Racist Remarks Found to be Prima Facie — Cause for Termination

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There are certain workplace offences arbitrators view as being so serious they undermine the trust an employer has in its employee to the point the employment relationship cannot continue. Misconduct that falls into this category has historically been: Theft, sexual assault, assaulting a supervisor and deliberating sabotaging the employer's equipment.

In the recent decision, Levi Strauss & Co v. Workers United Canada Council,[1] Arbitrator Gordon Luborsky added to the list: "Use of demeaning racial or ethnic slurs by one employee to another," describing such behaviour as "very serious misconduct falling within the category of workplace offences that prima facie justifies terminating the employment relationship". This is not to say decision-makers will not consider mitigating factors such as the circumstances in which the misconduct arose. They will. However, there is now an arbitral basis to classify racist behaviour as prima facie cause for termination or another significant discipline.

WHAT HAPPENED?

The grievor, a white man, worked in the company's distribution centre. The work area consisted of several conveyor belts which moved product from various sorting stations. As part of the company's safety mechanisms, the work area had pull cords which, when pulled, stopped the conveyor belt system. One day, another employee, a black man, pulled a pull cord for a non-safety related reason. The grievor took exception to this and approached that employee. A heated exchange followed, during which the grievor uttered you "Black Bastard" and mouthed the n-word to him. The two employees then left the shop floor briefly to speak to a manager. When the grievor returned to the floor, he announced he had gotten rid of the other employee. He used a racist epithet as part of his announcement. When the company was made aware of these racist remarks, it conducted an investigation and the grievor was terminated for violating the company's Workplace Violence and Harassment Policy. At the time of his termination, the grievor was 53 years old and had 23 years of service with a clean disciplinary record.

GRIEVANCE DISMISSED

At arbitration, the grievor admitted to the heated exchange and that he had used profanities. However, he denied having made racist comments or used racist epithets. Arbitrator Luborsky did not believe the grievor in light of the testimony of other witnesses and surveillance footage. As a result, the question became whether the conduct was just cause for termination. After a thorough review of the evolution of the law on harassment and discrimination in the workplace, Arbitrator Luborsky held that racist remarks, whether directed at a specific individual or made generally, can no longer be classified or excused as "shoptalk."

Thus in the prevailing environment, given the progress towards the societal goal of eliminating all forms of harassment in the workplace, consistent but not limited by the recent amendments of the [Occupational Health and Safety Act], it is in my opinion now appropriate to regard any use of demeaning racial or ethnic slurs by one employee to another as very serious misconduct falling within the category of workplace offences that prima facie justifies terminating the employment relationship, amongst the appropriate disciplinary measures as part of the "corrective action" (in the words of sec. 32.0.7 (b) of the OHSA) that the employer is obliged to consider in response to workplace harassment, because of the hurtful nature of such conduct that undermines the smooth running of a diversified workforce. [emphasis added]

In the circumstances, Arbitrator Luborsky found the employer had just cause for termination, in the absence of mitigating factors, such as:

- Did the act arise in the context of a momentary flare-up?
- Did the grievor have a clean record?
- Did the grievor make a timely apology?
- Did the grievor show genuine remorse?

In this case, the grievor failed to make an apology and never showed any remorse for his action, as such, the termination was upheld.

LESSONS FOR EMPLOYERS

Racism has no place in Canadian workplaces and now there is an arbitral basis to treat this type of misconduct as prima facie cause for termination or another significant discipline. This does not mean a zero-tolerance policy, calling for automatic dismissal, will be blindly followed by a decision-maker. As a matter of substantive and procedural fairness, a decision-maker should always consider whether there are mitigating circumstances sufficient to impact the result.

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