

FTR Now

Can Workplace Discrimination Arise Out of a “Non-Traditional” Employment Relationship? The Supreme Court of Canada Says “Yes”

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In a recent decision, the Supreme Court of Canada held that workplace discrimination can be perpetrated by someone other than the complainant’s employer or superior. Accordingly, employers should be aware that they may be responsible for discrimination against workers who are not their employees, where a “sufficient nexus” exists between a complainant and a respondent in the employment context. Learn more in this *FTR Now*.

In [British Columbia Human Rights Tribunal v. Schrenk](#), the complainant worked as a civil engineer on a road improvement project. The project’s construction contractor was a separate but affiliated company. A site foreman employed by that construction contractor made racist and homophobic statements to the complainant on the worksite. The complainant raised the comments with her employer, and her employer asked the construction contractor to remove the foreman from the worksite. The harassment continued, and the construction contractor ultimately terminated the foreman’s employment.

The complainant filed a complaint with the British Columbia Human Rights Tribunal (Tribunal) against the foreman personally as well as the foreman’s employer, the contractor. The contractor and the foreman both applied to dismiss the claim on the grounds that the complainant was not an employee of the contractor: the contractor had some affiliation with the complainant’s employer, but was a separate company. In addition, the foreman was employed by the contractor and did not have any direct supervisory authority over the complainant.

The Tribunal found that it had jurisdiction to hear the complaint, as did the B.C. Supreme Court, but the Court of Appeal disagreed.

The Supreme Court of Canada Decision

The Supreme Court of Canada was asked to consider the B.C. *Human Rights Code* (B.C. Code) and the scope of its prohibition of a “person” discriminating against someone “regarding employment.” A majority of the Court concluded that the B.C. Code prohibits discrimination against employees whenever that discrimination has a “sufficient nexus” with the employment context. While the Court recognized that discrimination by employers can be “particularly insidious,” it concluded that discrimination may also arise from the conduct of co-workers, even where those co-workers have a different employer.

The Court articulated a non-exhaustive test for determining whether discriminatory conduct has a sufficient nexus with employment, stating a Tribunal should consider:

1. whether the respondent was integral to the claimant’s workplace;
2. whether the impugned conduct occurred in the claimant’s workplace; and
3. whether the claimant’s work performance or work environment was negatively affected.

Takeaways for Employers

This decision is a reaffirmation by the Supreme Court of Canada that human rights legislation will be interpreted very broadly, with the aim of protecting individuals against the “indignity of discrimination.”

Employers should be aware that their responsibility to ensure a discrimination-free workplace can extend beyond their own employees. Discrimination complaints may arise as a result of the conduct of their employees concerning other individuals who are not their employees, so long as a “sufficient nexus” exists between the complainant and respondent in the employment context.

Ontario’s *Human Rights Code* has similar, but not identical, language to the B.C. Code. Where the B.C. Code states that a person must not discriminate against another person “regarding employment,” the Ontario *Human Rights Code* states that every person has a right to equal treatment “with respect to employment” without discrimination. While the application of the Supreme Court’s decision in *Schrenk* under the Ontario *Human Rights Code* remains an open question, the Ontario Human Rights Tribunal will likely be guided by the Court’s decision when determining the scope of its jurisdiction.

If you have any questions regarding this decision, please contact your [regular Hicks Morley lawyer](#).

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