HUNTER-LIBERATORE-LAW

Single Racial Slur Created Poisoned Work Environment

In a recent decision from Arbitrator Larry Steinberg – *Iron Forming Inc. v Labourers' International Union of North America, Local 183* – an employer has been found vicariously liable for creating a poisoned work environment following an employee's stand-alone utterance of a racial slur.

This case addresses several issues relevant to the employer-employee relationship, including vicarious liability, poisoned work environments, reprisals, workplace investigations, and remedies under *the Human Rights Code*.

Vicarious Liability

Under section 46.3(1) of the Ontario *Human Rights Code*, employers are expressly exempt from liability for harassment perpetrated by officers, officials, employees, and agents, unless,

- The harasser was part of the "directing mind" of the company and the harassment occurred while carrying out the employer's business, or
- The employer created a poisoned work environment by having knowledge of the harassment yet failing to take steps to stop the harassment.

Poisoned Work Environment

A poisoned work environment is one that is objectively emotionally or psychologically negative for an employee. A poisoned workplace can be created through words, gestures, or action such as,

- Offensive remarks slurs or jokes based on a protected characteristic in the *Human Rights Code* (race, gender, religion, sexuality etc.)
- Derogatory name calling
- Taunting or mocking an employee
- Unfairly singling out an employee
- Ostracizing an employee, or
- Commenting on a person's looks or appearance

Generally, a finding that a workplace is "poisoned" requires a pattern of persistent and repetitive harassing behaviour. The exception to this general rule is that an egregious, stand-alone incident can create a poisoned workplace.

As we recounted in last month's Case Law Update, not all race-related comments will amount to disciplinable misconduct in violation of human rights legislation. In that case, Arbitrator Sheri Price acknowledged that some race related comments may be subjectively offensive, but they do not necessarily create a poisoned work environment; adjudicators must consider the objective seriousness of the comments or conduct.

Racial Slur

The grievor in *Iron Forming Inc.* was born in Eritrea and was dispatched to work for the employer as a carpenter helper at the Enola job site in Mississauga. On June 9, 2021, the grievor was assigned to work on a crew which included the foreman (Pique Sr's) and his son (Pique Jr.). A verbal altercation occurred between the grievor, and Pique Sr. Pique Jr. joined the altercation and the grievor claimed that Pique Jr. called him the N-word and challenged him to a fight. According to the grievor, no one else was close enough to hear the slur.

The incident was reported to the union's business representative (Camara) and written statements were collective from employees. The grievor testified that the next day, at about 4:00 pm, he was outside the construction trailer when he was approached by another foreman, Almeida, who said words to the effect "Are you good now? Not going to freak out anymore". This caused another commotion which was disbanded when Camara asked Almeida to leave.

Workplace Investigation

The employer tasked its Health and Safety Manager, Steve Bonnay to investigate the allegation of racial harassment. Bonnay's evidence was that he reviewed the witness statements – none of which corroborated the grievors allegation which Pique Jr. denied; three witnesses stated that the grievor called himself the N-word. Bonnay did not interview any of the witnesses but

did speak to Pique Sr. When questioned during arbitration, Bonnay stated that he was too busy to interview the witnesses.

After reviewing the statements, Bonnay concluded that either Pique Jr. uttered the slur or the grievor called himself the N-word and then tried to blame Pique Jr. Bonnay was not satisfied that Pique Jr. had uttered the slur and finalized his report to that effect on June 15.

Reprisal

On June 15, Pique Jr. was advised that he could return to work at the Enola site. The grievor returned to work on June 21 at the employer's Bromsgrove jobsite under a new foreman (Courtney) but was advised that he would be transferred back to Enola the next day to work under Courtney. No one told the grievor that Pique Jr. was also back at Enola though management testified that they intended to keep the two separate. On June 22, the grievor commenced work on the Enola site where he was told that Courtney was being reassigned and that he could be working under Almeida. The grievor raised a concern about working under Almeida, but Courtney assured him the reassignment was temporary.

On June 23, the grievor was walking though the job site, after Almeida asked him to retrieve a broom, when he ran into Pique Jr. The grievor was caught off guard but there was no altercation between the two. On July 6, the grievor was advised that Pique Jr. had left the company and he would be permanently assigned to Almeida's crew. The grievor was uncomfortable working under Almeida considering their prior altercation and left the job site.

On July 7, the grievor returned to the site to work under a new foreman (Jackson) when Almeida began instructing the grievor to work under his direction and confronted the grievor about not wanting to work with him. The grievor approached another unnamed foreman and told him that he did not want to work with Almeida. When the seemingly annoyed foreman asked the grievor which foreman he wanted to work with, the grievor quit his job.

Legal Arguments

The union alleged the company had conducted an inappropriate investigation, had reprised against the grievor, and was vicariously liable for Pique Jr's discriminatory conduct under the *Code*. With respect to the investigation, there were no interviews of the grievor or the witnesses, the grievor was not advised of the outcome of the investigation and did not receive a copy of the investigation report. The company did not take the complaint seriously and did not take sufficient steps to protect the grievor from interacting with Pique Jr. and Almeida.

The union argued that the company had reprised against the grievor when it assigned him to work with Almeida notwithstanding the grievor's objections. The union further argued that Almeida's sending the grievor to get a broom in an area where he was likely to encounter Almeida was further evidence of unlawful reprisal.

The company argued that a single racial slur made by one union member to another in the heat of an argument was racial harassment engaging section 5(2) of the *Code*. However, by virtue of section 46.3(1), the employer was not vicariously liable for violations of section 5(2) of the *Code*, where the harassment was committed by an employee toward another employee:

> **46.3(1) Acts of officers, etc.**
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> For the purposes of this Act, except subsection 2(2), subsection 5(2), section 7 and subsection 46.2(1), any act or thing done or omitted to be done in the course of his or her employment by an officer, official, employee or agent of a corporation, trade union, trade or occupational association, unincorporated association or employers' organization shall be deemed to be an act or thing done or omitted to be done by the corporation, trade union, trade or occupational association, unincorporated association or employers' organization.

The company defended its investigation arguing that there was no need for interviews of the witnesses considering their statements; the conclusion that no slur took place was not unreasonable; and the appropriate remedy for failing to provide the grievor with the report was a declaration of breach of the *Code*. The company further argued there was no reprisal against the grievor

and that it accommodated the grievor as best it could by assigning him to Courtney and then Almeida when Courtney left. There was no evidence that Almeida's asking the grievor to get a broom was reprisal.

In reply, the union argued that notwithstanding the vicarious liability restriction in section 46.3(1) of the *Code*, a single slur is a particularly egregious stand-alone incident that amounts to a poisoned work environment in violation of section 5(1) of the *Code* which guarantees equal treatment in employment without discrimination because of race.

Liability

Arbitrator Steinberg began by acknowledging the prevalence, pervasive, and dehumanizing impact of anti-black racism in society and in the workplace. In this case, the parties had agreed that the arbitrator's finding about what occurred between Pique Jr. and the grievor would be based on the evidence before him.

Pique Jr. did not respond to requests from the employer to provide a will-say setting out his evidence. As such, the only evidence before arbitrator Steinberg was the grievor's evidence and the arbitrator accepted that during a heated argument, Pique Jr. got close to the grievor face's and said, "Do not talk to [Pique Sr.] like that again [N-Word]". Arbitrator Steinberg also accepted that no other employees on the site were close enough to hear the comment and that the comment was not part of an ongoing pattern of discriminatory behaviour.

With respect to the employer's investigation, both parties agreed that the elements of a proper investigation were set out in *Laskowska v. Marineland of Canada Inc* and can be summarized as,

- awareness of issues of discrimination/harassment, policy, complaint mechanism and training,
- post-complaint seriousness, promptness, taking care of its employee, investigation and action, and
- resolution of the complaint (including providing the complainant with a healthy work environment) and communication

When assessing the employer's investigation, Arbitrator Steinberg found that the employer had no complaint procedure and provided no education or attempts to familiarize employees with the concepts of harassment. While the employer did act promptly on becoming aware of the incident, the employer's failed to interview witnesses and failed to advise the grievor that Pique Jr. was on site.

When considering the final element of a reasonable investigation (the resolution of the complaint), Arbitrator Steinberg noted that some of the employer's actions such as attempting to accommodate the grievor by assigning him to a different site and foremen were reasonable. However, he also found that the employer failed to advise the grievor that Pique Jr. was at the Enola site, failed to give the grievor a copy of the investigation report and failed to keep the grievor "in the loop" about the process of the investigation, therefore failing this element of the test. He concluded that overall, the workplace investigation was not conducted reasonably.

There was also a fair inference that the employer reprised against the grievor when he returned to Enola: he was assigned to Almeida's crew, formally reassigned to Jackson's crew but continued to work for Almeida, and no one with knowledge of the situation was called to testify and provide an explanation.

Lastly, Arbitrator Steinberg found that pursuant to section 46.3(1) the employer was not liable for violations under section 5(2), however, the employer was vicariously liable for Pique Jr.'s actions by creating a positioned work environment:

> I agree with the union that the time has come to do more than pay lip service to the idea of the seriousness of anti-black racism, and particularly in cases where the slur at issue is the use of the N-word. …[the] word is so profoundly offensive to black people and must never, ever be spoken to or about them…
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> Therefore, I find that **the single slur at issue in this case is an egregious stand-alone incident that supports a finding of a poisoned work environment**. If I am wrong in that conclusion I would also find that the

slur combined with the facts regarding the reprisal noted above are sufficient to make a finding of persistent and repeated wrongful behaviour such that a poisoned work environment was created (at paras 124-125).

Remedy

The union sought $75,000 in general damages for injury to the dignity, feelings, and self-respect of the grievor and systemic remedies including the creation of a human rights and discrimination policy with a complaint procedure; the incorporation of a mission statement confirming a commitment to equality in the workplace; and human rights and discrimination training of no less than two (2) hours on company time.

With respect to the reprisal, Arbitrator Steinberg found that the grievor did not suffer any harm arising from the wrongful behaviour and awarded him $4,000 for the impact the reprisal had on him. He further found that the union's request for $75,000 in damages was disproportionate to the employer's violation of the *Code*. While the conduct was very serious, it was a single incident in the context of a heated verbal argument, and $11,000 was an appropriate damage award for injury to the grievor's dignity, feelings, and self-respect.

The employer was also ordered to create a human rights and discrimination policy with an accompanying complaint procedure; engage an experienced and qualified individual to conduct human rights and discrimination training on company time for all bargaining unit personnel with separate training sessions for management and supervisor employees; and conduct continuous human rights and discrimination training and education in the workplace.

Takeaways:

- Employers should be on guard that a single racial slur uttered in the workplace can amount to a poisoned work environment engaging the vicarious liability sections of the *Human Rights Code*.

- All Human Rights and Discrimination Policies should include a complaint procedure. Employees should be trained on the substantive requirements of the policy and procedure.
- Management and supervisory employees tasked with conducting workplace investigations should receive investigation training and be aware of the elements of a reasonable investigation under the *Code*, the *Occupational Health and Safety Act*, and the employer's policy.