ONTARIO ARBITRATOR FINDS AN ISOLATED RACIAL SLUR CONSTITUTES HARASSMENT IN VIOLATION OF THE *HUMAN RIGHTS CODE*

Pretressed Systems Inc. v. Labourers' International Union of North America, Local 625 (Venosa Grievance) (September 16, 2005) (Snow)

By Natasha L. Savoline

On September 16, 2005, Arbitrator Snow found that a single unwelcome comment constituted harassment under the Ontario *Human Rights Code*.

The grievor was an individual of Italian ancestral descent who was employed by the Employer as a Batcher mixing concrete. The grievor alleged that his rights under the *Human Rights Code* were violated when his supervisor directed a racial slur towards him.

The grievance arose after the grievor failed to hear an order communicated over a two-way radio placed by his supervisor, Chris Davidson. When the grievor advised Mr. Davidson that he had not heard the order, Mr. Davidson responded "You fucking immigrant, you want me to come up there and teach you how to speak English?". Mr. Davidson insisted that he did not intend to offend the grievor and was "just kidding".

Many of the grievor's co-workers were aware of the incident. The Union argued that the comment was insulting and demeaning to the grievor and was an attack on his immigrant status. The Employer argued that a single isolated incident does not amount to harassment under the *Human Rights Code*.

Arbitrator Snow determined that in some circumstances more than one comment is required for a person to know that the comment is unwelcome. However, Arbitrator Snow found that Mr. Davidson's single comment to the grievor was known, or ought reasonably to have been known, to be unwelcome. Arbitrator Snow also found that Mr. Davidson's comment was disturbing or annoying and, as such, the comment was vexatious.

Arbitrator Snow accepted that vexatious comments or conduct will often need to be repeated to constitute harassment given that the *Human Rights Code* requires a "course" of comment or conduct. However, Arbitrator Snow rejected that legislators could have intended that a comment such as Mr. Davidson's would have to be repeated to constitute harassment. As such, Arbitrator Snow determined that Mr. Davidson's single isolated comment violated the grievor's right to a workplace free from harassment under the *Human Rights Code*.

In respect of remedy, Arbitrator Snow issued a declaration in respect of the Employer's violation of the *Human Rights Code*. Arbitrator Snow also ordered Mr. Davidson to provide the grievor with a written apology. Notably, Arbitrator Snow did not find it to be an appropriate case to award damages.

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While some decision-makers have expressly rejected that a single incident can constitute harassment under human rights legislation, others have suggested that in certain circumstances a single incident or comment could violate an employee's right to a workplace free from harassment. Arbitrator Snow's decision is a warning to employers to be cautious of conduct or comments in the workplace, which could be offensive and/or misconstrued. A single isolated incident or comment may be sufficient to find the Employer liable under the *Human Rights Code*. In addition, an intention to offend, discriminate or harass is not necessary to find that a violation has occurred.

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