

SUPREME COURT OF CANADA CONFIRMS EXPANSIVE PROTECTIONS AGAINST DISCRIMINATION REGARDING EMPLOYMENT

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In a recent decision of particular importance to employers in British Columbia, the Supreme Court of Canada (the “**SCC**”) has upheld a decision of the British Columbia Human Rights Tribunal (the “**Tribunal**”) that protection under the British Columbia *Human Rights Code* (the “**Code**”) from discrimination “regarding employment” can extend to the actions or conduct of a person other than the complainant’s employer or superior in the workplace.

Background

In *BC Human Rights Tribunal v Schrenk* [\[1\]](#), the complainant, Mr. Sheikhzadeh-Mashgoul was employed as a civil engineer for Omega and Associates Engineering Ltd., an engineering firm engaged by the Municipality of Delta, to supervise a road improvement project. As a civil engineer, the complainant was responsible for supervising work performed by Clemas Construction Ltd. (“**Clemas**”), the construction contractor hired by the Municipality for the project.

Mr. Schrenk was employed by Clemas as its site foreman and superintendent on the project. Over a period of time, Mr. Schrenk engaged in a course of serious discriminatory conduct against the complainant. This conduct included making homophobic comments as well as other comments intended to denigrate the complainant’s Muslim background, including “you are not going to blow us up with a suicide bomb, are you” and “go back to your mosque where you came from”. After this course of discriminatory conduct became known to Omega and to Clemas, Mr. Schrenk was initially removed from performing work on the project and then was subsequently terminated by Clemas.

Tribunal Decision

The complainant filed a complaint with the Tribunal alleging that he had been discriminated against by Mr. Schrenk and Clemas contrary to the provisions of Section 13 of the *Code*. In response, Mr. Schrenk and Clemas applied to dismiss the complaint arguing the *Code* did not apply because no employment relationship existed

between the complainant and Mr. Schrenk.

The Tribunal held that it had jurisdiction to deal with the complaint and concluded that the protection provided under the *Code* against discrimination “regarding employment” was not limited to protecting employees from the actions or conduct of their *own* employers or supervisors in the workplace.

Lower Court Decisions

The BC Supreme Court dismissed Mr. Schrenk’s application for judicial review. On appeal to the BC Court of Appeal, the Court of Appeal allowed the appeal and held that the Tribunal erred in concluding that it had jurisdiction to deal with the complaint.

SCC Decision

On further appeal to the SCC, the SCC upheld the decision of the Tribunal, dismissed the appeal, and confirmed that a breach of Section 13 of the *Code* may be found against a co-worker, even where the co-worker has a different employer and has no supervisory responsibility, as was the case with Mr. Schrenk. The SCC held that individual perpetrators like Mr. Schrenk should not be immunized from liability before the Tribunal simply because they do not share a common employer with the victim of their harassment.

The SCC explained that a contextual analysis is to be adopted in determining whether discriminatory conduct has a “significant nexus” with the employment context. The factors which the SCC considered to be important in determining whether a significant nexus with the employment context is established are: (1) whether the harasser was integral to the complainant’s workplace, (2) whether the impugned conduct occurred in the complainant’s workplace, and (3) whether the complainant’s work performance or work environment was negatively affected.

In applying this contextual analysis, the SCC concluded that although Mr. Schrenk was employed by a different employer than was the complainant and Mr. Schrenk had no supervisory responsibilities over the complainant, nonetheless the protections of the *Code* were sufficiently broad to protect the complainant from the discriminatory conduct of Mr. Schrenk.

Importance for Employers

The decision of the SCC means that where an employer is unaware of the existence of discriminatory conduct, and hence may bear no liability for the behaviour, an employee may be entitled to a remedy under the *Code* against the co-worker harasser, including the payment of compensation, even where no employment relationship exists. Of course, where the employer is aware of such behaviour and takes no steps to intervene, the employer will also be subject to orders under the *Code* including for the payment of compensation.

This decision is an important reminder for employers that it is necessary to endeavour to ensure that the conduct of all persons present at the workplace, including contractors and employees of contractors, is respectful and non discriminatory. Otherwise, even if a human rights complaint is dismissed against the employer, employers still run the risk of becoming embroiled in a human rights complaint which may involve persons who are neither employed by or supervised by that employer.

by N. David McInnes and Natalie Cuthill

[1][British Columbia Human Rights Tribunal v Schrenk](#), 2017 SCC 62.[ps2id id='1' target='']

A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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