No Power or Control? Discrimination Against an Employee by a Subordinate May Not Be Captured by the British Columbia Human Rights Code

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The British Columbia Court of Appeal recently considered whether the B.C. Human Rights Tribunal's jurisdiction extends to discriminatory remarks made by an employee to a supervisor. In *Schrenk v. British Columbia (Human Rights Tribunal)*, 2016 BCCA 146, the complainant was an engineer who worked at a construction site. The complainant supervised work that was carried out by the appellant, a site foreman, though the two did not share the same employer. The appellant had allegedly made discriminatory remarks at the construction site about the complainant's place of birth, religion and sexual orientation. After the complainant's engineering firm complained about these comments, the appellant's employment was terminated.

When the complainant filed a complaint with the Human Rights Tribunal, the appellant argued that his comments, regardless of whether or not he made them, could not constitute discrimination in employment, because he exercised no power over the complainant's employment. Accordingly, the appellant applied to have the complaint dismissed claiming the Tribunal did not have jurisdiction over it, on the basis that this incident did not constitute discrimination "regarding employment" under the *Human Rights Code* (the "Code").

The Tribunal did not dismiss the complaint, finding that it did have jurisdiction over the complaint on the basis that the complainant was an employee, that the discriminatory conduct negatively affected his employment, and that the source of discrimination was a "person" under the Code, which is a broadly defined term that is not limited to employers and persons in an employment-like relationship with the complainant. On judicial review, the B.C. Supreme Court agreed with the Tribunal that the issue was whether the complainant experienced discrimination regarding his employment, not whether he was in an employment-like relationship with the appellant.

However, the Court of Appeal took a different view and concluded that the Tribunal had erred in finding that it had jurisdiction over the complaint. Rather, it held that the question was not whether the complainant was engaged in employment, but whether the relationship between the appellant and the complainant was of the sort regulated by

the Code. The Court emphasized that not all discriminatory comments inflicted upon employees, even in the course of their employment, constitute discrimination regarding employment. Rather, discrimination is "regarding employment" when the comments are imposed by an employer, or an individual who is clothed with the employer's authority such that they can impose unwelcome conduct as a condition of employment. In this case, the appellant had no such authority over the complainant, and for this reason the Court of Appeal dismissed the complaint.

The Court of Appeal's decision demonstrates that not all incidents of discrimination at the workplace are of the sort captured by the Code. Following this case, we expect the Human Rights Tribunal will look carefully to see whether the wrongdoer stood in such a relationship with the complainant that the wrongdoer was in a position to discriminate against the complainant with respect to employment. However, employers should note that even if a wrongdoer is not clothed with sufficient authority over a complainant to be captured by the Code, the employer can still be found to have discriminated regarding employment if it is found to have tolerated the discrimination.

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