



Assessing Workplace Sexual Harassment Complaints for Employment, Human Rights and WorkSafe BC Claims

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About Me

Practicing employment/human rights/investigations for many years

Forte Workplace Law has 15 lawyers (and growing), offices in BC & AB

Workplace sexual harassment has always been a focus

Represented complainants, respondents, companies, and as an independent investigator.

Head of the firm's investigation group – we conduct external investigations for all sorts of clients

I am on the SHARP Workplace roster of lawyers



Resources – further reading

- Human Rights and Employment Law (CLEBC Employment Law Conference, May 2021)
- [Practical Considerations in Employment and Civil Law Remedies for Workplace Sexual Harassment Claims](#)
- [Human Rights Complaints: When is it an option in situations of sexual assault and harassment?](#)
- [Workers Compensation Board System's Role in Preventing, Investigating and Compensating Workplace Sexual Assault and Harassment](#)
- SHARP Workplaces Legal Advice Clinic Foundational and Substantive law sessions at [SHARP Workplaces Lawyer Training](#); support materials for lawyers and their clients at [Resources for SHARP Workplaces Lawyers](#)
- Stand Informed Legal Advice Services sessions at [Stand Informed Lawyer Training](#); Support materials for lawyers and their clients [at Resources for Stand Informed Lawyers](#)

Agenda for Today



Sexual Harassment – Legal Test



Different Kinds of Claims:
Employment (BC Courts), Human
Rights (Tribunal), Work Safe BC



Best Practices and Tips

Sexual Harassment

- Unwelcome Conduct or comments, of a sexual nature
- That detrimentally affects the work environment or
- Leads to adverse work consequences



Power Imbalance and Consent

- *Janzen v. Platy*: sexual harassment is a form of discrimination based on sex and gender; historically it has been predominantly perpetrated by men against women
- Power imbalances have been found:
 - where the Respondent was older than the Complainant,
 - the Respondent was the Complainant's boss or supervisor,
 - the Respondent was the Complainant's professor, or other cases
 - the Respondent had the power to impact the Complainant's work environment in some way
- Consent



Scenario/Poll

Dave, a partner, is talking with Cherie, the firm's business development manager, about an upcoming client event.

Dave tells Cherie that he is worried the clients will be bored with his presentation and jokes that she should wear a skirt and high heels to keep their attention.

At the event, Cherie overhears a client telling Dave that she is "easy on the eyes." She says she is not feeling well and leaves early.

**IS IT SEXUAL
HARASSMENT?**

YES OR NO?

Employment Claim (non-Union)

Constructive Dismissal

What is it?

- A claim for constructive dismissal is a claim for severance (and potentially other damages). The employee takes the position that the employer has effectively dismissed them by its actions/inactions and is owed severance.

Test for Constructive Dismissal

- When an employer unilaterally changes a fundamental term of the employment contract
- Sexual harassment and/or assault and a failure to address it can result in a constructive dismissal as it renders a workplace intolerable (*Deol v Dreyer Davison LLP*, 2020 BCSC 771)

Employment Claim (non-Union)

Risks to Raising a Constructive Dismissal Claim

- ❖ If a client alleges constructive dismissal the employer may take the position that the employee has “resigned” and process their resignation / end of employment.
- ❖ This can immediately cut off benefits and access to things like STD LTD.
- ❖ The employee should be prepared for this, and take medical advice on their ability to work before potentially triggering the end of their employment.
- ❖ The employee must make it clear that they “object” to the behaviour/environment – otherwise, it can be hard to argue constructive dismissal

Human Rights Complaint

- Section 13(1) of the Human Rights Code, *RSBC 1996, c 210* (the “**Code**”), prohibits discrimination on the basis of sex in relation to employment.
- Where an employee is subjected to sexual harassment and assault by another employee, this constitutes discrimination on the basis of sex in relation to employment.
- Importantly, pursuant to s.44(2) of the Code, employers can and are often held liable for discriminatory acts carried out by their employees, including sexual harassment and assault.



Case Study

- Ms. McIntosh worked for Metro. She and Mr. Augustynowicz, the owner, entered into a consensual sexual relationship including exchanging sexually explicit texts
- The relationship ended
- Mr. Augustynowicz continued to send sexually explicit texts
- Ms. McIntosh communicated she no longer wanted to engage in communications or conduct of a sexual nature
- Mr. A did not stop sexting Ms. M
- Ms. M left her job and complained to BCHRT

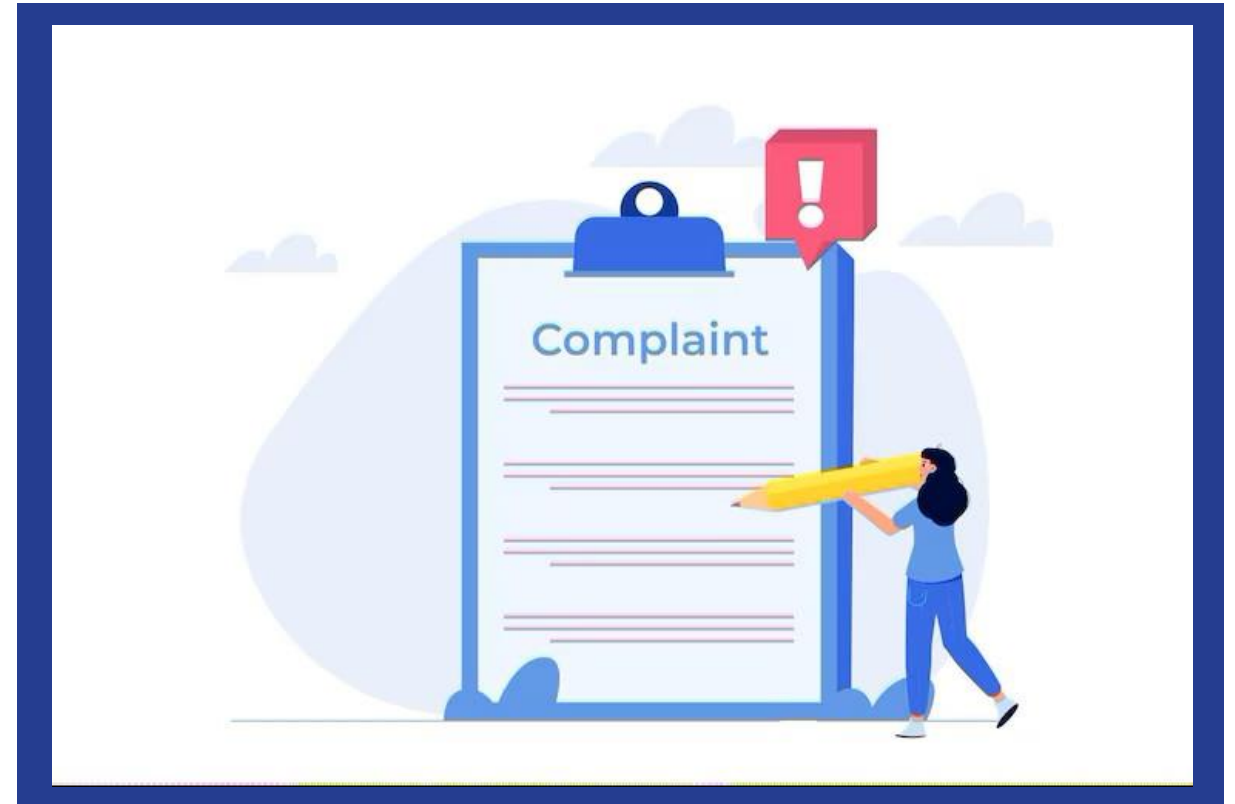
McIntosh v. Metro Aluminum Products and another, 2011 BCHRT 34

BCHRT found :

- Mr. A was in a position of authority. He was responsible for maintaining a workplace free of sexual harassment
- He failed by repeatedly making comments and propositions that were “offensive, inappropriate, and unlawful in an employment context”
- Consensual relationship okay, but when she said stop sexting, he should have stopped
- Declared discriminatory conduct; ordered Mr. A to cease discriminatory conduct
- Awarded Ms. M about \$14,500 in wage losses, about \$3000 for legal costs incurred pursuing the claim, and \$12,500 for injury to dignity feelings and self respect

Work Safe BC Complaint

- **Compensation for Injury**
- **Bullying and Harassment** – Work Safe deals with whether the Employer handled the complaint properly, does not assess the merits of the complaint
- **Prohibited Action Complaints** – Work Safe assesses whether the employee experiences a negative consequence after raising a health and safety concern (including bullying and harassment / sexual harassment)



Considerations of being in multiple jurisdictions

- Coordinate remedies and know what each jurisdiction can offer
- Time Limits/Deadlines
- Be ready to respond to deferral applications if there's an overlapping court or WorkSafe claim.
- Document Disclosure requirements
- Double Recovery
- File concurrently or one at a time
- Mediations or Early Settlements

Best Practices

1. Understand what your client wants
2. Explain and consider all of the processes
3. Consider timing
4. Consider resources
5. Consider which processes clients can do on their own versus legal representation
6. Consider opportunities for early resolution (if desired)





Questions

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Thank You