January 2018

BRIEFING NOTE

Workplace Harassment post-*Schrenk* – Widening the scope of protections

In a recent decision of the Supreme Court of Canada, *BCHRT v Schrenk* 2017 SCC 62, the SCC (majority 5:2) ruled that the protections from harassment at work extended beyond the immediate sphere of the employer and employee relationship. In this case, the SCC expanded the extent of s. 13(1)(b) of the BC *Human Rights Code*, which prohibits discrimination in employment, and found that a contextual and holistic interpretation of that section prohibited discrimination against employees *whenever that discrimination had a sufficient nexus with the employment context.*

In this case, the complainant/appellant Mr. Sheikhzadeh-Mashgoul ("**SM**") was a civil engineer working for Omega and Associates Engineer ("**OAE**"), which was hired by a municipality as the consulting engineer to supervise a road improvement project. The municipality also hired Clemas Contracting ("**CC**") as the primary construction contractor to carry out the project. SM's role was to supervise the work by CC and its employees. The respondent, Mr. Schrenk ("**S**"), was employed by CC as the site foreman and superintendent. The allegations of harassment pertained to altercations between SM and S. Specifically, SM alleged that S made derogatory/racist comments to SM about his place of origin (Iran) and religion (Muslim). SM brought S's comments to the attention of OAE, the municipality and CC. Despite discussions, S persisted with his behavior, until CC was ultimately asked to remove S from the worksite.

Although S was removed from the worksite, S's harassment did not stop. A few months after his removal, S sent unsolicited emails to SM continuing with his derogatory insinuations and comments. Ultimately, these emails were brought to the attention of S's employers, who asked him to stop. When S refused to stop, his employment with CC was terminated (March 2014). In April 2014, SM filed a complaint before the BCHRT against S, CC and the municipality (which was later withdrawn), alleging discrimination on the basis of religion, place of origin, and sexual orientation. S and CC applied to the Tribunal to have the complaint dismissed on the basis that the discriminatory conduct at issue did not fall within the scope of protections under the *Code*.

The issue before the BCHRT was whether the *Code* protected SM from discrimination in employment by S and S's employer, CC, even though SM was not in an employment relationship with CC or S. The BCHRT found that the Code prohibits a "person" from discriminating regarding employment and that the Code does not limit "person" to an employer or someone in an employment-like relationship with the complainant. The Tribunal therefore concluded that the Code applied to protect SM from the discriminatory conduct at issue, and dismissed the application by CC and S.

S sought judicial review to the BC Supreme Court arguing that SM was not in an employment relationship with S or CC and therefore it was outside the scope of s. 13(1)(b) of the Code. The Court considered the issue slightly different and found that the question was whether SM had experienced discrimination "regarding employment". The Court found that he had.

On appeal to the BC Court of Appeal, the Court found the proper question was whether the allegation made by SM against S was a complaint concerning conduct that might possibly amount to discrimination "regarding employment" . The Court interpreted "regarding employment" as referring to complaints against those who have the power to inflict discriminatory conduct as a condition of employment. Under that consideration, the BCCA

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found that S was not in a position to impose the discriminatory conduct on SM as a condition of his employment and allowed the appeal.

The BCHRT appealed to the SCC. The primary issue before the SCC was the interpretation of the words "regarding employment". Rowe J (for the majority) found that in applying a broad and liberal interpretation that reflects the broad purposes of the Code, the phrase "regarding employment" was not restricted to discrimination within hierarchical workplace relationships but rather should be interpreted to prohibit discriminatory conduct that targets *employees* so long as that conduct has a sufficient nexus to the employment context. **So long as there is a sufficient nexus between the discriminatory conduct and the circumstances of employment (using a contextual analysis), a complainant can seek a remedy against an individual, irrespective of whether the individual has an employment relationship with the complainant**.

In considering whether there is a sufficient nexus, the Court provided some factors to inform the analysis: (1) whether the respondent 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. These factors are not exhaustive and their relative importance will depend on the circumstances.

Using this framework, the majority found that S's conduct did come within the scope of s. 13(1)(b) as S was the foreman of the site, was an unavoidable part of SM's work environment and his derogatory comments to SM about his religion, place of origin and sexual orientation had a detrimental impact on the workplace because it forced SM to contend with repeated affronts to his dignity. In this regard, S was found in breach of the *Human Rights Code* and had engaged in discriminatory conduct against SM.

It is noted that this decision only dealt with whether the complaint could be brought against S and S's employer, CC. The courts did not deal with what, if any, liability could be attributed to SM's employer, OAE, or the municipality, which raises further questions of who SM's employer is responsible for and what legal obligations OAE has to protect S from discriminatory conduct by others.

What does this mean for Employers:

The SCC has reaffirmed that the Human Rights Code must not be read narrowly, but liberally, broadly and consistent with its remedial purpose. This case expands the interpretation of the Code with respect to workplace harassment and discriminatory behaviour in the employment relationship. Such behaviour is no longer confined to conduct between employees/employers but extends to *any* person outside of that relationship *so long as there is a sufficient nexus to the complainant's employment.*

This is a reflection of the realities of the modern work arrangements where employers will often contract or hire third parties for certain aspects of the job. Employers should ensure that there are proper procedures in place to deal with complaints of workplace harassment and discriminatory conduct between staff, and also between staff and outside parties. While the broad duty to provide a harassment free workplace already exists under the *Workers Compensation Act* and the *Occupational Health and Safety Regulations*, the *Schrenk* decision reveals that employers may also risk exposure under the *Human Rights Code*.

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