Is workplace discrimination everyone's business?

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Ariane Villemaire and Véronique Morin

The Supreme Court held that the British Columbia *Human Rights Code* protects employees against all forms of discrimination in the workplace, even if the perpetrator of such discrimination is not their employer.

On December 15, 2017, the Supreme Court issued a very interesting judgment[1] on the subject of discrimination in the context of a person's employment or the terms and conditions of their employment.

The Supreme Court concluded that section 13(1) of the British Columbia *Human Rights Code* is not limited to protecting employees from discrimination by their employer; it also provides protection against discrimination at the hands of a co-worker, even if that person works for another employer.

Summary of the facts

Mohammadreza Sheikhzadeh-Mashgoul was a civil engineer employed by Omega and Associates Engineering Ltd. ("Omega").

Pursuant to a contract between Omega and the City of Delta for road improvement work, Mr. Sheikhzadeh-Mashgoul supervised the work of the general contractor, Clemas Contracting Ltd. ("Clemas"). Clemas hired Edward Schrenk as a site foreman and superintendent.

While Mr. Schrenk was at work, he made several derogatory remarks about Mr. Sheikhzadeh-Mashgoul's religion, place of origin and sexual orientation. Despite the intervention of Omega and Clemas, Mr. Schrenk continued to make racist and homophobic remarks. Clemas ultimately terminated Mr. Schrenk's employment.

Mr. Sheikhzadeh-Mashgoul filed a complaint before the British Columbia Human Rights Tribunal ("Tribunal") against Mr. Schrenk and Clemas. Both defendants filed a motion to dismiss the complaint, arguing that there was no employment relationship with the complainant and as a result, section 13(1) of the *Human Rights Code* did not apply.

Decisions below

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Section 13(1) of the *Human Rights Code* reads as follows:

> 13(1) A person must not
>
> (a) refuse to employ or refuse to continue to employ a person, or
>
> (b) discriminate against a person regarding employment or any term or condition of employment
>
> because of the race, colour, ancestry, place of origin, political belief, religion, marital status, family status, physical or mental disability, sex, sexual orientation, gender identity or expression, or age of that person or because that person has been convicted of a criminal or summary conviction offence that is unrelated to the employment or to the intended employment of that person.
>
> (Emphasis Ours)

The Tribunal denied Mr. Schrenk's application, concluding that the expression "person" could not relate solely to the complainant's employer and pointing to the need to protect everyone working in a common enterprise (in this case, a construction site).[2]

The Supreme Court of British Columbia upheld the Tribunal's decision, but the Court of Appeal held that the Tribunal had erred and that it lacked jurisdiction to deal with the complaint.

Decision of the Supreme Court of Canada

The Court allowed the appeal.

Five of the nine judges concluded that the Tribunal had jurisdiction to hear Mr. Sheikhzadeh-Mashgoul's complaint and that section 13(1) of the *Human Rights Code* protects employees from all discrimination with "a sufficient connection to their employment context",[3] regardless of the identity of the perpetrator of the discrimination.

The majority analyzed the wording of section 13(1) and concluded that the term "person" must be given a broad interpretation as it covers all people, not only an employer or a person who exercises control over the employee. It also determined that the expression "regarding employment" means that the discrimination must be related to the employment context. As such, the majority noted that this expression is not limited to discrimination within hierarchical workplace relationships.

The majority stated that employees are vulnerable in the employment context, since they are a captive audience to those who discriminate against them in their workplaces.

Finally, the majority also considered the arrangement, as well as the purposes of the *Human Rights Code* and concluded that section 13(1) protects employees against discrimination in the context of employment, whether perpetrated by their superiors or by any other person. The majority therefore affirmed that the Tribunal had jurisdiction to hear Mr. Sheikhzadeh-Mashgoul's complaint against Mr. Schrenk.

We note that Chief Justice McLachlin and Justices Côté and Brown dissented, concluding instead that section 13(1) of the *Human Rights Code* applies only to discrimination in the context of employer-employee or similar relationships.

It should be noted that only Mr. Schrenk had sought judicial review and appealed the decisions of the lower courts. Accordingly, the Supreme Court focused only on the question of whether section

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13(1) of the *Human Rights Code* applied to Mr. Schrenk. That being said, since the Tribunal's decision was upheld, we must conclude that the provision also applied to Clemas. The complaint against Mr. Schrenk's employer was therefore upheld.

Impact of the decision in Quebec

The provisions of the *Charter of Human Rights and Freedoms* ("Charter") differ from section 13 of the *Human Rights Code*.

Section 10 protects every person against discrimination. This provision reads as follows:

> **10.** Every person has a right to full and equal recognition and exercise of his human rights and freedoms, without distinction, exclusion or preference based on race, colour, sex, gender identity or expression, pregnancy, sexual orientation, civil status, age except as provided by law, religion, political convictions, language, ethnic or national origin, social condition, a handicap or the use of any means to palliate a handicap.
>
> Discrimination exists where such a distinction, exclusion or preference has the effect of nullifying or impairing such right.

Section 15 of the Charter refers to "discrimination in respect of the hiring, apprenticeship, duration of the probationary period, vocational training, promotion, transfer, displacement, laying-off, suspension, dismissal or conditions of employment of a person or in the establishment of categories or classes of employment".[4]

At first glance, these aspects appearto relate more to an individual's employer.

On the other hand, section 10.1 of the Charter (which specifically relates to harassment) could apply to third parties and not only the complainant's employer:

> 10.1. No one may harass a person on the basis of any ground mentioned in section 10.[5]

We would also note that section 46 of the Charter provides a guarantee in relation to economic and social rights and it reads as follows : "Every person who works has a right, in accordance with the law, to fair and reasonable conditions of employment which have proper regard for his health, safety and physical well-being."[6]

Finally, section 4 of the Charter provides a right to the safeguard of every person's dignity.

Conclusion

Although this recent decision of the Supreme Court relates to a British Columbia statute, it will nonetheless be interesting to see how it is applied, particularly when the Quebec courts have occasion to rule on the scope of the Charter provisions pertaining to employment.

In this case, the Supreme Court obviously stressed the objective of protecting human rights, but clearly based its decision on the terms and expressions used in the legislation at issue and the legislative history of the British Columbia *Human Rights Code*. Caution should therefore be exercised and distinctions drawn before jumping to any hasty conclusions.

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1. *British Columbia Human Rights Tribunal* v. *Schrenk*, 2017 SCC 62.
2. *Id.*, para. 17.
3. *Id.*, para. 3
4. *Charter of Human Rights and Freedoms*, CQLR, c. C-12.
5. *Id.*
6. *Id.*

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