EMPLOYMENT UPDATE

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On December 15, 2017, the Supreme Court of Canada released its reasons for judgment in *British Columbia Human Rights Tribunal v. Schrenk*, 2017 SCC 62. This decision overturned the British Columbia Court of Appeal's decision where it was held that not all discriminatory comments and actions that happen at a workplace are necessarily discrimination "regarding employment" for the purposes of the British Columbia *Human Rights Code*, R.S.B.C. 1996, c. 210 (the *"Code"*). The Supreme Court decision expands the scope of protection under the *Code*, allowing a claim against an individual employed by a different company than the complainant, and their employer. The decision confirms a prohibition that discriminatory conduct extends to employees employed by different employers as long as a sufficient connection to the complainant's employment can be established.

The complainant was a civil engineer by the name of Mohammadreza Sheikhzadeh-Mashgoul. He was working on a construction project. During the course of his work, he was allegedly repeatedly harassed by the respondent Schrenk, who was a site foreman and superintendent, employed by a different company. The harassment occurred on the work site and included racist and homophobic statements directed towards the complainant. The complainant had complained to his employer about the harassment which he was experiencing on the work site. The complainant's employer asked Schrenk's employer to remove him from the worksite. They did so but Schrenk continued to be involved in the project in some capacities and continued to harass the complainant. Ultimately Schrenk was terminated.

The complainant filed a complaint with the British Columbia Human Rights Tribunal under s. 13 of the *Code*. Section 13 provides in part as follows:

DISCRIMINATION IN EMPLOYMENT

13 (1) A person must not

(a) refuse to employ or refuse to continue to employ a person, or

(b) discriminate against a person regarding employment or any term or condition of employment

because of the race, colour, ancestry, place of origin, political belief, religion, marital status, family status, physical or mental disability, sex, sexual orientation, gender identity or expression, or age of that person or because that person has been convicted of a criminal or summary conviction offence that is unrelated to the employment or to the intended employment of that person.

Schrenk applied to dismiss the complaint on the basis that he was not in an employment relationship with the complainant and that the Tribunal therefore had no jurisdiction over the matter. The issue at the Tribunal level was not whether the conduct complained of amounted to discrimination, but rather whether the discrimination was "regarding employment". Schrenk's argument was essentially that as he was not in a position of economic authority over the complainant, specifically he was neither his employer nor his superior in the workplace, his conduct could not be considered discrimination "regarding employment" within the meaning of the *Code*. The Tribunal denied the application to dismiss finding that they did have jurisdiction. Schrenk's application for judicial review to the British Columbia Supreme Court was denied. On further appeal, the British Columbia Court of Appeal held that the Tribunal had incorrectly concluded that it had jurisdiction. The case was then appealed to the Supreme Court of Canada.

Reasons for judgment of the majority were written by Rowe J. with concurring reasons written by Abella. Dissenting reasons were written by the former Chief Justice McLachlin, with Brown and Côté concurring. The issue being considered by the Court was the scope of the prohibition against discrimination "regarding employment" as defined by the *Code*. Rowe J. described the question for the Court as follows:

> [2] At issue, then, is the question of whether discrimination "regarding employment" can ever be perpetrated by someone other than the complainant's employer or superior in the workplace. To be clear, the issue is not whether Mr. Schrenk's alleged conduct would amount to *discrimination*; no one disputes this. Rather the question in this appeal is whether such discrimination was "regarding employment".

The Court held that the scope of s. 13(1)(b) of the *Code* is not limited to protecting employees solely from discriminatory harass-

ment by their superiors in the workplace. Rather, the protection of the *Code* extends to all employees who suffer discrimination with a sufficient connection to their employment. This could extend to co-workers who are not employed by the same employer and therefore the Tribunal was correct in accepting jurisdiction over the complaint.

Arriving at this conclusion required the Court to engage in statutory interpretation. As noted by Rowe J. at paragraph 29:

> I note at the outset that this appeal calls for an exercise in statutory interpretation. The question before this Court is whether the words of s. 13(1)(b) of the Code can encompass discrimination only by an employer or superior in the workplace. While we disagree in the result, the Chief Justice and I agree that this question requires an interpretation of the words "regarding employment". For this reason, I respectfully differ from Justice Abella when she suggests that our analysis need not be rooted in "the particular words of British Columbia's Code" (para. 73). While human rights jurisprudence provides significant guidance regarding the scope of "discrimination" *generally*, our starting point remains the words adopted by the British Columbia Legislature when defining the scope of discrimination "regarding employment" *specifically.*

Rowe J. began his analysis by noting that the meaning of "person" is broad and certainly encompasses a broader range of actors than merely any person with economic authority over the complainant. The next analysis was with respect to what the words "regarding employment" meant. Rowe J. described this as critical as they delineate the kind of discrimination that is prohibited under s. 13 of the *Code*. He concluded that the discrimination at issue must be "regarding" employment in that it must be related to the employment context in some way. He goes on to state that s. 13(1)(b) does not restrict who can perpetrate discrimination but rather it defines who can suffer employment discrimination. He concludes as follows:

> [38]…Determining whether conduct falls under this prohibition requires a *contextual* approach that looks to the particular facts of each claim to determine whether there is a sufficient nexus between the discrimination and the employment context. If there is such a nexus, then the perpetrator has committed discrimination "regarding employment" and the complainant can seek a remedy against *that* individual.

The Court's ruling turned on the specific wording of the British Columbia *Code*. The majority held that reading the *Code* and applying principles of statutory interpretation and the particular rules that apply to the interpretation of human rights legislation, s. 13 of the *Code* prohibits discrimination against employees as long as there is a sufficient nexus between the discrimination and the employment. The *Code* does not require the discrimination to occur by a co-worker employed by the same employer.

To determine whether there is a sufficient nexus, the Tribunal must conduct a contextual analysis that considers all relevant circumstances. Factors which inform this analysis include:

(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.

This case has now been returned to the BC Human Rights Tribunal which will proceed with a hearing concerning the complaint against Schrenk and his employer. It does expand the statutory duties and requires employers to ensure that their employees are provided with a harassment free workplace regardless of where the harassment is coming from.