Talukder, an employee/manager of Sole. The defendant, Ms. Chu, also filed an affidavit. There were no cross-examinations conducted prior to this hearing.

[4] During the initial hearing, I asked counsel if they were aware of any jurisprudence where an interim injunction had been granted in a defamation action following a contested hearing, as neither party had filed any such authority. Subsequent to the hearing, counsel for the plaintiffs filed a number of cases and I heard further submissions with respect to those authorities.

[5] For the reasons set out herein, the request for an interim injunction is denied.

Procedural History

[6] On July 24, 2020 counsel for the plaintiffs wrote to the Triage Judge of the Superior Court of Justice in Brampton seeking a date for an urgent motion for an interim injunction. As a result of COVID-19, this was the procedure to follow. The Triage Judge agreed that the matter was urgent and scheduled the matter to be heard on July 30, 2020, six days later.

[7] On July 25, 2020 a Notice of Defamation was delivered to Ms. Chu requesting that she remove defamatory, slanderous and libelous statements from her social media and provide an apology to the plaintiffs. Ms. Chu did not respond.

[8] The plaintiffs' motion record was served on Ms. Chu by email on July 27, 2020, two days before the motion was heard. On July 28, 2020 she was served

with the plaintiffs' factum. In very short order, Ms. Chu retained counsel and by July 29, 2020 her affidavit and factum were served and filed. The matter was then before me the following day. These were extremely tight time lines, as can sometimes be the case when interim injunction relief is sought, and the timelines no doubt had an impact on the quality of the evidence before me with respect to the reliance on hearsay evidence. I will address this issue later in these reasons.

Review of the Evidence

i. Sole Cleaning

[9] Sole was opened by Mr. Gregoriou and Mr. Shantz in Toronto in 2019. They are the owners and principals of the company that specializes in shoe and handbag restoration. According to Ms. Chu, a large percentage of Sole's customers are members of the Black, Indigenous, and People of Colour ("BIPOC") communities. Her evidence is that Sole leans heavily into these cultures and features testimonials and ratings from a number of Black Toronto celebrities. Sole's employees are also all members of the BIPOC communities. Neither Mr. Shantz or Mr. Gregoriou are members of these communities.

[10] Sole's business has been affected by COVID-19. It was closed in March and gradually reopened in May 2020. Its reopening coincided with the BLM rallies and protests occurring in many cities around the globe, including Toronto.

ii. Ms. Chu's Employment with Sole Cleaning

[11] Ms. Chu was employed by Sole between August 1, 2019 until the point when she was terminated on June 30, 2020. Ms. Chu's postings on social media regarding Sole, Mr. Shantz and Mr. Gregoriou commenced after she was terminated. At the time of Ms. Chu's termination, Sole had eight employees.

[12] Ms. Chu studies Criminology at university. When she was hired at Sole, she worked as a shoe restoration and painting specialist.

iii. The Black Lives Matter Movement

[13] According to Ms. Chu, in response to cases of police brutality across the United States, there were a series of rallies, protests and demonstrations across the globe that were organized by or held in support of the BLM movement, including in Toronto.

[14] Ms. Chu's evidence is that as an Asian-Canadian woman, she has experienced instances of racism, but not to the extent of the racism experienced by the Black community. Her evidence is that she will never be close to fully understanding the trauma that comes along with being subjected to racism, but she believes that silence in the face of racial injustice is the same as being complicit. As

a result, she uses her social media accounts to comment on and support the BLM movement.

[15] According to Ms. Chu, in response to the BLM movement many companies began to post company statements on their social media pages in support of the movement. Her evidence is that she and a number of her co-workers at Sole suggested that Sole post a statement in support of BLM, particularly in light of Sole's connections to the BIPOC community and to sneaker culture.

iv. The BLM Statement

[16] On June 11, 2020 Mr. Shantz and Mr. Gregoriou decided to post a statement to Sole's website in support of BLM. According to Ms. Chu, they were hesitant to do so at first. Ms. Chu was upset with the contents of the statement because it contained spelling errors, including the incorrect spelling of George Floyd's name: spelled "Geroge". Ms. Chu was also of the view that the statement was "performative in nature and capitalized on the BLM movement". Her evidence is that other employees at Sole Cleaning felt the same way and perceived the statement as careless and inconsiderate.

[17] It is not in dispute that Ms. Chu reached out to Mr. Shantz and Mr. Gregoriou and shared her views with them. Her evidence is that she was worried about Sole's

reputation, as the statement came across as “tone deaf”. She offered to rewrite the statement and Mr. Levi agreed to her proposal. Ms. Chu sent him a revised statement that same night.

[18] The following day, on June 12, 2020, Ms. Chu followed up with Mr. Shantz asking whether he would be posting the new statement. Mr. Shantz’s evidence is that he thanked Ms. Chu for her work but he had to review it with Mr. Gregoriou, as it was a management decision.

[19] In the text message Mr. Shantz sent to Ms. Chu that day, he referred to her as Margaret and not Maggie. According to Ms. Chu, Margaret is her government name that she has never used, nor did Mr. Levi ever use it to refer to her in the past. Ms. Chu’s evidence is that she believed Mr. Shantz intentionally used that name to refer to her as a slight because he was not pleased with her speaking up and commenting on the initial statement in support of BLM. It is not in dispute that Ms. Chu texted Mr. Shantz and told him he disrespected her by using that name. According to Ms. Chu, many members of BIPOC communities use nicknames with which they identify. Her evidence is that this was not the first time Mr. Shantz used an employee’s name that they do not prefer in order to belittle an employee.

[20] Mr. Shantz acknowledges that Ms. Chu was upset with the use of her name Margaret, but his evidence is that this was the first time that he was aware that she

took issue with the use of that name. His evidence is that he initially referred to Ms. Chu as Margaret, rather than Maggie, as he was being more formal to reflect the seriousness of the conversation they were having.

[21] On June 13, 2020 the revised statement in support of BLM was posted on Sole's social media accounts. The second statement again contained spelling mistakes. According to Ms. Chu, a co-worker texted Mr. Gregoriou about the typos and his response was "I really don't care about it".

v) Ms. Chu's Employment and the Damaged Shoes

[22] There is conflicting evidence regarding Ms. Chu's job performance. According to Ms. Chu, after she spoke up about the BLM statement, she was targeted and harassed at work. She alleges that she was increasingly micro-managed with Mr. Shantz and Mr. Gregoriou examining her work, which they had never done before.

[23] According to Mr. Levi and Mr. Gregoriou, after Sole reopened in May, they noticed that Ms. Chu's work performance was declining: she started having difficulty meeting deadlines and her restoration and painting work was below standard. In addition, on or about June 20, 2020 Mr. Gregoriou examined a pair of shoes that Ms. Chu had been working on and found that they were damaged and it was

decided that Ms. Chu would have to return the damaged shoes to the customer.

[24] Mr. Levi wrote a note to Ms. Chu advising her that she would have to return the shoes. In that note, he put quotation marks around her name – Maggie. The note was placed in the damaged shoes. According to Mr. Levi, he did this as Ms. Chu told him she no longer wanted to be called Margaret. Ms. Talukder suggested that putting Ms. Chu's names in quotations was inappropriate so Mr. Levi texted another manager, Sean Hanes, and asked that he remove the note before Ms. Chu arrived for her next shift. According to Ms. Chu, the manager removed the note but showed her a picture of it. The manager, Mr. Hanes, was subsequently terminated, the same day that Ms. Chu was terminated.

[25] Ms. Chu's evidence is that she was told by a co-worker, by text, that Mr. Shantz believed she purposely damaged the shoes. Ms. Chu's evidence is that the shoes were not damaged. According to Ms. Chu, she believes she was asked to return the shoes to the customer to further humiliate her, as no other employee had ever been asked to return damaged shoes to a customer. She was also hurt by the use of quotation marks around her name. She believes this was also done to humiliate and belittle her.

[26] According to Ms. Chu, without discussing it with her, she was demoted from "lead painting expert" to "painting expert". Ms. Chu believes this was also done in

retaliation for speaking out about the initial BLM statement.

[27] On June 28, 2020 Ms. Chu spoke with Ms. Talukder about the tensions at work. According to Ms. Talukder, Ms. Chu told her that she thought Mr. Levi was trying to teach her a lesson because she had spoken up about the BLM statement. Ms. Talukder's evidence is that during a phone call, Ms. Chu said Mr. Levi and Mr. Gregoriou were ignorant, racist, egotistical and privileged white men.

[28] Ms. Talukder's evidence is that Ms. Chu was jumping to conclusions in believing that she was targeted for her support of BLM when asked to return a pair of shoes she had damaged. Her evidence is that Ms. Chu was not targeted for any reason at work.

[29] Ms. Talukder told Mr. Shantz about this conversation. According to Mr. Shantz, he was shocked and alarmed that Ms. Chu felt this way and decided he would arrange to apologize to her and clear things up between them. He was troubled that she felt she was being targeted and punished for speaking up about the BLM statement and wanted to assure her this was not the case.

vi) Ms. Chu is Terminated

[30] On June 30, 2020 Mr. Shantz arranged to speak to Ms. Chu. The conversation did not go well. According to Mr. Shantz, Ms. Chu's attitude was

extremely hostile and angry. His evidence is that her behaviour during this conversation was so shocking and disproportionate that he felt it necessary to terminate her employment. He denies that she was terminated due to her support of BLM, and he denies telling her or anyone else that she was terminated for this reason.

[31] Ms. Chu's evidence is that she was upset with Mr. Levi during the meeting but denies being hostile, as he alleges. According to Ms. Chu, she was told by Mr. Hanes that he overheard Mr. Levi tell other employees, after she was terminated, that she was too unstable to work, and that the BLM movement was clouding her judgment.

[32] According to Mr. Shantz, after he terminated Mr. Hanes and Ms. Chu, he overheard them say that they were going to "expose" Sole and "put me on blast".

[33] Ms. Chu's evidence is that following her termination, all of Sole's employees resigned and many indicated that they felt they were poorly treated and worked in a toxic work environment. It is also her evidence that other employees told her that they heard Mr. Shantz and Ms. Talukder use the "N-word" on multiple occasions at work and that Ms. Talukder used it to berate a group of Black customers. Ms. Chu was also told by colleagues that Ms. Talukder was heard to use the term "faggot". According to Ms. Chu, these comments made Sole's employees, who are all

members of the BIPOC community, deeply uncomfortable.

[34] Ms. Chu's evidence is that she heard Mr. Gregoriou use the "N-word" while talking to friends.

[35] Ms. Talukder, who describes herself as a person of colour, denied that she ever heard Mr. Shantz use racial epithets in the presence of any Sole employee or in private. It is also her evidence that he is a supporter of BLM and has personally donated to the organization.

[36] Ms. Talukder's evidence is that as a result of Ms. Chu's social media postings after she was terminated, several other employees resigned. Two employees emailed Ms. Talukder on July 1, 2020 and told her that they were resigning. One told her that his reason for resigning was that the ideals "reflected on to the company do not align with my morals". Between July 6 and 11, other employees resigned, most stating reasons connected to the conflict surrounding Sole. According to Ms. Talukder, she believes that Ms. Chu's defamatory remarks in her social media postings made Sole's employees uncomfortable about returning to work.

vii). Ms. Chu's Social Media Postings

[37] There is no dispute that following her termination, Ms. Chu made a series of

social media posts on Twitter and Instagram alleging that she was terminated by Sole for supporting the BLM movement; that Mr. Levi and Mr. Gregoriou are racists and have used racist epithets; that Sole does not care about Black people and only wants to profit off of Black culture; and that Sole treats its employees poorly.

[38] Although there are a number of postings on Ms. Chu's social media accounts, some quite lengthy, in the statement of claim, the plaintiffs listed 24 statements taken from the postings which they allege are defamatory. During submissions, counsel for the plaintiffs indicated that the injunctive relief was being sought for twelve of those statements: ten postings on Instagram that have now been archived (meaning they can no longer be seen by the public) and two postings that remain on Twitter.

[39] For the purpose of this injunction, the plaintiffs only seek the removal of postings that make allegations of racist behaviour. While many of the postings also include comments about the plaintiffs being a poor employer, the focus of this injunction is only on those comments dealing with allegations of racism.

[40] Ms. Chu's evidence is that the postings describe her termination and the harassment she suffered at work. Her evidence is that she believes the posts to be true and intends to prove the truth at trial. It is also her position that the posts are matters of fair comment or opinion.

viii). The Impact of the Postings

[41] Mr. Levi's evidence is that since these posts were made, numerous negative comments were written by others about Sole. Sole has also received threatening and hateful messages directly on its social media pages. The company was also the subject of an article written on a Toronto blog that detailed Ms. Chu's posts. Mr. Levi, Mr. Gregoriou and Ms. Talukder have also received numerous hateful and threatening messages on their personal social media accounts. Ms. Talukder's evidence is that she has been very frightened by the posts. According to Mr. Shantz, Ms. Chu's posts have caused him an enormous amount of fear and anxiety. He fears that the harm to his and Sole's reputation will restrict or reduce future opportunities.

[42] According to the plaintiffs, in addition to losing employees and having difficulty rehiring new ones, Sole has lost business relationships with persons with whom it has collaborated. One such individual is a music artist in Toronto who also posted a message to his 50,000 followers after Ms. Chu told him that Sole Cleaning was racist.

The Social Media Statements

[43] The plaintiffs seek an interim injunction that the following postings be removed from the defendant's social media accounts:

- a) "Not saying that my old workplace should take notes but... That Drake's CEO has resigned in the wake of allegations of anti-Black racism at the hospitality brand. NOW spoke to many current and former employees about their experiences"
- b) "Despite Levi and Stefan being two x white males, none of the staff were consulted"
- c) "too comfortable with saying racial and homophobic slurs"
- d) "forcefully asserted their dominance, neglecting that their company would be nonexistent without black culture"
- e) "acknowledgement of saying racial and homophobic slurs"
- f) "an apology for using the staffs BIPOC status to seem culturally sensitive. The list goes on."
- g) "I was told that I was "too passionate about the BLM movement and was targeted a week after speaking out..."
- h) "It is completely performative activism and simply says 'we understand there's racism but we've never felt it. Donate here lol'"
- i) "This was also a statement made by two cisgendered Caucasian people. Nothing that the rest of the team could have stood by"
- j) "What can you say when your two bosses are the owners and they're racist/targeting you."
- k) "Soleclean is racist and performative and doesn't give a fuck about BLM"

- l) "H's also said the N word... with the hard R... every single co-worker can attest to that."
- m) "that the BLM movement was clouding my judgment and I was taking the movement too seriously."
- n) "FUCKING RACIST ASS OWNER Y'ALL FIX UP BEFORE PEOPLE START PROTESTING @SOLECLEAN.CA"
- o) "THESE GUYS FIRED COUPLE OF WORKERS CAUSE THEY WERE SUPPORTING THE BLACK LIVE MATTER MOVEMENT WE SHOULDN'T LET SOME RACIST WHITE OWNER MAKE ANOTHER PERSON FEEL SCARED TO STAND FOR WHAT'S RIGHT"
- p) "BIG PSA. IF YOU'RE IN TORONTO DO NOT SUPPORT SOLE CLEAN"
- q) "Really disappointing behaviour from a company that profits off sneaker culture"
- r) "I just really want people to understand that profiting off black culture is not in your face all the time. It's my bosses saying the n word and then playing black artists in store. It's my bosses talking shit about black customers."

[44] Of the statements listed above, (a) and (r) are posted on the defendant's Twitter account and the balance were posted on Instagram and are now archived.

Issues

[45] The issue for determination on this motion is whether the plaintiffs have met the test for an interim injunction in the context of a defamation action.

Analysis

[46] In their factum, the plaintiffs relied on the test for injunctive relief as set out

in *RJR MacDonald Inc v. Canada*, [1994] 1 S.C.R. 311, 1994 CanLII 117 (S.C.C.). Their factum, therefore, focused on the wrong test. The plaintiffs agree that that is not the test for injunctive relief in defamation actions.

[47] In *Canada (Human Rights Commission) v. Canadian Liberty Net*, [1998] 1 S.C.R. 626, the court expressly rejected the three-part test for injunctive relief set out in *RJR* on the basis that the test did not sufficiently protect free expression, and that “the test would seldom, if ever, protect controversial speech”: at para. 49. The court cited with approval the following passage from Robert Sharpe, *Injunctions and Specific Performance* (Toronto: Thomson Reuters Canada Limited, 2019) (loose-leaf updated November 2020, Release No. 20):

There is a significant public interest in the free and uncensored circulation of information and the important principle of freedom of the press to be safeguarded.

...

The well-established rule is that an interlocutory injunction will not be granted where the defendant indicates an intention to justify [i.e. prove the truth of] the statements complained of, unless the plaintiff is able to satisfy the court that the words are both clearly defamatory and impossible to justify.

...

[I]t seems clear that the rule is unaffected by the American Cyanamid case and that the balance of convenience is not a factor.

[48] In *Canadian Liberty*, the Supreme Court of Canada also approved of *Rapp et al. v. McClelland & Stewart Ltd. et al* (1981), 34 O.R. (2d) 452, 128 D.L.R. (3d)

93 (Ont. H.C.), where the court stated the following at page 667:

The guiding principle then is, that the injunction should only issue where the words complained of are so manifestly defamatory that any jury verdict to the contrary would be considered perverse by the Court of Appeal. To put it another way where it is impossible to say that a reasonable jury must inevitably find the words defamatory the injunction should not issue.

....*American Cyanamid*....has not affected the well establish principle in cases of libel that an interim injunction should not be granted *unless the jury would inevitably* come to the conclusion that the words were defamatory.

[Emphasis as added by the Supreme Court]

[49] The test for injunctive relief in defamation actions was recently enunciated by the Ontario Divisional Court in *Bagwalla v. Ronin et al and Ronin v. Ronin et al*, 2017 ONSC 6693, at para. 19, as follows:

- 1) The publication complained of must be clearly defamatory;
- 2) If the Defendant states an intention to justify or to rely on fair comment, the injunction must be refused unless it is clear that any such defence will inevitably fail; and
- 3) The Plaintiff must establish irreparable harm if the injunction is refused.

[50] This is a very high test that recognizes the importance of protecting free speech, particularly in matters of public interest. When I asked counsel for authority where such interim injunctions were granted after a contested hearing, I was provided with only five decisions, from across Canada. This underscores that the granting of interim injunctive relief in defamation cases is rare and should only be ordered in the clearest of cases. The question is whether this is one of those

clearest of cases.

[51] The plaintiffs agree that the expression at issue is a matter of public interest rather than private interest. While I might characterize the posts as more personal in nature, they are also a critique of Sole, the management of the business and treatment of Sole's employees by its owners. In *17046604 Ontario Limited v. Pointes Protection Association*, 2018 ONCA 685, 142 O.R. (3d) 161 (Ont. C.A.), aff'd 2020 SCC 22, Doherty J.A. commented at para. 54 that the public interest is determined by asking: "what is the expression about or what does it pertain to?" The motives of the author or the merits of expression are not to be considered: *Pointes*, at para. 65.

[52] In my view the public would have an interest in knowing something about a company that offers them services and whether they wish to be supporting that company through paying for the use of its services. In particular, the public has an interest in knowing about a company's stance on matters of social and political importance such as the BLM movement and its treatment of its employees.

[53] This issue of public interest is also relevant when assessing the defence of fair comment, which will be discussed below.

[54] The first issue is whether the expression complained of is clearly defamatory.

[55] Defamation is defined as a publication which tends to lower a person's reputation in the estimation of right-thinking members of society, or to expose them to hatred, contempt or ridicule: *Botiuk v. Toronto Free Press Publications Limited*, [1995] 3 S.C.R. 3, 126 D.L.R. (4th) 609, at para. 62.

[56] In *Grant v. Torstar Corp*, 2009 SCC 61, [2009] 3 SCR 640, the Supreme Court, at para. 28, set out a three-part test that a plaintiff must meet in order to prove defamation as follows:

- a. 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;
- b. That the words in fact referred to the plaintiff; and
- c. That the words were published, meaning that they were communicated to at least one person other than the plaintiff.

[57] There is no dispute that Ms. Chu's words were published and communicated to at least one person other than the plaintiff. The evidence is that her social media accounts were widely disseminated. There is also no dispute that the words referred to the plaintiffs.

[58] Calling an individual or corporation a racist has been found to be

defamatory: *Upper Canada District School Board v. Gilcig*, 2017 ONSC 2904, at para. 34. However, on a motion for an interlocutory injunction, a finding that the words are defamatory is not sufficient to grant the injunction where the defendant raises the defence of justification or fair comment. When those defences are raised, the injunction will only be granted where the plaintiff has satisfied the court that it is *clear* that the defences will *inevitably fail*. This is a stringent test that is much higher than showing a *prima facie* case that the defences will not succeed. If the plaintiffs only had to establish that there was a *prima facie* case that the defences will not succeed, they might have met that onus. In my view, however, they have not met the onus of demonstrating that the defences will inevitably fail.

[59] I will now deal with the two defences Ms. Chu relies on; justification and fair comment.

[60] The defence of justification means that the statement is substantially true.

[61] Where the statement is an opinion, which includes a deduction, inference, conclusion or criticism, it may attract the defence of fair comment. For the defence of fair comment to succeed, the comment must be based on proven fact and on matters of public interest. The defendant must also prove that, objectively, any person could honestly express the comment based on the proven facts. The defence of fair comment will not succeed if the comment was made maliciously:

Dhillon v. Brar, 74 Man. R. (2d) 12, 1991 CanLII 11836 (MBQB), at para. 50.

[62] In this case, the defendant relies on both defences as some of the statements in dispute are fact which she says she intends to prove are true and some are opinions to which the defence of fair comment applies.

[63] As is often the case on a motion, the affidavits present conflicting evidence. That evidence has not been tested by way of cross-examinations. For the purpose of this motion, however, I am not required to make any credibility assessments. If Ms. Chu's evidence is contradicted by one of the other affiants in their affidavits, I do not have to determine whose evidence I accept as fact. For example, Ms. Chu's evidence is that her work was increasingly scrutinized after she spoke up about the BLM statement, that she was wrongfully accused of damaging a pair of shoes and that she was terminated for her support of the BLM movement. The plaintiffs' evidence is that Ms. Chu's work performance declined, that she damaged the shoes and that she was terminated for cause. For this motion, while I do not have to determine whose version of the events I accept, there is some assessment of the merits of the claim and of the defences that must be undertaken to determine if the test for granting the injunction has been met. I do not have to determine if the statements Ms. Chu made are true but only if, based on the evidence presented, the defence of justification will inevitably fail. I also do not have to determine if the

statements qualify as fair comment but only if, based on the evidence presented, the defence of fair comment will inevitably fail.

[64] There is some hearsay evidence in Ms. Chu's affidavit, on which she relies. This is not unexpected, given that she was served with the motion record only three days before the hearing. While there are some limitations with hearsay evidence, I am not prepared to put no weight on it as suggested by the plaintiffs and I will consider the hearsay evidence, together with all the other evidence, in assessing whether Ms. Chu's defences will inevitably fail.

[65] According to the plaintiffs, who bear the onus on this motion, the defence of justification will inevitably fail because the evidence relied on by Ms. Chu does not support a finding that the statements are true. The plaintiffs point to the evidence that they chose to put out a statement from Sole in support of BLM, and to speak out against racism, and that all of its employees are members of the BIPOC community. This evidence, they argue, demonstrates that they are not racist and the statements are therefore not true. Accordingly, the defence of justification will inevitably fail. They urge me to use common sense when assessing the evidence.

[66] According to the plaintiffs, the evidence relied on by Ms. Chu to support her comments that the plaintiffs are racist has nothing to do with racism and that a person could not honestly express that opinion based on the evidence she has

presented. They argue that her evidence, relates to employment issues and at best, might support her comments or opinion that she was mistreated as an employee by the plaintiffs but not that they are racist. This includes the use of her name Margaret rather than Maggie; her belief that she was being targeted and punished at work for expressing her concerns about the initial BLM statement and the spelling errors in the statement; her subsequent alleged demotion, and then termination of her employment. Accordingly, her defence of fair comment will inevitably fail.

[67] In my view, the appropriate approach in assessing the evidence is looking at it as a whole, as opposed to looking at each individual piece of evidence in isolation. A contextual approach should be used. For example, while I agree that, in isolation, Mr. Shantz' use of Ms. Chu's name of Margaret, rather than Maggie, and then writing her a letter using Maggie in quotations, may be more indicative of insensitivity and poor management, that is just one piece of the puzzle. Much like circumstantial evidence in a criminal matter, the evidence must be considered in its totality, as each piece of evidence is like a building block or piece of a larger puzzle that eventually fits together as a whole.

[68] Furthermore, even if I were to find that the evidence relied upon by Ms. Chu to support her defence of justification and fair comment may be weak, that is not the test on an interim injunction in a defamation action. I must be satisfied that the

words are so clearly defamatory and *impossible* to justify that an action in defamation would almost certainly succeed, in order to grant the injunction.

In my view, when I look at the evidence in its totality, including Ms. Chu's evidence that she heard Mr. Gregoriou use the "N-word", that has not been denied, the hearsay evidence that co-workers heard Mr. Gregoriou and Ms. Talukder use racial epithets, that she was purposely addressed by the wrong name, that she felt belittled, humiliated, punished and targeted at work due to her support of BLM and that her employment was terminated shortly thereafter, it cannot be said that it would be perverse for a trier of fact to find that the defence of justification or fair comment has been made out. This is not one of those clearest of cases where injunctive relief ought to be granted pending trial.

[69] Having made this finding, I nonetheless want to comment on the issue of the use of the objective standard when assessing the fair comment defence. When I heard this motion, I was not familiar with the phrase "government name" and the term BIPOC. I asked Ms. Chu's lawyer during submissions if Ms. Chu simply did not like to use the name she was given at birth. Her lawyer explained to me the use of nicknames in the BIPOC community, and the cultural importance associated with those names. The reason I raise this is to illustrate the duty we have to learn about the experiences of racialized persons and how their experiences can be seen

through a lens that differs from those of us who are not members of racialized communities.

[70] I consider this relevant when assessing the defence of fair comment, which imports an objective test that the opinion, based on proven facts, is one that any person could honestly express. Accepting the evidence Ms. Chu has led as fact and the comments she makes that the plaintiffs are racist, the question is: could any person honestly express that opinion on those facts? The plaintiffs' position is that the comments are not only untrue but that a person could not honestly express the opinion they are racist based on the evidence. They assert that when looking at the evidence, at most, the comments or inferences that could be made is that there were employment issues with Sole but not that it and Mr. Shantz are racist.

[71] In my view, this ignores the experiences of members of the racialized community who are likely more attuned to and aware of not only overt acts of racism, but perhaps also the more insidious passive acts of racism such as deliberately using the name of an individual who, for cultural and other reasons, does not use that name. That is just one example of how racism can be seen and experienced through a different lens.

[72] The lived experiences of members of the BIPOC and other racialized communities who experience racism in the workplace, overtly or otherwise, cannot be ignored when assessing the objectivity component of the fair comment test when dealing with allegations of racism. To do so would do an injustice to these communities and overlook the systemic racism they have experienced and continue to experience in the workplace – experiences that may be viewed differently by persons who are not members of a racialized community.

[73] The plaintiffs also argue that the defence of fair comment will inevitably fail as there is evidence that Ms. Chu acted maliciously when she posted the defamatory comments after her employment was terminated for cause.

[74] Malice relates to Ms. Chu's state of mind and she has specifically denied any malice. The plaintiffs assert that Ms. Chu posted the comments when societal emotions surrounding the BLM movement were heightened, and that she did so deliberately knowing of the harm it would cause them.

[75] The evidence that she posted the comments motivated by ill-will stemming from the termination of her employment may succeed at trial but that is not the test for this motion. I must assess whether it is impossible that a trier of fact at trial will find that her postings were not motivated out of malice.

[76] It is not in dispute that Ms. Chu was concerned with Sole's and Mr. Shantz's posting in support of BLM and thereafter felt punished and targeted for speaking out about those concerns. It is not in dispute that she shared her concerns with Ms. Talukder before she was terminated. She told Ms. Talukder that she thought Mr. Shantz and Mr. Gregoriou were ignorant, racist and egotistical privileged white men before she was terminated. Based on the evidence before me, the loss of her employment, and any anger she may have had arising from that, did not trigger her beliefs as she expressed those beliefs before she was terminated. Before her employment was terminated, she believed that Mr. Shantz and Mr. Gregoriou were racist and that she was being targeted for speaking up against what she saw as the performative and tone-deaf nature of the initial statement posted on Sole's website in support of BLM. These are beliefs she held and shared with others. There is also no dispute that Ms. Chu was supportive of the BLM movement, which may have been the motivation behind her postings. I am therefore not satisfied that the plaintiffs have met their burden that it would be perverse for a trier of fact to find that there was no malice.

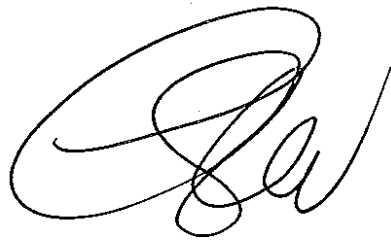
[77] Having found that the defence of justification and fair comment will not inevitably fail, I need not consider if the plaintiffs will suffer irreparable harm if the injunction is refused.

Conclusion

[78] Great caution must be exercised on a motion seeking interlocutory relief in a defamation action, as granting the injunction will limit the defendant's right of free expression. The test is a stringent one and, based on the evidence before me, considered in context and in its totality, I am not satisfied that the plaintiffs have met their onus. The plaintiffs have not established that the defences of justification and fair comment will inevitably fail.

[79] The plaintiffs' motion is therefore dismissed.

[80] The defendant is entitled to her costs. If the parties cannot agree on quantum, the defendant shall file her cost outline and any relevant offers to settle by December 18, 2020. The plaintiffs shall file any response, to a maximum of two pages, by January 8, 2021.

A handwritten signature in black ink, appearing to be 'L. Shaw', written over a horizontal line.

L. Shaw J.

CITATION: Sole Cleaning v. Chu, 2020 ONSC 7226
COURT FILE NO.: CV-20-2717-00
DATE: 2020 11 24

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

LEVI-EVAN SHANTZ and SOLE CLEANING
INC.

Plaintiffs

– and –

MARGARET CHU

Defendant

REASONS FOR DECISION

L. Shaw J.

Released: November 24, 2020