

Supreme Court broadens protection against workplace discrimination

Top court upholds tribunal decision that harassment from employee of different employer at same workplace is related to employment of victim

BY RONALD MINKEN

CAN AN EMPLOYEE claim workplace discrimination against an employee from another company? According to the recent Supreme Court of Canada case of *British Columbia Human Rights Tribunal v. Schrenk*, the answer, in some circumstances, is yes. In *Schrenk*, the top court found that s. 13(1)(b) of the British Columbia Human Rights Code, which prohibits discriminating against someone “regarding employment,” was not limited to protecting employees from their superiors in the workplace and employers, but, rather, the protection extends to all employees who “suffer discrimination with a sufficient connection to their employment context.”

The issue arose when Mohammadreza Sheikhzadeh-Mashgoul allegedly experienced discriminatory comments at work and subsequent emails based on his religion, place of origin, and sexual orientation by Edward Schrenk.

Sheikhzadeh-Mashgoul was a civil engineer working for Omega and Associates Engineering Ltd, who was hired to supervise a road improvement plan by the municipality of Delta in British Columbia. He was required to supervise the work of Clemas Contracting at a roadwork site, with whom Schrenk was a site foreman and superintendent. After experiencing a series of alleged discriminatory comments and emails from Schrenk, Sheikhzadeh-Mashgoul filed a complaint with the British Columbia Human Rights Tribunal against Schrenk, alleging employment discrimination based on religion, place of origin, and sexual orientation. Schrenk argued that since he was not in a position of economic authority over Sheikhzadeh-Mashgoul and didn't work for the same employer, it was not discrimination “regarding employment” and, therefore, outside the jurisdiction of the tribunal. The tribunal disagreed and found that Schrenk's conduct was covered by the code even

though he was not Sheikhzadeh-Mashgoul's superior in the workplace or associated with his employer. Schrenk appealed this decision all the way to the Supreme Court of Canada.

The question dealt with by the Supreme Court was: What is the breadth of the prohibition of discrimination regarding employment in the code — could that discrimination be perpetrated by someone other than a superior in the workplace or someone not working for the employer?

A broad concept

The court examined the language of “regarding employment” in s. 13(1)(b) of the code. The court determined that the term “regarding employment” reflects a broad concept that means the matter must be related to employment in some way. After a thorough analysis, the court found that “regarding employment” does not refer to discrimination that takes place only within the direct employment relationship.

The court found in order to determine whether conduct falls under s. 13(1)(b) of the code, a contextual approach must be applied to examine the facts of each particular case to determine whether the alleged discriminatory behaviour has a sufficient nexus to the employment context. If the nexus exists, then there has been discrimination “regarding employment” and the complainant can then seek a remedy against the individual discriminating. The court also outlined some factors to assist with the contextual analysis:

- Whether the person doing the discriminating was integral to the complainant's workplace
- Whether the impugned conduct occurred in the complainant's workplace
- Whether the complainant's work performance or work environment was negatively affected.

The court was careful to emphasize that these factors are not exhaustive and their relevance will depend on the circumstances of each situation.

Applying the above factors in relation to the case at hand, Canada's top court determined that the alleged discriminatory conduct of Schrenk would fall under s. 13(1)(b) of the code as being related to employment. Taking everything into account, it affirmed the tribunal's decision and allowed the appeal.

Takeaways for employers

Although this case related to the code in British Columbia, there is the potential it may have an effect on jurisprudence in other Canadian jurisdictions. Ontario's Human Rights Code, for example, also prohibits workplace discrimination but the wording is slightly different, stating “every person has a right to equal treatment with respect to employment without discrimination...” It may be that the wording is similar enough to British Columbia's code that the *Schrenk* decision could spark new liability in relation to discrimination in Ontario and other jurisdictions, resulting in human rights claims from individuals that may not have a direct employment relationship with the offending party.

For more information see:

- *British Columbia Human Rights Tribunal v. Schrenk*, 2017 CarswellBC 3506 (S.C.C.).

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