

Date Issued: March 26, 2024

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Indexed as: Lessard v. 681624 BC Ltd. dba Kelowna BMW/Mini Kelowna and others, 2024  
BCHRT 94

IN THE MATTER OF THE *HUMAN RIGHTS CODE*,  
RSBC 1996, c. 210 (as amended)

AND IN THE MATTER of a complaint before  
the British Columbia Human Rights Tribunal

BETWEEN:

Trevor Lessard

**COMPLAINANT**

AND:

681624 BC Ltd. dba Kelowna BMW/Mini Kelowna, BMW Canada Inc.,  
Gord Hayes, Brian Johnston, and Jim McManes

**RESPONDENTS**

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**REASONS FOR DECISION**  
**APPLICATION TO DISMISS A COMPLAINT**  
Section 27(1)(c) and (d)(ii)

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Tribunal Member:

Robin Dean

On his own behalf:

Trevor Lessard

Counsel for the Respondents 681624 BC Ltd.  
dba Kelowna BMW/Mini Kelowna, Gord  
Hayes, Brian Johnston and Jim McManes:

Veronica Ukrainetz

Counsel for the Respondent BMW Canada:

Donovan Plomp and Danielle Douglas

## I INTRODUCTION

[1] Trevor Lessard alleges that his former employer Kelowna BMW/Mini Kelowna and its owners Brian Johnston and Jim McManes discriminated against him in employment based on mental disability, age, and political belief. He also alleges that BMW Canada is vicariously liable for discrimination on the part of its franchisee Kelowna BMW/Mini Kelowna.

[2] Mr. Johnston and Mr. McManes, supported by Kelowna BMW/Mini Kelowna and Gord Hayes, apply under s. 27(1)(d)(ii) of the *Human Rights Code* to dismiss the complaint as against themselves. BMW Canada makes a separate application to dismiss the complaint against it under s. 27(1)(c) and 27(1)(d)(ii) on the basis that it, as franchisor, has no control over Kelowna BMW/Mini Kelowna's operations.

[3] I find it most efficient to decide both applications under s. 27(1)(d)(ii). The issue I must decide is whether proceeding with the complaint against Mr. Johnston, Mr. McManes, and BMW Canada would not further the purposes of the *Code*.

[4] For the following reasons, I allow the applications to dismiss. To make this decision, I have considered all the information filed by the parties. In these reasons, I only refer to what is necessary to explain my decision. I make no findings of fact.

## II DECISION

[5] Section 27(1)(d)(ii) allows the Tribunal to dismiss a complaint where proceeding with it would not further the purposes of the *Code*. These purposes include both private and public interests: s. 3. Deciding whether a complaint furthers those purposes is not only about the interests in the individual complaint. It may also be about broad public policy issues, like the efficiency and responsiveness of the human rights system, and the expense and time involved in a hearing: *Dar Santos v. UBC*, 2003 BCHRT 73, at para. 59, *Tillis v. Pacific Western Brewing and Komatsu*, 2005 BCHRT 433 at para. 15, *Gichuru v. Pallai (No. 2)*, 2010 BCHRT 125, at paras. 113-118.

1. *Mr. Johnston and Mr. McManes*

[6] Mr. Johnston and Mr. McManes argue that it would not further the *Code's* purposes to proceed against them: *Daley v. BC (Ministry of Health)*, 2006 BCHRT 341. Mr. Lessard disagrees and says that both Mr. Johnston and Mr. McManes bear some responsibility for the conduct of the management of Kelowna BMW/Mini Kelowna.

[7] There are strong policy reasons that favour complaints against individual respondents. As the Supreme Court of Canada has acknowledged, “the aspirational purposes of the *Code* require that individual perpetrators of discrimination be held accountable for their actions”: *British Columbia Human Rights Tribunal v. Schrenk*, 2017 SCC 62 at para. 56. This is especially true for allegations of discrimination with a high degree of personal culpability, like sexual or racial harassment: *Daley* at para. 53.

[8] On the other hand, naming individual respondents can complicate and delay the resolution of complaints, exacerbate feelings of personal animosity, and cause needless personal distress to individuals who are accused of discrimination: *Daley* at para. 54. Because employers and institutional respondents are liable for the acts of their agents, they will be responsible for any remedy ordered by the Tribunal: *Code*, s. 44(2); *Robichaud v. Canada*, [1987] 2 SCR 84. In those situations, the remedial aims of the *Code* may be most fairly and efficiently fulfilled without holding individuals liable.

[9] The Tribunal balances all these considerations to decide whether the purposes of the *Code* are best served by having a complaint proceed against individuals as well as an institutional respondent, or against the institutional respondent only. It has identified the following factors as relevant:

- a. whether the complaint names an institutional employer as a respondent and that respondent has the capacity to fulfill any remedies that the Tribunal might order;
- b. whether the institutional respondent has acknowledged the acts and omissions of the individual as its own and has irrevocably acknowledged its responsibility to

satisfy any remedial orders which the Tribunal might make in respect of that individual's conduct; and

- c. the nature of the conduct alleged against the individual, including whether:
  - i. their conduct took place within the regular course of their employment;
  - ii. the person is alleged to have been the directing mind behind the discrimination or to have substantially influenced the course of action taken; and
  - iii. the conduct alleged against the individual has a measure of individual culpability, such as an allegation of discriminatory harassment.

*Daley* at paras. 60-62.

[10] I understand that Mr. Lessard says that Mr. Johnston and Mr. McManes should be responsible for what goes on in their company. However, consideration of the above factors weighs in favour of dismissing the complaint against Mr. Johnston and Mr. McManes.

[11] Kelowna BMW/Mini Kelowna has been named as a respondent, has acknowledged the acts and omissions of Mr. Johnston and Mr. McManes as its own, and has acknowledged its responsibility to satisfy any remedial orders the Tribunal might make with respect of the Mr. Johnston's and Mr. McManes's conduct. Further, the nature of the conduct alleged against Mr. Johnston and Mr. McManes militates in favour of dismissing the complaint against them. The Complaint does not allege that either owner personally took any action against Mr. Lessard. It seeks to hold Mr. Johnston and Mr. McManes liable simply because they are owners of the franchise. This is not enough to demonstrate the individual culpability generally required to maintain a complaint against an individual respondent. For these reasons, I dismiss the complaint against Mr. Johnston and Mr. McManes.

## 2. BMW Canada

[12] Mr. Lessard says that BMW Canada bears responsibility and that “contractually their franchisee...should be following standards in place by ... the Human Rights Code of B.C.”

[13] BMW Canada says that it exerts no direction, control, or supervision over the employees of Kelowna BMW/Mini Kelowna. It says that it does not prescribe remuneration or working conditions and that it “has no control over the workplace in any way relevant to the Complaint.” It says the one exception is the right to approve, acting reasonably, any appointment or change of the position of General Manager. It says that the franchise agreement between Kelowna BMW/Mini Kelowna and BMW Canada does not give them sufficient control over employee relationship to be held vicariously liable.

[14] Kelowna BMW/Mini Kelowna supports BMW’s position that the complaint should be dismissed against BMW Canada. It says that BMW Canada “has no involvement whatsoever in [Kelowna BMW/Mini Kelowna’s] management and supervision of employees, or employee related matters including establishing the Employer’s policies and practices in relation to its employees.”

[15] Depending on the circumstances, a franchisor may be a proper respondent to a complaint under the *Code* against its franchisee. The Tribunal has held that liability may be found where a franchisor has the ability to interfere with and influence the franchisee’s employment relationship with its employees and fails to do so: *Chein and others v. Tim Hortons and others (No. 2)*, 2015 BCHRT 169 at paras. 73-74; *Charthaigh v. Blenz The Canadian Coffee Company*, 2012 BCHRT 264 at paras. 19-20. Each franchise relationship is governed by the terms of the franchise agreement: *Charthaigh* at para. 24, and it is that franchise agreement which gives insight into the determination I must make on BMW Canada’s application to dismiss.

[16] In the materials before me, there is a redacted copy of the franchise agreement, in which BMW Canada authorizes Kelowna BMW/Mini Kelowna to sell BMW vehicles. In a clause titled “Independence of the Retail Centre”, the franchise agreement reads:

The Retail Centre operates its business in its own name, on its own account and at its own risk. It has no power to legally bind BMW Canada or the Manufacturer and it is understood and agreed between the parties hereto that this Retailer Agreement will not be construed as constituting the Retail Centre as agent of BMW Canada or the Manufacturer for any purpose whatsoever. The Retail Centre will not describe itself as agent for BMW Canada or the Manufacturer or in any words indicating any relationship of agency existing between the Retail Centre or the Manufacturer.

[17] Again, BMW Canada, backed by Kelowna BMW/Mini Kelowna, says that it has no control over the workplace or the employees of Kelowna BMW/Mini Kelowna. I am satisfied based on this information that a member hearing this matter would likely conclude that BMW Canada had no ability to interfere in the employment relationship between Kelowna BMW/Mini Kelowna and Mr. Lessard. I do not have before me any other provisions of the franchise agreement that evidence sufficient control by BMW Canada over the employment relationship between Kelowna BMW/Mini Kelowna and its employees. Further, I have no other evidence before me that in practice, BMW Canada exercised control or was involved in the employment relationship between Kelowna BMW/Mini Kelowna and its employees. Without evidence from which a member hearing this matter could conclude that BMW Canada had sufficient control over the numbered company, it cannot be held vicariously liable in the circumstances. I am satisfied that it would not further the purposes of the Code to proceed against BMW Canada. For these reasons, the complaint against BMW Canada is dismissed.

### **III CONCLUSION**

[18] I allow the applications to dismiss. The complaint will proceed against Kelowna BMW/Mini Kelowna and Mr. Hayes only.

Robin Dean  
Tribunal Member