OSLER

Can a franchisor be liable for discrimination against a franchisee's employee?

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In this recent human rights tribunal decision out of B.C., a former employee of a franchisee launched a human rights complaint against the franchisee, and also named the franchisor as a respondent. The franchisor applied to be removed from the complaint on the basis that it was not the employer, and therefore not a proper party to the proceeding.

The tribunal dismissed the franchisor's application, finding that discrimination can be found in the absence of an employment relationship if the party has the ability to interfere with or influence the employment relationship. However, the tribunal implied that the franchisor could have improved its chances of a successful dismissal had it provided more evidence of independence during the proceeding.

Background

Ms. Reid (the Complainant) was a former employee of X and A Fitness Club (the Franchisee) where she worked in the position of Membership Advisor.

Prior to her employment, the Complainant was injured in a motor vehicle accident, which restricted her ability to perform certain physical tasks, such as heavy lifting. However, she stated that she was able to perform the main tasks of her job with some accommodations provided by her manager. The Franchisee, however, terminated the Complainant's employment because of her medical issues and physical limitations. Ms. Reid alleged discrimination in employment on the basis of physical disability, contrary to Section 13 of the B.C. *Human Rights Code* (the Code) before the British Columbia Human Rights Tribunal (BCHRT). The Complainant named the Franchisee, its owner, Snap Fitness of Canada Inc. and Snap Fitness Inc. (the Franchisor) as respondents.

Issues

The Franchisor applied to be removed from the complaint on the basis that it was not a proper party to the proceeding. The Franchisor argued that it would not further the purpose of the Code for it to be named a respondent to the complaint because the Franchisee was independently owned and operated and that the Franchisor was never the employer.

The Complainant provided the following evidence in support of her argument that the Franchisor did influence the employment relationship:

- her work was controlled according to the Franchisor's policies and directives

- correspondence regarding her employment was on “Snap Fitness” letterhead
- she was paid with cheques, bearing the “Snap Fitness” mark
- her work email address was cloverdale@snapfitness.com

Further, the Franchisor directly issued discounted rates for gym members, provided advertising posters, monitored access to its franchisees’ gym facilities and was the point of contact for problems regarding the door/swipe entry system. Finally, a copy of a job posting for a position at “Snap Fitness – Cloverdale Group” mentioned that the position was with the “Snap Fitness team.”

Decision of the BCHRT

The BCHRT rejected the Franchisor’s argument. The BCHRT stated that the Code makes it clear that a respondent does not need to employ a complainant in order to be in violation of the Code. The Code provides that a “person,” not necessarily an “employer,” must not discriminate regarding employment.

The BCHRT noted that while it is more common for the employer to be the party that violates these provisions of the Code, any person whose actions or omissions discriminate against another person regarding employment would be in violation. The BCHRT established that discrimination can be found in the absence of an employment relationship if a respondent has the ability to interfere with or influence the employment relationship. In addition, the BCHRT referenced its prior *Chein v Tim Hortons* and *Charthaigh v Blenz* decisions for the proposition that liability may be found where a franchisor has the ability to interfere with and influence the franchisee’s employment relationship with its employees but fails to do so.

The BCHRT found that the Complainant’s evidence and Ms. An’s affidavit suggested that the Franchisor had some level of influence over the Franchisee. It was the Franchisor’s burden to persuade the BCHRT and provide relevant evidence to support the application. Without the benefit of the full franchise agreement (which was not produced by any of the parties) and other information, the BCHRT said it was unable to assess the full extent of influence or control and was not persuaded that proceeding with the complaint against the Franchisor would not further the purposes of the Code.

Takeaways

Of interest here for franchisors is the BCHRT’s affirmation that there is no universal conclusion that a franchisor is not a proper respondent to a complaint against one of its franchisees. The importance of the terms of the franchise agreement is highlighted in this decision. Every franchise relationship is governed by the terms of the franchise agreement and the Franchisor had only provided two pages of a franchise agreement that was at least 45 pages in length. Had the franchise agreement been produced and had it clearly spelled out the relationship between the franchisor, the franchisee and the franchisee’s employees, the result may have been different. As we have seen in other recent cases, however, the franchise agreement must walk the line of protecting the franchise system while not granting employer-like powers to the franchisor.