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TEXTUAL HARASSMENT: SEXUAL HARASSMENT VIA TEXT MESSAGE

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A. INTRODUCTION

The British Columbia Human Rights Tribunal recently released a decision dealing with sexual harassment and texting, *McIntosh v Metro Aluminum Products Ltd and Zbigniew Augustynowicz*.[1] Though this is a British Columbia decision, comparable Ontario legislation suggests that this decision should serve as a warning to employers, including that they could find themselves involved in human rights proceedings if they do not have adequate policies and procedures in place to deal with sexual harassment. This case, to be discussed in this Bulletin, underscores that employers (including charities and not-for-profits) are well advised to develop and implement sexual harassment policies and that both employers and employees should understand what types of behaviours constitute sexual harassment. Failure to take these steps could result, as it did in this complaint, in substantial monetary awards to affected employees.

B. THE FACTS

The facts of this case reveal discriminatory conduct that stemmed from a consensual sexual relationship that had ended. The complainant, Lisa McIntosh, filed a complaint with the British Columbian Human Rights Tribunal against Zbigniew Augustynowicz and Metro Aluminum Products Ltd for discrimination on the basis of sex, which was in the form of sexual harassment. McIntosh was an employee of the Augustynowicz, who owed Metro Aluminum Products, and the two had engaged in a sexual relationship while she was his

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[1] 2011 BCHRT 34, available online at http://www.canlii.org/en/bc/bchrt/doc/2011/2011bchrt34/2011bchrt34.html.

employee. After several months, McIntosh ended the relationship and Augustynowicz assured her that this would not affect her work for Metro Aluminum Products.

However, over the next three months, Augustynowicz sent McIntosh several text messages of a sexual nature, including propositions, demeaning language and sexually provocative comments. McIntosh told Augustynowicz verbally and through text message that such communication was unwelcome. When Augustynowicz continued to send sexual messages, McIntosh attempted to ignore Augustynowicz but he continued to respond with further sexual messages. McIntosh then pretended that she had entered into a new relationship in hopes that this would stop the messages, but it did not. Finally, McIntosh threatened to report the harassment to the police, and Augustynowicz finally stopped sending messages. As a result of the ongoing sexual messages and a pre-existing medical condition, McIntosh took a stress leave. She then extended her leave and eventually did not return to work.

C. THE DECISION

In determining that this constituted discrimination, the Tribunal first reiterated the long-standing rule that sexual harassment is a form of sex discrimination.[2] The Tribunal cited *Janzen v. Platy Enterprises Ltd.*,[3] where the Supreme Court explained that sexual harassment is:

> … unwelcome conduct of a sexual nature that detrimentally affects the work environment or leads to adverse job-related consequences for the victims of harassment. It is…an abuse of power. When sexual harassment occurs in the workplace, it is an abuse of both economic and sexual power. Sexual harassment is a demeaning practice, one that constitutes a profound affront to the dignity of the employees forced to endure it….

The Tribunal further explained that sexual harassment might be blatant as in grabbing, leering and sexual assault, but it might also be subtle and may include innuendos and propositions. Since, in this situation, the sexual innuendo was overt, the only real issue to be determined was whether the messages were unwelcome. Based on credibility and the evidentiary record, the Tribunal found that the messages were indeed unwelcome.

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[2] Note that in Ontario, harassment in employment on the basis of sex is specifically prohibited under section 5(2) of the Ontario *Human Rights Code*.
[3] [1989] 1 SCR 1252.

The Tribunal found Augustynowicz sexually harassed McIntosh largely because of the nature of the evidence that results from text messaging. That is, the complainant did not have any difficulty in demonstrating that there was communication of a sexual nature or that the messages were demeaning, because they were all written down. Further, there was a clear record that McIntosh had asked Augustynowicz to stop sending sexual messages on several occasions, and that these requests were followed by additional sexual messages. The Tribunal also determined that these findings were unaffected by the multiple factors that the respondent attempted to introduce in order to argue that the messages did not constitute sexual harassment. Such factors included whether McIntosh opened or responded to the text messages, whether she dressed provocatively, whether she was a “workplace flirt”, or whether she had previously consented to sexual relations.

Finding that McIntosh was sexually harassed by Augustynowicz and that she left her employment with Metro Aluminum Products Ltd. as a result, the Tribunal ordered several remedies. The Tribunal ordered that Augustynowicz cease the contravention of the Human Rights Code, declared that the conduct was discriminatory, awarded McIntosh $14,493.80 for lost wages when she left her position and awarded her $12,500 for injury to dignity, feelings and self respect. Both Augustynowicz and Metro Aluminum Products Ltd. were held to be jointly and severally liable for the award. Finally the Tribunal declined to make an order that the employer implement a sexual harassment policy because no evidence was introduced on the issue, but it strongly encouraged the employer to do so of its own accord. Since the decision of the Tribunal, a petition has been filed for judicial review with the British Columbia Supreme Court, however the court has not yet made any decision on the matter.

D. CONCLUSION

Though the facts of this case are based on harassment via technology, the lesson to be taken is much more far reaching. Employees and employers need to be aware that sexual harassment is a form of discrimination prohibited by human rights legislation, as well as occupational health and safety legislation in some provinces, including Ontario. Further, employers can be held liable for harassment by their employees, especially if the harassing employee is in a position of authority. However, employers can also be held liable if they learn of the harassment and do not properly respond to it. For this reason, employers are well advised to have clear policies on sexual harassment. In Ontario, as in this case, the Tribunal has the power to order that an employer implement sexual harassment policies and procedures.

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