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EMPLOYEE TAKING VIDEOS OF CUSTOMER RESULTS IN TERMINATION FOR CAUSE

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A. INTRODUCTION

On September 30, 2019, the Court of Queen's Bench of New Brunswick (the "Court") released its decision in *Durant v Aviation A. Auto Inc.* ("*Durant*"),[1] finding that an employee's surreptitious taking of photograph and videos of a female customer without her consent or knowledge constituted just cause for the employee's dismissal from employment. In this motion for summary judgment, the Court applied a contextual approach to determine that the employee, Robert Durant's ("Mr. Durant") misconduct was egregious as it invaded the female customer's privacy, which was incompatible with Mr. Durant's employment obligations towards his employer, Aviation A. Auto Inc. ("Audi Moncton"). This *Charity & NFP Law Bulletin* summarizes the Court's reasoning in *Durant*, the principles of which are relevant to charities and not-for-profits ("NFPs") as employers.

B. RELEVANT FACTS

Since July 16, 1984, Mr. Durant was employed by what was formerly Dieppe Auto, a Volkswagen/Audi dealership. Dieppe Auto was later acquired by Audi Moncton and Mr. Durant remained under its employ as a service advisor until the time of his termination on September 10, 2018.

On August 30, 2018, Mr. Durant took a photograph and two videos of a female customer without her knowledge or consent using his work-supplied tablet computer ("Incident"), which he then showed to a

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[1] 2019 NBQB 214.

couple of technicians and other employees. Both while making the video and when showing it at a later time to a technician, the Court found Mr. Durant made improper remarks about the female customer.[2] In addition, Mr. Durant also took a third video using his personal cell phone from the screen of the tablet computer, and later texted a photograph to a co-worker.[3]

While Mr. Durant acknowledged making a video of the female customer, he claimed that it was made due to his concern that she was intoxicated from alcohol or drug consumption, in addition to having claimed that she "approached the service desk area '*rapidly*', in an '*openly animated manner*' and in a '*shockingly inappropriate state of public dress*'."[4] Contrary to Mr. Durant's assertions, several other employees of Audi Moncton who were present during the Incident stated that the female customer gave no impression of having consumed any drugs or alcohol, was perfectly calm and was not angry or animated, except for at one point seeming slightly annoyed at someone she was speaking to on her phone.

Mr. Durant also showed the video to a service technician, Rachel Hughes ("Ms. Hughes"), who walked away feeling disgusted and disappointed after a couple of seconds of watching the video that was being viewed by a group of employees as well. Ms. Hughes complained to the then general sales manager regarding the taking and showing of the video by Mr. Durant, who then reported the matter to the Audi Moncton human resources manager, Michelle Duffie. Ms. Duffie found the photograph and two videos in the "recycle bin" folder of the tablet computer and proceeded with conducting interviews of Audi Moncton employees who had potentially witnessed the Incident. It was brought to her attention that this was not an isolated event, but rather Mr. Durant had a history of surreptitiously taking photos of female customers that he considered attractive, and he did so by carrying his cellphone in his chest shirt pocket with the camera lens pointing outward.[5]

Following this, at a meeting regarding the Incident with Mr. Durant, he acted as though he had done nothing wrong due to the presence of security cameras on the premises, and stated that given his history of working at the dealership for 34 years, the "incident was on the low end of the spectrum on range of

[2] *Ibid* at para 62.
[3] *Ibid.*
[4] *Ibid* at para 15.
[5] *Ibid* at para 27.

seriousness."[6] Mr. Durant acknowledged having taken a photograph of a customer at the dealership's old premises, in addition to having taken a video of a technician without her knowledge, and stated that his manager had talked to him about it. However, Mr. Durant failed to mention that there were other more recent instances of similar misconduct on Mr. Durant's part, as well as having received a disciplinary letter from November 2014 that warned Mr. Durant that conduct of a similar nature could result in disciplinary action against him that could include termination of his employment.[7] Taking all these factors into consideration, Mr. Durant was terminated from his employment.

C. ANALYSIS

After determining that this was a proper case for summary judgment, the Court applied a contextual approach to find that Mr. Durant's conduct warranted dismissal. In order to determine whether there is just cause for termination, the court must answer the core question of "whether the employee's misconduct was sufficiently serious that it struck at the heart of the employment relationship" and in doing so, "the court must:

> (a) Determine the nature and extent of the misconduct;
>
> (b) Consider the surrounding circumstances; and
>
> (c) Decide whether dismissal was warranted."[8]

On the first part of the test, the Court found that Mr. Durant's conduct was serious in nature for several reasons. There was an abundance of evidence establishing that Mr. Durant mocked and ridiculed the female customer's appearance, and the video was taken for an improper purpose, which was not work-related. Further, the Court did not draw any inference from the fact that surveillance footage for the Incident was not available, and comparing his actions with Audi Moncton using video surveillance was meritless due to the clear distinction that exists for a person's expectation of privacy depending on the circumstances. In this regard, the Court quoted the recent Supreme Court of Canada's decision in *R v Jarvis*[9] where the Supreme Court stated that while individuals may reasonably expect being captured by video surveillance in certain locations, they do not reasonably expect to be the subject of targeted

[6] *Ibid* at para 36.
[7] *Ibid* at para 80.
[8] *Ibid* at para 60.
[9] 2019 SCC 10 at paras 89, 90.

recording. Agreeing with Audi Moncton, the Court stated that since no customers have any expectation of being filmed at close range, there was potential that if this kind of conduct became public knowledge, Audi Moncton would suffer damage to its business and general reputation in the highly competitive industry. Further, not accepting any responsibility or apologizing for his conduct, taking the video on a work-supplied tablet computer and viewing the video with several co-workers in the workplace, acting contrary to his seniority, experience and not showing any leadership skills, all added to the seriousness of his conduct, which was further enhanced by Mr. Durant being the first point of contact for Audi Moncton customers.

On the second part of the test, the Court considered both the circumstances of the employee and the employer. Being the "face" of Audi Moncton, his relationship with customers was crucial, but despite Mr. Durant's claims that he had a stellar employee record of 34 years, there were co-workers that had come forward reporting Mr. Durant's similar misconduct in the past, and he had been issued a warning letter. Further, Audi Moncton had placed a degree of trust in him to treat the customers with courtesy and respect. Had Mr. Durant's conduct become public knowledge, Audi Moncton would have suffered serious harm, include having potentially exposed Audi Moncton to legal recourse by customers and its employees.

Finally, on the third part of the test, by considering the "nature, extent and seriousness of the misconduct in the context of the surrounding circumstances"[10], the Court concluded that Mr. Durant's misconduct was very serious as a standalone incident because of the invasion of the female customer's privacy and subsequently made derogatory comments, which were incompatible with Mr. Durant's employment obligations. This serious conduct was made even more egregious when similar inappropriate misconduct of the past that Mr. Durant had been warned about, was taken into consideration. Further, despite the duration of the Incident being short in comparison to the overall period of his employment, "considering the whole of the circumstances and context, Mr. Durant's misconduct struck at the very heart of the employment relationship, thereby giving rise to its breakdown."[11]

[10] *Durant*, *supra* note 1 at para 84.
[11] *Ibid* at para 91.

D. CONCLUSION

The Court found that Audi Moncton had established just cause for Mr. Durant's termination of employment. Customers of businesses, and clients or recipients of services of charities and NFPs, have certain reasonable privacy expectations, including the expectation that they will not be the subject of unauthorized video recording or photos. Employees who violate that trust may expose the charity or NFP to liability, including privacy breach complaints. Charities and NFPs involved in any situation where an employee has potentially violated the privacy rights and expectations of a client or service recipient, whether by unauthorized recording or by other means, may require legal advice in relation to the appropriate response.

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