SCC File No. 27041

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA)

BETWEEN:

BRITISH COLUMBIA HUMAN RIGHTS TRIBUNAL

Appellant
(Respondent)

- and –

EDWARD SCHRENK

Respondent
(Appellant)

FACTUM OF THE INTERVENER RETAIL ACTION NETWORK

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PART I OVERVIEW AND STATEMENT OF FACTS

1. The Intervener, Retail Action Network ("RAN") accepts the Statement of Facts set out in the Appellant's factum.

2. RAN is a membership-based organization of workers and labour activists that seeks better conditions and workplace justice for non-unionized retail, food service and hospitality workers ("RFH workers") who are engaged in precarious work. RAN approaches this appeal from the perspective of highly vulnerable workers, and asks this Court to consider the same.

3. RAN's submissions, grounded in the perspective and experience of these workers, will focus on the importance of approaching the interpretation of human rights legislation in a manner that: (a) acknowledges and gives effect to the institutional and systemic nature of workplace discrimination; (b) takes a complainant-centred approach; and (c) respects the remedial importance of employer liability under s.13 of the BC *Human Rights Code* (the "*Code*").[1]

PART II POSITION ON THE APPELLANT'S QUESTION

4. RAN says that the British Columbia Human Rights Tribunal's (the "Tribunal") jurisdiction under s.13 of the *Code* is not limited to circumstances in which the alleged discriminator is in a position of economic authority relative to the complainant, but rather must be interpreted so as to meaningfully address all workplace discrimination, including that which is connected to the systemic and structural conditions of the complainant's employment.

PART III STATEMENT OF ARGUMENT

A. Introduction

5. The Tribunal's jurisdiction must be interpreted liberally and purposively in light of the variety of workplaces in British Columbia. While the case below arose in the context of the construction industry, the implications of the decision will be felt by all workers in British Columbia.

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[1] *Human Rights Code*, 1996 RSBC c.210 [*Code*]

6. RAN submits that the Court of Appeal's interpretation of what constitutes discrimination "regarding employment" fails to promote the purposes of the *Code* because it situates discriminatory harassment exclusively within a limited subset of individual employment relationships, rather than within the institutional environment as a whole.

7. This individualistic approach has two important consequences. First, it limits the *Code's* reach to a narrow range of relationships, rendering the *Code* unable to effectively address the co-worker and customer harassment likely to be prevalent in workplaces with vulnerable employees. Second, it undermines the concept of strict employer liability as set out in *Robichaud v Canada (Treasury Board)*[2] because employers are now only liable where they "tolerated" the harassing conduct or "played some role in allowing the conduct to occur or continue."

B. Discrimination is a systemic and structural problem

8. In many workplaces, harassment must be understood as a systemic and structural problem of inequality. Organizational structures, practices, and norms in the employment sphere, enmeshed in social inequalities, can institutionalize power and vulnerability to discrimination. The power imbalance that facilitates workplace harassment can thus arise from a range of institutional dynamics rather than solely relationships of direct economic authority.[3]

9. For example, Professor Colleen Sheppard writes that:

> ...systemic inequalities—such as the isolation of individual women in male-dominated jobs and in traditionally female jobs, the sexualization of many jobs where women predominate, the impact of racism, the sexist supervisory structures of most workplaces and the precariousness of women's job security in the face of economic globalization—create an institutional environment in which women become more readily subjected to sexual harassment.[4]

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[2] *Robichaud v Canada (Treasury Board)*, [1987] 2 S.C.R. 84 [*Robichaud*]

[3] Colleen Sheppard, "Systemic Inequality and Workplace Culture: Challenging the Institutionalization of Sexual Harassment," (1995) 3 C.L.E.L.J. 249 [Sheppard] at 250.

[4] Sheppard, *supra* note 3 at 249-250: passage cited with approval in *Lippé et Commission des droits de la personne et droits de la jeunesse du Québec v Québec (Procureur général)*, [1998] Q.H.R.T.J. No. 43 at para 152.

10. When discriminatory harassment is understood as a systemic and structural problem - rather than simply the outgrowth of an individual employment relationship gone wrong - its source becomes less important than its effects.

11. This approach represents a shift in emphasis from the position and characteristics of the respondent to those of the complainant. A complainant-centred perspective primarily concerns itself with the complainant's social and economic vulnerabilities within the institutional environment, as well as the complainant's lived experience of the "subtleties, harms, fears, threats, and realities of harassment."[5] It recognizes that the relationships and hierarchies within workplaces that can render workers vulnerable to harassment may be much more nuanced and complex than would be seen on any organizational chart.

12. Further, this approach is reflective of this Court's decision in *Robichaud,* which emphasized that human rights legislation is remedial in nature and directed to "redressing socially undesirable conditions quite apart from the reasons for their existence."[6] It is also consistent with *Janzen v. Platy Enterprises Ltd.*, in which this Court did not limit discriminatory harassment to economic consequences; but instead invoked a broader and more nuanced understanding of the impact on the work environment and the "adverse job-related consequences for the victim."[7]

C. Institutional dynamics in the workplace

13. There are a number of overlapping and mutually reinforcing institutional dynamics that interact with social inequalities to facilitate discriminatory harassment in the workplace, some examples of which include: precarious employment conditions, occupational segregation, and the sexualization of certain occupations and workplace atmospheres.

14. Precarious work is characterized by "job instability, lack of benefits, low wages and degree of control over the process. It may also involve greater potential for injury."[8] Workers in

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[5] Colleen Sheppard, "Developing a Systemic Approach: Experiential Knowledge and Sexual Harassment," in *Inclusive Equality: The Relational Dimensions of Systemic Discrimination in Canada* (Montreal: McGill-Queen's University Press, 2010) [Sheppard 2010] at 80.

[6] *Robichaud, supra* note 2 at para 10.

[7] *Janzen v. Platy Enterprises Ltd.* [1989] 1 S.C.R. 1252 [*Janzen*] at 33.

[8] Law Commission of Ontario, *Vulnerable Workers and Precarious Work* (Toronto: 2012) at 1.

precarious employment experience highly asymmetrical power relations with their employers and customers, and may have little control over their schedules, the duration of their shifts, and their overall income. Precarious employment conditions increase employees' vulnerability to discriminatory harassment because of real or perceived risk to their employment or employment circumstances if they resist such treatment.

15. Certain workplaces may have additional elements that exacerbate precariousness, such as the tipping system used in restaurants, which increases servers' vulnerability to discriminatory harassment by customers, in particular as between women servers and male customers. Customers wield significant social and economic power over servers in the context of customer service norms in restaurants (as evidenced by the expression "the customer is always right") and servers' dependence on customers to supplement generally low wages (referred to as the "wage-tip" relation). Further, the customer's power is mutually reinforcing with the sexualization of women servers, discussed below, as sexualized interactions with customers are seen as "the price to be paid for a tip."[9]

16. Further, occupations within certain industries may be horizontally and vertically segregated by gender and race. For example, in restaurants, most management positions are held by men. Amongst non-supervisory employees, the "back of the house" is primarily made up of male employees, whereas the "front of the house" is primarily made up of female employees. Racialized employees are often relegated to lower-paying, "back of the house" positions.[10]

17. In light of such job stratification, employees may be vulnerable to harassment in the context of horizontal power relations, not because one worker actually controls the other's employment, but because of perceptions of power and authority that emerge from occupational segregation. In *Karlenzig v Chris' Holdings Ltd.*, a female server was sexually harassed by her non-supervisory co-worker, a male cook. The Saskatchewan Human Rights Commission accepted the complainant's testimony that "she did not perceive [her co-worker] and herself to be

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[9] Kaitlyn Matulewicz, "Law and the Construction of Institutionalized Harassment in Restaurants," 30(3) CJLS 401 [Matulewicz] at pages 403, 407 and 411-412. See also: *Lanteigne v Sam's Sports Bar Ltd*. (c.o.b. G.G.'s Sports Bar) [1998] BCHRTD No. 40; *Nixon v Greensides* Sask., 1992, CHRR D/469 Sask. Bd. Inq.

[10] Matulewicz, *supra* note 9 at 411-412.

equal and indicated that he was a cook and she was a waitress, that he worked in the back and she worked in the front."[11]

18. Women who are isolated in primarily male workplaces also experience increased vulnerability to harassment.[12] The dominant male group may use harassment as a tool to "isolate the women involved, reminding them that the environment is not meant for them, that they are weak and that they are integrating themselves into the environment at their own risk".[13]

19. Certain occupations where women predominate, such as secretaries, airline attendants and restaurant servers, are sexualized such that women in these occupations are rendered highly vulnerable to sexual harassment. This is in part because these occupations may be seen as socialized or marketized versions of women's traditional familial roles as wives and mothers. As Professor Sheppard states, "women's work involved being a subordinate and servicing the needs of others, and extended to include implicit compliance with the sexual desires of male employers, supervisors and clients."[14]

20. In the restaurant industry, factors contributing to the sexualization of women servers include the predominance of women in serving positions, the inherently subservient nature of serving positions (which accords with gendered expectations of women), and sexualized dress codes.[15] In recent years, tribunals have held that sexualized dress codes are discriminatory, including in cases where servers were sexually harassed while subject to these dress codes.[16]

21. The sexualization of certain occupations may also reflect and reinforce a sexualized workplace atmosphere. For example, sexualized discourse and touching are so embedded in restaurant culture that employees may perceive this conduct as normal or "part of the job." As a result, there exists a "problem of naming" where employees do not identify sexual conduct as

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[11] *Karlenzig v Chris' Holdings Ltd.*, 1991 CanLII 7916 at para 22.

[12] Sheppard, *supra* note 3 at 267.

[13] *Lippé*, *supra* note 4, at para 168

[14] Sheppard, *supra* note 3 at 275-277.

[15] Sheppard, *supra* note 3 at 276-277; see also Matulewicz, *supra* note 8 at 406.

[16] *Noseworthy v. Canton Restaurant*, [2009] N.L.H.R.B.I.D. No. 2; *Doherty v. Lodger's International Ltd.*, [1981] N.B.H.R.B.I.D. No. 3, 38 N.B.R. (2d) 217, 3 C.H.R.R. D/628.

harassment, even when it meets the legal definition.[17] Further, a sexualized atmosphere may render employees more vulnerable to sexual harassment by "blurring the lines of acceptable conduct."[18]

D. Liability under a systemic and structural approach

22. An understanding of some of these workplace dynamics informs a different interpretation of liability under the *Code* than the Court of Appeal's individualistic approach - one that is better able to satisfy the Tribunal's core purpose of identifying and eliminating employment discrimination "consistent with the 'almost constitutional' nature of the rights protected."[19]

23. By situating discriminatory harassment within individual employment relationships, the Court of Appeal characterizes economic authority as the only source of power allowing a person to control an employee's terms or circumstances of employment. In support of the Court of Appeal's analysis, the Respondent's factum says that discriminatory harassment is an outgrowth of relationships characterized by a dynamic of power and vulnerability.[20]

24. However, under a systemic and structural approach, dynamics of power and vulnerability are understood to be woven into the larger institutional environment. In order to meaningfully address discrimination in this context, the Tribunal must have broad jurisdiction to address discrimination through the imposition of liability on a wide range of participants in that institutional environment.[21]

25. Particularly when viewed from the complainant's perspective, a systemic and structural approach reveals that a complainant's social and economic vulnerability in the employment sphere is not necessarily a corollary to or a reflection of the respondent's power. Rather, a complainant's vulnerability vis-à-vis the respondent may arise from institutional dynamics

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[17] Matulewicz, *supra* note 8 at 402.

[18] *Curling v. Torimiro*, [1999] O.H.R.B.I.D. No. 17, 36 C.H.R.R. D/468, 1999 CarswellOnt 5150 at para 77.

[19] *Robichaud*, *supra* note 2 at para 13.

[20] Respondent's Factum, para 41, 10.

[21] Respondent's Factum, para 42, 11.

external to their relationship or from a complex interaction of institutional dynamics that exist within and outside of their relationship.

26. As a result, persons holding economic authority are not the only persons in positions of power in the employment sphere. Rather, employers, supervisory employees, non-supervisory employees, and third parties can all draw power from institutional dynamics to impose discriminatory harassment as a term or condition of employment, or "impose impediments on others to the full and free participation in the economic, social, political and cultural life of British Columbia."[22]

27. For example, a non-supervisory employee may draw power from another employee's precarious employment situation in order to discriminate against them.[23] As described above, co-workers often enjoy social power over each other due to intersecting conditions that extend beyond the workplace, and which are reinforced through institutional dynamics, such as gendered and racialized divisions of labour and differences in status conferred by their jobs within hierarchical and stratified working environments.

28. There is also often a power imbalance as between workers and customers, which renders workers vulnerable to discrimination and harassment by customers. Social power imbalances again intersect with structural employment conditions to increase risk. In particular, women workers (who are more likely to work in customer service-oriented positions due to gendered occupational segregation) report high levels of sexual harassment and discrimination from customers.

29. Customers are rarely mere bystanders in the RFH industries. Rather, they wield disproportionate social and economic power, including, for example, through their participation in the remuneration of servers in the restaurant industry. As such, sexualized interactions between servers and customers can be understood as a form of institutionalized *quid pro quo*, where the server cannot easily resist or walk away from such conduct without it affecting her terms and conditions of employment.

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[22] Respondent's Factum, para 42, 11.

[23] *O.P.T. v. Presteve Foods Ltd.*, 2015 HRTO 675, and *Peart v Ontario (Community Safety and Correctional Services*, 2014 HRTO 611.

30. As a result of all of these factors, it is essential that the Tribunal be able to address discrimination by co-workers and customers if the human rights regime is to effectively protect workers' dignity. Maintaining the Tribunal's broad jurisdiction over perpetrators of harassment in the employment sphere also has important remedial implications. It means that in every case, the Tribunal has the power to identify and meaningfully respond to the harassment itself, rather than restricting its scrutiny to the role of the employer, if any, respecting the harassment. Further, it recognizes the role of human agency in situations of harassment. While discriminatory harassment may be rooted in systemic and institutionalized dynamics of power and vulnerability, a perpetrator is still implicated in exploiting those dynamics. Naming individual harassers increases accountability amongst all actors in the employment sphere for maintaining a discrimination free workplace.

31. A systemic and structural approach also underscores the importance of employer liability as a necessary systemic response to a systemic problem. In *Robichaud,* this Court observed that in light of the remedial purpose of human rights legislation, "only an employer can provide the most important remedy – a healthy work environment."[24] *Robichaud* reflects a decisive departure from a respondent-centred analysis which restricts liability to individual wrongdoing, and has been consistently applied by the Tribunal to hold employers liable for the conduct of supervisory and non-supervisory employees.[25]

32. Many workplaces are organized in a way that makes it difficult for workers to resist harassment and makes harassment a normalized and sometimes accepted feature of the work.[26] Moreover, in certain industries, the employer may actually profit from workplace conditions that make harassment more likely to occur, such as precarious employment (and resulting worker dependence), the wage-tip relation, sexualized dress codes, and hiring practices that reflect ideas about appropriate gendered and racialized bodies for certain jobs[27] – the latter two of which directly relate to drawing customers into a business. All of this contributes both to the incidents of harassment, and the reluctance of employees to report it.

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[24] *Robichaud, supra* note 2, at para 94.

[25] See also s.44(2) of the *Code*.

[26] Matulewicz, *supra* note 9 at 403.

[27] Matulewicz, *supra* note 9 at 411.

33. Employer liability must cover discrimination that flows from these workplace conditions. For example, where a restaurant server must comply with a sexualized dress code and is repeatedly sexually harassed by customers, such harassment is not merely an unpleasant experience that happens to occur at work, but rather, an experience that occurs *because of* the institutional workplace conditions. To liken this conduct to bad behaviour that can be "avoided on the street without fear of employment-related economic consequence",[28] is to ignore the reality that employees are subjected to this treatment and cannot readily avoid it precisely *because* they are at work. The *Code* must allow the Tribunal to meaningfully examine the employer's responsibility for such harassment.

34. In discussing the inadequacy of individualistic, perpetrator-targeted remedies like minimal financial compensation and letters of apology in the context of sexual harassment specifically, Professor Sheppard argues that remedial orders "will need to be much more far-reaching and creative if they are to redress the systemic inequalities that accentuate the problem of harassment."[29] Restricting remedies under the *Code* may have a discouraging effect on workers choosing to access the human rights system, even where some narrow remedies may be available to them.

35. The ultimate goal of a discrimination-free workplace is the ideal against which an employer's actions or inactions must be measured[30] – reading in limitations to employer responsibilities reduces incentive for employers to take proactive measures to realize this goal, and removes workers' access to a real systemic remedy. As LaForest J. eloquently stated in *Robichaud*, if human rights legislation is to achieve its purpose, tribunals "must be empowered to strike at the heart of the problem, to prevent its recurrence and to require that steps be taken to enhance the work environment."[31]

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[28] *Schrenk v. British Columbia (Human Rights Tribunal)*, 2016 BCCA 146, Appellant's Record, Vol. 1, tab 4 at para.33.

[29] Sheppard 2010, *supra* note 6 at 84.

[30] *School District No. 44 (North Vancouver) v. Jubran*, 2005 BCCA 201 at para. 93-94.

[31] *Robichaud, supra* note - 2 at 94.

36. The principle of strict employer liability furthers the purpose of the *Code* to remove discrimination because it constitutes an important incentive for employers to examine institutional dynamics and other power structures in their workplaces to reduce risk of discriminatory harassment of their employees. In contrast, restricting employer liability to cases where the employer tolerated the wrongdoing or played some role in allowing the conduct to occur or continue unreasonably restricts the inquiry to an individualistic and reactive approach concerned with the employer's conduct, rather than the employer's responsibility to proactively attend to the health and safety of the work environment.

37. Moreover, in the absence of strict employer liability, greater pressure is placed on the victim to report harassment – even where institutional dynamics make discriminatory harassment more likely and reporting more threatening. Discriminatory harassment is commonly underreported, especially by employees in precarious positions vis-à-vis their employer, often because of well-founded concerns about the impact such complaints will have on the employees' ability to maintain their hours, their schedule, even their job. [32]

38. Accordingly, the effect of the two implications of the Court of Appeal's decision discussed here – the apparent exclusion of harassment by co-workers and customers from the definition of discrimination regarding employment, and the limitations placed on employer liability - means that the most vulnerable workers, many of whom have no other access to administrative workplace justice, will have no recourse under the *Code* for the discrimination they experience at work.

PART IV COSTS SUBMISSION AND ORDER SOUGHT

39. RAN does not seek costs and asks that none be ordered against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

March 17, 2017
Victoria, British Columbia

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[32] *Commission des droits de la personne et des droits de la jeunesse, agissant en faveur de F.R. v. Caisse populaire Desjardins d'Amqui*, [2003] Q.H.R.T.J. No. 27 at para. 79.

PART V TABLE OF AUTHORITIES

Legislation