

# LEGAL UPDATE

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REGIONAL EMPLOYERS SERVICES

## DISCRIMINATORY HARASSMENT IN THE WORKPLACE

*The BC Human Rights Code is not limited to protecting employees solely from discriminatory harassment by superiors in the workplace and may include discrimination by co-workers, even when those co-workers have a different employer.*

### THE FACTS

The Supreme Court of Canada issued a decision last week confirming that the prohibition on discriminatory conduct in employment in the BC Human Rights Code (the “Code”) extends to employees employed by different employers, provided a sufficient connection to the complainant’s employment can be established.

“S-M” worked for Omega and Associates Engineering Ltd. (“Omega”) as a civil engineer on a road improvement project. Omega hired Clemas Construction Ltd. (“Clemas”) to handle the construction component of the project. “S” was employed by Clemas as a foreman on the project. S made racist and homophobic statements to S-M while on the job, which S-M in turn raised with his employer Omega.

Omega requested that Clemas remove their employee S from the worksite. Clemas did so but S continued to be involved in the project in some capacity. S continued to harass S-M and Clemas ultimately terminated S’s employment.

S-M filed a complaint with the British Columbia

Human Rights Tribunal, alleging that S’s derogatory comments amounted to discrimination in the course of employment, in violation of section 13 of the Code. Section 13 states that a person must not discriminate against a person “regarding employment” because of any of the protected grounds under the Code (e.g., race, gender, sexual orientation).

The issue before the Tribunal was not whether S’s alleged conduct amounted to discrimination under section 13, but rather whether this discrimination was “regarding employment”.

S applied to dismiss the complaint on the basis that he was not in an employment relationship with S-M and the Tribunal therefore had no jurisdiction over the matter. The Tribunal disagreed and denied S’s application to dismiss. S’s application for judicial review to the British Columbia Supreme Court was denied. The British Columbia Court of Appeal allowed S’s appeal and held that the Tribunal had incorrectly concluded it had jurisdiction over S-M’s section 13 complaint. The case was then appealed to the SCC.



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## THE DECISION

The SCC examined whether discrimination “regarding employment”, as defined under section 13 of the Code, could only be committed by a fellow employee or supervisor in the workplace. The SCC concluded s. 13(1)(b) is not limited to protecting employees solely from discriminatory harassment by their superiors in the workplace. Reading the Code in line with the modern principle of statutory interpretation and the particular rules that apply to the interpretation of human rights legislation, the SCC found that s. 13(1)(b) prohibits discrimination against employees whenever that discrimination has a sufficient nexus with the employment context. This may include discrimination by co-workers, even when those co-workers have a different employer.

The SCC noted that the Human Rights Tribunal must conduct a contextual analysis that considers all relevant circumstances in determining whether the individual who engaged in the discriminatory conduct has a sufficient connection to the workplace so as to bring their actions within the parameters of s. 13.

Factors which may inform this analysis include: (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.

These factors are not exhaustive and their relative importance will depend on the circumstances. The SCC noted that this contextual interpretation furthers the purposes of the Code by recognizing how employee vulnerability stems not only from economic subordination to their employers but also from being a captive audience to other perpetrators of discrimination, such as a harassing co-worker.

While employers have a special duty and capacity to address discrimination, this does not prevent individual harassers from also potentially being held responsible, whether or not they are in authority roles. Prohibiting all “persons” in a workplace from engaging in discrimination recognizes that preventing employment discrimination is a shared responsibility among those who share a workplace. This is especially so where the employer’s best efforts are inadequate to resolve the issue or where, as here, the subject of the assault himself occupies a position of some authority. The harasser’s degree of control and ability to stop the offensive conduct is clearly relevant, but this goes to the factual matrix, not the jurisdiction of the Human Rights Tribunal to hear the complaint.

Ultimately, the SCC held that the Human Rights Tribunal correctly concluded that it had jurisdiction over S-M’s complaint and allowed the appeal.

## WHAT THIS MEANS FOR EMPLOYERS

This is a significant decision for employers. Relationships in the workplace may be covered by the Code even where no employment relationship exists, such as in instances where co-workers have different employers.

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## QUESTIONS?

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## SOURCES

*B.C. Human Rights Tribunal v. Schrenk*, 2017 SCC 62 <<https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/16919/index.do>>, retrieved on 2017-12-18

