HUNTER-LIBERATORE-LAW

Case Law Update – Race Related Comments

As we previously described in our February Case Law Update, summary dismissal for just cause requires employees to engage in misconduct that is serious enough to strike at the heart of the employment relationship.

Many employers today believe that employees who make racially insensitive comments meet the just cause threshold and can be summarily dismissed without notice or pay in lieu of notice. A recent arbitration decision suggests that employers are still required to take a nuanced approach when dealing with employees who make questionable comments related to race.

In *Ontario Power Generation v Power Workers' Union* (Price, April 10, 2023), the grievor was a 63-year-old woman with 18 years of discipline free service with the employer. In January 2022, during a conversation with a colleague and citizen of the Métis Nation of Ontario, the grievor who was temporarily working as the complainant's front-line supervisor told the complainant that they should "play the Indian card" to obtain a permanent position with the employer. The grievor made further comments regarding the Métis Nation's supposed interference with the construction of a Deep Geologic Repository (DGR), a nuclear waste storage site. The grievor told the complainant that the repository should "never have been allowed to be decided by a binding vote" and that the employer had "spent a lot of money courting the Métis Nation for the DGR project" to no avail.

In February, the grievor and the complainant were working in the cafeteria when a TV program or announcement about Black history month came on. The grievor remarked, "Why don't we get a white history month?" the grievor asked the same question a few days later in the presence of the complainant and other employees. On that occasion, the grievor turned to look directly at the complainant and said, "I'm not prejudiced." The complainant, upset at the grievor's remarks, began working from home to avoid the grievor and filed an internal complaint in March 2022 alleging harassment based on ancestry.

When questioned during the investigation, the grievor stated that she never meant to offend the complainant, that she would have apologized had she

known the effect of her comments, and that she had been speaking to a "friend". The investigator found that the grievor had engaged in harassment on the basis of race, ancestry and/or place of origin in violation of the employer's Code of Business Conduct but that the grievor's comments did not violate human rights legislation or policy. During her disciplinary interview, the grievor acknowledged her comments were not respectful or dignified and advised the employer that she wanted to apologize to the complainant. Nevertheless, the employer terminated the grievor's employment for cause. Two days after her discharge, the grievor provided the employer with a written apology to the complainant.

The union argued that the employer lacked just cause for discharge and that the grievor should have been educated instead of terminated given her 18 years of discipline free service. The employer's position was that the grievor's racist slurs warranted the serious penalty of discharge. Arbitrator Price found that the grievor's suggestion that the complainant "play the Indian card" to obtain permanent employment was insulting and offensive on the basis of ancestry and warranted discipline. However, she found that the grievor's comments about the Métis Nation and the Deep Geologic Repository were not disciplinable misconduct as they were not disparaging or inflammatory – they were a mere expression of opinion between work colleagues regarding an issue of interest to the grievor's employer:

> In my view, there is a big difference between disparaging individuals or communities on the basis of their Indigeneity and merely disagreeing with or even criticizing the policies or decisions of an organization that happens to be Indigenous. … the Employer was not entitled to discipline the grievor for expressing her disagreement, during a private conversation with a work colleague, with what was effectively a political decision not to support a particular public works project, especially since that decision affects others in the grievor's community. The fact that the decision in question happened to have been taken by an Indigenous organization does not alter that fact (at para 50).

In assessing the grievor's remarks about "white history month", Arbitrator Price found that the grievor's question was not disrespectful, demeaning or

otherwise harassing towards the complainant. While the grievor's statement that she was, "not prejudiced" revealed that the grievor understood she could be perceived as prejudiced, that did not give the employer just cause to discipline the grievor:

> In my view, there is a difference between treating people in a negative manner on the basis of race, which is not alleged here, on the one hand, and not supporting measures that single out a particular group for recognition or special treatment based on race, on the other, even where recognition or treatment is favourable. Whereas the former is contrary to human rights legislation, the latter is not a form of prohibited speech that engages the employer's disciplinary power (at para 58).

The arbitrator found that the grievor's comment was provocative and careless and would have justified a non-disciplinary letter of expectation counselling her on proper workplace behavior. However, the grievor's comments, when considered together, did not poison the complainant's work environment, despite the complainant's subjective reaction to the grievor's comments – objective seriousness of the comments or conduct is a relevant factor. As only one of the grievor's comments warranted discipline, and the grievor's misconduct was not sufficiently serious in and of itself to warrant the penalty of discharge, the employer's discharge of the grievor was disproportionally harsh:

> The Employer's commitment to improving relations with Indigenous individuals and communities is laudable, as well as its commitment to eradicate racism in the workplace. I also agree that the Employer can and should adopt a "zero tolerance" to racism in the workplace. However, "zero tolerance" means that discriminatory conduct will be called out and addressed; **it does not mean that the most severe penalties will be imposed for every instance of discriminatory or harassing conduct.** As the caselaw states, arbitrators have a duty to ensure that the disciplinary penalty is proportionate to the employee's offence, whatever the nature of the offence. Having considered the submissions carefully, I am inclined to agree with the Union that a

remedial approach that seeks to educate employees and correct misconduct through the imposition of appropriate levels of progressive discipline is more in keeping with the remedial nature of human rights law.

Other mitigating factors included the grievor's 18 years of service, her lack of prior discipline, her sincere apology to the complainant, her expressed remorse for her actions, her willingness to submit to further training on Indigenous issues, and her commitment to refrain from similar behaviour in the future. Arbitrator Price concluded that the employment relationship was not "irretrievably broken and unsalvageable" and reinstated the grievor to her employment, with no loss of seniority or compensation save, a one-day suspension, substituting for the discharge. The grievor was also required to participate in whatever Indigenous-focussed sensitivity and awareness training the employer determined appropriate.

Key Takeaways

- While racist comments or slurs are serious workplace offences, not every race related comment in the workplace, no matter the recipient's subjective opinion regarding the comment, is misconduct subject to discipline.
- Employers must consider the individual circumstances of each employee when determining what discipline to impose for discriminatory or harassing misconduct, including the nature of the misconduct, the surrounding circumstances, the proportionality of the response, the seniority of the offender, and their disciplinary history.

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