

Consequences, not intent: B.C. Court of Appeal finds school board liable for homophobic bullying by students

The British Columbia Court of Appeal has upheld a decision of the B.C. Human Rights Tribunal that held a school board liable for the homophobic bullying of a high school student by his peers. A significant aspect of the decision was the determination that it was irrelevant that the complainant did not identify himself as homosexual and that his harassers may not even have believed that he was homosexual. The decision is also significant because the finding of liability against the board was made despite the fact that it had taken disciplinary action against the harassers and had promulgated a Code of Conduct that had resulted in many students knowing that bullying was unacceptable.

The case, *School District No. 44 (North Vancouver) v. Jubran* (April 6, 2005), involved a student who, over the course of five years, was repeatedly taunted with homophobic epithets and physically assaulted. The harassment began when the complainant was in grade eight; and the school became aware of the incidents when he was in grade nine. From that time until the complainant's graduation, the principal, vice-principal and other school staff were actively involved in investigating incidents of harassment that he reported to them and disciplining the students involved.

DISCIPLINARY MEASURES INEFFECTIVE

Measures taken by the school included discussing with the offending students the inappropriateness of their behaviour and warning them of escalating consequences, including detentions, notification of parents or police, suspensions and possibly expulsions, if they repeated their behaviour. One detention and two suspensions were imposed. Most of the students who were disciplined did not re-offend, but others became involved in the harassment. The school principal acknowledged, during his testimony before the Tribunal, that the school had not changed its strategy of progressive discipline even though that strategy had been ineffective in stopping the harassment.

"PART OF THE HIGH SCHOOL VOCABULARY"

The Tribunal had also heard evidence that students used homophobic taunts interchangeably with other insults and that the use of homophobic words did not necessarily mean that harassers thought the complainant was homosexual. One of the students testified that the words used were "part of the high school vocabulary" and that words like "gay" were used to describe someone, something, or a situation, that students did not like. One student testified that he himself used those words "all the time" and that it was common for a student to say "that shirt is so gay" or "the long jump is so gay" if they did not like it.

TRIBUNAL: INTENT OF HARASSERS IRRELEVANT

In finding that the complainant had been discriminated against on the basis of sexual orientation, the Tribunal had concluded that whether he identified himself as homosexual or whether his harassers knew or believed him to be homosexual was irrelevant. In the Tribunal's view, it is the effect of the conduct or action that is relevant to a determination of whether discrimination has occurred, not the intent of the harassers.

The Tribunal had held that the school board had failed to fulfill its duty to provide the complainant with an educational environment free from discriminatory harassment. Although the school board had taken a number of steps to deal with specific incidents, the Tribunal had found that it had not addressed homophobia or homophobic harassment among students on a more general basis. The Tribunal had awarded the complainant damages of \$4,500 for injury to his dignity, feelings and self-respect and had also issued an order that the board cease its contravention of the Code and refrain from committing the same or a similar contravention.

The Tribunal's decision was overturned by the B.C. Supreme Court, which held that, because the Tribunal had not found either that the complainant was homosexual or that his harassers believed him to be homosexual, there had been no discrimination against him.

COURT: PERCEPTION OF HARASSERS IRRELEVANT TO ISSUE OF DISCRIMINATION

In allowing the complainant's appeal, the B.C. Court of Appeal agreed with the Tribunal that the harassers' perceptions of the complainant's sexual orientation were irrelevant. What mattered in the analysis of discrimination was the *effect* of the conduct complained of:

"The effect of their conduct, however, was the same whether or not they perceived [the complainant] to be homosexual. The homophobic taunts directed against [the complainant] attributed to him the negative perceptions, myths and stereotypes attributed to homosexuals. His harassers created an environment in which his dignity and full participation in school life was denied because the negative characteristics his harassers associated with homosexuality were attributed to him."

The Court stated that a focus on the subjective perceptions of harassers raises the same concerns as those previously expressed by courts when they rejected the assertion that a finding of discrimination required proof of intent or motive. It is extremely difficult to prove motive, and the concern of human rights law is the consequences of conduct, not punishment of misbehaviour. Summing up, the Court stated:

"To require [the complainant] to prove the subjective perceptions or beliefs of his harassers is akin to having to prove that they intended to discriminate against him. [W]e are dealing with consequences, not intent or perception. The consequences of the actions of [the complainant's] harassers was that he was discriminated against because of his sexual orientation, whether or not he was or his harassers believed or perceived him to be homosexual."

SCHOOL BOARD LIABLE FOR FAILURE TO CREATE ENVIRONMENT FREE FROM DISCRIMINATION

Having found that the complainant was entitled to make a claim of discrimination, the Court

then considered the Tribunal's finding that the school board was liable for the discriminatory conduct of the students. The Tribunal had found that the school board had a duty to provide students with an educational environment free from discriminatory harassment. It had found also that, although members of the school administration had turned their minds to the complainant's situation and discussed different approaches to dealing with it, the school board had done nothing to address the issue of homophobia or homophobic harassment with the students generally and had not implemented a program designed to address that issue. The school administration had inadequate tools and insufficient training and education to deal with the harassment. Moreover, the board had not sought the assistance of human rights and harassment experts until the complainant had filed his human rights complaint.

The school board had countered that the Tribunal's decision erroneously imposed a standard of "strict liability" on boards for the conduct of students. This reasoning was flawed, the board had argued, because the Tribunal had based its decision on case law involving the behaviour of teachers, not students, and because the board had taken steps to deal with the complainant's harassers.

The Court disagreed that the Tribunal had imposed a standard of strict or vicarious liability. Rather, the Court stated, the Tribunal had relied on the articulation by the Supreme Court of Canada in *Ross v. New Brunswick School District No. 15* of the importance of a discrimination-free school environment and the duty of school boards to provide it:

"That environment is mandated by the special position educational institutions occupy in fostering the values of our society and by the [B.C. *Human Rights*] Code, which requires those who provide services to the public to do so in a non-discriminatory way, so as to foster the full participation of individuals in the life of British Columbia, in a climate of understanding, mutual respect and equality of dignity and rights."

The goal of a discrimination-free school environment is the ideal against which the school board's response to the harassment had to be measured, the Court stated. The Tribunal had found that the board had not responded in an effective way to the students' discriminatory conduct. The board had pursued an ineffective disciplinary approach and had not implemented "a broader, educative approach to deal with the difficult issues of harassment, homophobia and discrimination". Only after the complainant graduated had the board established a strategy to address harassment and discrimination.

Accordingly, the Court upheld the complainant's appeal and restored the Tribunal's order.

In Our View

The Tribunal had also found that, in addition to having taken disciplinary measures, the school administration had developed a Code of Conduct, sent it home with students and communicated it in school assemblies. While it had found that many students were aware that name-calling, homophobic or otherwise, was unacceptable, there had been no dialogue in the school on the subject, and the message about bullying had tended to get lost in the "myriad of other information" made available at the beginning of the school year.

It appears, therefore, that schools may be held to a high standard in their response to bullying situations, and that human rights legislation may be a means to enforce this standard. In the event of an allegation of a possible breach of human rights legislation, it would be prudent to seek the advice of experts in the field.

For further information, please contact **Paul Marshall** at (613) 940-2754.

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