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## **DIRECTORS' ACTIONS LEAD TO NOT-FOR-PROFIT'S WORKPLACE DISCRIMINATION LIABILITY**

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*By Barry W. Kwasniewski\*\**

### **A. INTRODUCTION**

On April 4, 2017, the Human Rights Tribunal of Ontario (the “HRTO”) released its decision in *Dix v The Twenty Theater Company*<sup>1</sup> in response to an application whereby a former employee (the “Applicant”) alleged discrimination with respect to employment because of sex, age, disability, and reprisal, against members of the board of directors of the not-for-profit The Twenty Theater Company (the “Respondent”), in contravention of the Ontario *Human Rights Code* (the “Code”).<sup>2</sup> The Applicant’s allegations were based on inappropriate comments by members of the not-for-profit’s board, and resulted in an award for damages to the Applicant. This case serves as an important reminder to not-for-profit board members that their inappropriate interactions with employees can result in serious consequences to the organization for which they have a fiduciary duty to protect as directors.

### **B. FACTS**

The HRTO refers to the Respondent as a “non-profit charitable organization” founded in 2010, with the mission to advance the development of musical theatre in Canada. The Applicant was employed by the Respondent under the management of the executive director from February 2015 until her dismissal in July 2015.<sup>3</sup> The Applicant alleged that during the course of her employment, she was subjected to sex and age discrimination by two members of the Respondent’s Board (hereafter referred to as “W” and “S”). In

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\* Barry W. Kwasniewski, B.B.A., LL.B., a partner, practices employment and risk management law with Carters’ Ottawa office. The author would like to thank Luis Chacin, LL.B., M.B.A., LL.M., Student-at-Law, for his assistance in preparing this Bulletin.

<sup>1</sup> 2017 HRTO 394.

<sup>2</sup> RSO 1990, c H.19.

<sup>3</sup> *Supra* note 1 at paras 2, 83.

her application filed August 12, 2015, the Applicant alleged that between April and July 2015, “the board members [primarily S] frequently implied that she could not do her job because she is a young woman.”<sup>4</sup> She also claimed that during a meeting in late June or early July 2015, while discussing how to engage participants at an upcoming golf tournament fundraiser, the board members made inappropriate comments about hiring attractive “promo girls” drawn from the theater company’s training program.<sup>5</sup> The Applicant also alleged that board members W and S would, without her consent, give her “hugs and kisses on the cheek” at some of the meetings, to which she did not object at any instance, but which later made her feel uncomfortable.<sup>6</sup>

On June 8, 2015, the respondent organization held its season launch party.<sup>7</sup> At this party, the Applicant claimed board member W acted in a flirtatious way, making her feel uncomfortable, but that she did not object because of the opportunity of him introducing her to several important contacts and helping her career.<sup>8</sup> On June 9, 2015, the following text messages were exchanged between W and the Applicant:<sup>9</sup>

[Director W]: Your pics look great! That dress was awesome  
Applicant: Thanks! Ha thank you, I don’t dress up often, I’m more of a jeans girl.  
[Director W]: Well I’m sure you look lovely in anything  
but the dress and heels were very elegant and hot ;)  
Applicant: Lol well thank you  
[Director W]: I am looking forward to you coming out with the shorter dress  
like you said last night hehehe

Director W testified that he was trying to encourage the Applicant and be “morally supportive” the night of the party, as she had mentioned she had a preference for shorter dresses and was not comfortable with what she was wearing during the event.<sup>10</sup> W also argued that the semi-colon was intended to be a “smiley face” rather than a “winky face”,<sup>11</sup> and upon further reflection, acknowledged it was an inappropriate choice of words and that he could understand why the Applicant felt uncomfortable after the exchange of text messages.<sup>12</sup>

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<sup>4</sup> *Ibid* at paras 5, 6.

<sup>5</sup> *Ibid* at para 19.

<sup>6</sup> *Ibid* at paras 26, 27.

<sup>7</sup> *Ibid* at para 37.

<sup>8</sup> *Ibid* at para 38.

<sup>9</sup> *Ibid* at para 39.

<sup>10</sup> *Ibid* at paras 43, 44.

<sup>11</sup> *Ibid* at para 45.

<sup>12</sup> *Ibid* at para 47.

The Applicant sought monetary compensation of \$40,000.00, including \$14,338.00 as compensation for injury to dignity, feelings and self-respect.<sup>13</sup>

## C. DECISION

Regarding the conduct of W and S during the board meetings, the HRTO found the Applicant's evidence to be lacking in particulars and, therefore, insufficient to support the allegations.<sup>14</sup> Moreover, the HRTO held there was no evidence that the term "promo girls" had been used at any board meeting, but instead that there was a discussion about the use of an agency to provide promotional models for the golf tournament and that the artists from the respondent's mentoring program were used appropriately to support the event.<sup>15</sup>

The HRTO relied on s.7(3)(a) of the Code, which states:<sup>16</sup>

7(3) Every person has a right to be free from,  
(a) a sexual solicitation or advance made by a person in a position to confer, grant or deny a benefit or advancement to the person where the person making the solicitation or advance knows or ought reasonably to know that it is unwelcome.

Addressing the allegation that the hugs and kisses constituted discrimination or harassment because of sex or age due to the absence of consent, as claimed by the Applicant,<sup>17</sup> the HRTO held that the test is not consent, but whether the "conduct was known or ought reasonably to have been known to be unwelcome", as per s.7(3)(a) the Code. In this case, considering the circumstances and the environment in which the conduct took place, the elements of the test were not met.<sup>18</sup>

Regarding the text messages sent by W, the HRTO found that the director was "in a position to confer, grant or deny a benefit" to the Applicant, as per s.7(3)(a) the Code. Director W had a role of leader and mentor to the Applicant, as it was he who had recommended her for the position in the organization. In the view of the HRTO:<sup>19</sup>

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<sup>13</sup> *Ibid* at para 116.

<sup>14</sup> *Ibid* at para 15.

<sup>15</sup> *Ibid* at para 24.

<sup>16</sup> *Supra* note 2.

<sup>17</sup> *Supra* note 1 at para 31.

<sup>18</sup> *Ibid* at paras 35, 36.

<sup>19</sup> *Ibid* at para 50.

[50] Even if I were to accept [W's] evidence that the semi-colon was intended by him as a smiley face, and not as a winky face, and that the "hehehe" was intended as a light-hearted hee-hee-hee, the fact remains that [W] sent text messages to the applicant describing her outfit from the event as "hot" and telling her that he was "looking forward to [her] coming out with the shorter dress". In my view, these comments are clearly and obviously sexual in nature.

Accordingly, the HRTO held that these texts constituted unlawful discrimination contrary to s.7(3)(a) of the Code. As W was a "directing mind" of the Respondent, it was held liable for his conduct.<sup>20</sup> The HRTO also held that the Respondent's decision to terminate the Applicant's employment in July, 2015 constituted an act of reprisal, as her threat of a human rights action was found to be a factor in the termination decision.

In assessing damages, the HRTO followed its practice to award one global amount for compensation for intangible losses.<sup>21</sup> Therefore, it considered previous decisions where a single and isolated comment had been found to be discriminatory, such as in *Lee v NCR Leasing Inc. o/a Aaron's Stores*,<sup>22</sup> where a store manager told an employee that "the shorter the skirt the better and to show cleavage", resulting in an award for damages.<sup>23</sup> In this case, the HRTO ruled that a general damage award of \$1,500.00 for the text messages was appropriate, with an additional award of \$5,000.00 as a result of the finding of reprisal for a total of \$6,500.00 of compensation for injury to dignity, feelings and self-respect. The Respondent was also ordered, if it were to re-commence operations, to undertake mandatory human rights training for all board members and employees, available through the Ontario Human Rights Commission website.<sup>24</sup>

## D. CONCLUSION

This decision by the HRTO provides a clear lesson to charities and not-for-profits that their board members' inappropriate conduct towards employees or anyone else involved with the organization, including volunteers and even other board members, can result in significant liability for the organization. In this case, the Respondent not-for-profit was found to be liable to the Applicant employee for what the HRTO held to be inappropriate workplace sexual advances by a board member. The form of the communication does not matter; if the content of the communication is such that it is a sexual solicitation

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<sup>20</sup> *Ibid* at para 51.

<sup>21</sup> *Ibid* at para 118.

<sup>22</sup> 2016 HRTO 1440.

<sup>23</sup> *Supra* note 1 at paras 120, 121.

<sup>24</sup> *Ibid* at para 128.

or advance that is known or ought reasonably to have been known to be unwelcome, then the HRTO, or potentially a civil court, can impose liability. Apart from organizational liability, directors may also face personal liability for their wrongful actions, including liability for breaches of the Code in their capacity as directors.