Supreme Court of Canada to consider scope of human rights protection in non-traditional employment relationships

CANADIAN EMPLOYMENT NEWS SERIES
Employment Alert
1 NOV 2016

The Supreme Court of Canada will once again be looking at the issue of which members of the workforce should have the protection of human rights legislation.

On October 13, 2016, the Supreme Court granted leave to appeal in British Columbia Human Rights Tribunal v. Edward Schrenk (“Schrenk”),¹ a case that questions how far the scope of the BC Human Rights Code should extend when individuals are not in traditional employee-employer relationships.

In Schrenk, the complainant, Mohammadreza Sheikhzadeh-Mashgoul, was a civil engineer who was assigned to work on a construction project. While working on-site, he was subjected to derogatory comments about his place of origin, religion and purported sexual orientation by Edward Schrenk, a site foreman who was the employee of the project’s contractor, Clemas Contracting Ltd. (“Clemas”). Mr. Sheikhzadeh-Mashgoul complained about Mr. Schrenk to Clemas, who eventually removed him from the site and terminated his employment.

Clemas was not Mr. Sheikhzadeh-Mashgoul’s employer, and the two men were not technically co-workers. Nonetheless, Mr. Sheikhzadeh-Mashgoul filed a complaint with the BC Human Rights Tribunal against both Mr. Schrenk and Clemas alleging discrimination regarding his employment.

Both Mr. Schrenk and Clemas objected to the BC Human Rights Tribunal having jurisdiction to hear the complaint on the basis that the complainant did not have an employment relationship with either of them. The Tribunal rejected this argument. Instead, it found that any discrimination suffered “regarding employment” can attract the protection of the Code, and that the legislation should not be so narrowly construed so as to only apply to traditional employee-employer relationships.

The BC Court of Appeal reversed the Tribunal’s decision on jurisdiction, finding that Mr. Sheikhzadeh-Mashgoul was not entitled to the protections of the Code. Key to the Court of Appeal’s decision was the issue of control: it found that any discrimination suffered “regarding employment” can attract the protection of the Code, and that the legislation should not be so narrowly construed so as to only apply to traditional employee-employer relationships.

The Supreme Court last considered the application of human rights protections to non-traditional employment relationships in McCormick v. Fasken Martineau DuMoulin LLP.² In that decision, the Court narrowed the scope of applicability when it held that a partner of a law firm was not, for the purposes of having the protection of human
rights legislation, an employee of the firm.

If the Supreme Court upholds the BC Court of Appeal’s decision in Schrenk, it will put further limits on which individuals are entitled to the protection of human rights legislation while at work. The Court’s decision, which will likely be issued sometime in 2017, will be particularly important in multi-employer workplaces, such as construction sites and workplaces that have a mix of contractors and employees.
