

This article first appeared in the B.C. Human Resources Management Association's HRVoice Magazine (April 2011).

COMBATting SEXUAL HARASSMENT IN THE WIRELESS AGE

By James D. Kondopulos of Roper Greyell LLP, Employment and Labour Lawyers

Text messages, e-mail, posts and tweets – the wireless age has transformed the way in which the world communicates. *McIntosh v. Metro Aluminum Products Ltd.*, [2011] B.C.H.R.T.D. No. 34 (Marion) is a recent B.C. Human Rights Tribunal decision confirming that regardless of this transformation, the ground rules have not changed. Employees continue to be entitled to a harassment-free workplace, and employers remain responsible for providing a work environment free of sexual and other harassment.

Background facts

Lisa McIntosh, a 40-year old mother of two adult children, worked for Surrey-based Metro Aluminum Products Ltd. as a delivery driver.

Shortly after commencing employment with Metro on February 25, 2008, Ms. McIntosh entered into a consensual sexual relationship with the company's owner, Zbigniew Augustynowicz.

Towards the end of June 2008, Ms. McIntosh learned that Mr. Augustynowicz was not "separated" from his wife as he had previously claimed. Ms. McIntosh told Mr. Augustynowicz that she wanted to end their personal relationship and restrict their interaction to work-related matters.

This was not well received by Mr. Augustynowicz. He started sending Ms. McIntosh text messages containing sexually demeaning language as well as sexual comments and propositions. He referred to Ms. McIntosh as a "bitch", made comments like "hi sexy", "nice ass" and "I need a horny woman", and asked if she could "hook up" with him or give him a "bj" or "nooner".

Ms. McIntosh asked Mr. Augustynowicz to "quit treating [her] that way" and stop sending her sexualized text messages. She did this verbally and by way of at least one text

message. She made it clear to Mr. Augustynowicz that he was making her feel very uncomfortable.

Mr. Augustynowicz, however, remained undeterred in his behaviour. It was only when Ms. McIntosh threatened in September 2008 “to contact the police and make a formal complaint” that he stopped sending her explicit text messages.

The ordeal caused Ms. McIntosh to experience difficulty being at work. She was advised by her doctor to take eight to twelve weeks off work because of “work-related stress”, and was provided with a medical note to that effect.

When Ms. McIntosh presented the note to her manager, she was told that she should look for other employment. At that time, Ms. McIntosh had only been on the job for around seven months.

Ms. McIntosh filed a human rights complaint against both Mr. Augustynowicz and Metro. She complained that she had been subjected to employment discrimination on the basis of sex and, specifically, to ongoing sexual harassment through repeated, unwelcome text messages of a sexual nature.

Ms. McIntosh took the position that “she did not quit and was not fired” but was forced out of her job with the company. She added that that she could not continue to work for Metro as it was making her physically and mentally ill.

Decision of the B.C. Human Rights Tribunal

The B.C. Human Rights Tribunal found Ms. McIntosh’s complaint to be well-founded. Sexual harassment had taken place, and she had been subjected to employment discrimination on the basis of sex.

Tribunal Member Enid Marion found Mr. Augustynowicz and Metro, in its capacity as Ms. McIntosh’s former employer, to be jointly and severally liable for the prohibited discrimination. She ordered them to pay Ms. McIntosh \$14,493.80 as compensation for lost wages, \$12,500 as damages for injury to dignity, feelings and self-respect, \$2,900.85 as reimbursement for expenses incurred in pursuing the complaint, and interest. This was a sizeable award given the relatively brief period of Ms. McIntosh’s employment.

At the outset of her analysis, Tribunal Member Marion reviewed the principles applicable in a case of alleged sexual harassment:

- (a) The onus is on the human rights complainant to establish, on a balance of probabilities, that he or she was subjected to employment discrimination on the basis of sex and, specifically, to sexual harassment.
- (b) Sexual harassment is broadly defined as “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 characterized as “an abuse of both economic and sexual power” and “a demeaning practice, one that constitutes a profound affront to the dignity of the employees forced to endure it”.
- (c) Blatant examples of sexual harassment include “leering, grabbing, and even sexual assault”. More subtle, but no less innocuous, examples include “innuendos, and propositions for dates or sexual favours”.
- (d) The test for determining whether sexual harassment has occurred is an objective one. Would a reasonable person, taking into account all of the circumstances, view the conduct or comments as unwelcome?

Turning to the facts of the case before her, Tribunal Member Marion found that Ms. McIntosh “was subjected to repeated comments of a sexual nature that Ms. Augustynowicz knew, or ought to have known, were unwelcome, and that detrimentally affected her work environment and led to adverse job-related consequences, including her departure from Metro”.

Tribunal Member Marion noted Mr. Augustynowicz was not deterred by Ms. McIntosh’s express verbal and written requests that he stop behaving inappropriately. The Tribunal Member also highlighted the context in which the conduct and comments occurred:

- (a) “As the owner of Metro and Ms. McIntosh’s employer, Mr. Augustynowicz was in a position of authority over her.”
- (b) “Mr. Augustynowicz was her employer and she was reliant on him for her financial security.”

Tribunal Member Marion considered whether the consensual sexual relationship between Ms. McIntosh and Mr. Augustynowicz could be used as a defence to the

complaint of sexual harassment. The Tribunal Member found that the complainant's prior relationship with Mr. Augustynowicz did not change the substance of the matter:

... [I]t was incumbent on Ms. McIntosh to clearly and expressly advise Mr. Augustynowicz that the relationship was over and she no longer wished to engage in sexual communications. I find that she did so, both orally and through text message. I also find that Mr. Augustynowicz did not respect this request. Instead, he continued to text her sexually demeaning, provocative and propositional comments. He knew, or ought to have known, that his sexualized text messages were unwelcome.

The Tribunal Member went on to say:

As consenting adults, Mr. Augustynowicz and Ms. McIntosh were entitled to enter into a sexual relationship, however ill-advised it might be in a workplace given their respective positions. However, once that relationship ended, and she communicated to him that she no longer wanted to engage in communications or conduct of a sexual nature, Mr. Augustynowicz had a legal responsibility to ensure that he ceased such communications and that the breakdown of their sexual relationship did not negatively impact Ms. McIntosh's working environment.

Notwithstanding the fact that her complaint was found to be justified, Ms. McIntosh is seeking judicial review of the Tribunal's decision. Her application for judicial review was filed with the B.C. Supreme Court on April 18, 2011, and relates to Tribunal Member Marion's findings with regard to the duty to mitigate and costs for improper conduct. None of this, of course, affects the substantive content of this article.

Some practical advice for HR professionals ...

Text messages and other forms of wireless communication represent a new twist to an old workplace issue but they are not, as is illustrated by *McIntosh v. Metro Aluminum Products Ltd.*, somehow insulated from human rights legislation and other rules against harassment. Employees remain entitled to work in an environment of mutual respect where everyone is equal in dignity.

Here is some practical advice for HR professionals to reduce or perhaps avoid vicarious liability of the kind imposed on Metro:

- (a) Relationships of the kind Ms. McIntosh had with Mr. Augustynowicz are, as Tribunal Member Marion put it, “ill-advised”. Consider implementing a policy that requires disclosure of such relationships to the HR department. This will provide the employer with an opportunity to adjust the reporting relationship to avoid any conflict of interest or, at the very least, make clear to the employees in question that their relationship must not affect productivity, work quality or the work environment.
- (b) Implement a comprehensive, enforceable anti-harassment and respectful workplace policy and, if such a policy is already in place, ensure that it is updated to capture all modes of communication, including wireless communication. Distribute the policy to all employees and make sure it is understood by them. Specify the disciplinary sanctions for breach of the policy and retaliation or reprisal.
- (c) Provide a safe mechanism for employees to report harassment.
- (d) Ensure that all harassment complaints are fairly and thoroughly investigated, regardless of who initiates the complaint and who is the subject of the complaint.

James D. Kondopulos practises employment, labour and workplace human rights law at Roper Greyell LLP in Vancouver. He can be reached at jkondopulos@ropergreyell.com. For more information about James’ practice and Roper Greyell, visit <http://www.ropergreyell.com/Ourpeople/Jkondopulos.html>.

While every effort has been made to ensure accuracy in this article, you are urged to seek specific advice on matters of concern and not to rely solely on what is contained herein. The article is for general information purposes only and does not constitute legal advice.