

IN THE MATTER of Grievances dated June 19 and July 3, 2020
AND IN THE MATTER of an Arbitration of those grievances under the *Labour Relations Act*, 1995 as amended.

BETWEEN:

**LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA,
LOCAL 183**

("the Union")

-and-

CLARK CONSTRUCTION MANAGEMENT INC.

("the Employer")

BEFORE: Michael G. Horan

APPEARANCES:

For the Union: John Evans and Aruna Vithiananthan, counsel

For the Employer: Daniel Wong and Max Skrow, counsel

Hearings were held by videoconference on: January 11, March 24, March 26, March 31, April 23, May 18, May 26, July 19, August 27, October 12, and December 2, 2021.

AWARD

Introduction

1. This arbitration proceeding deals with claims of Darryl Downey (“Downey”), that he was subjected to discrimination and harassment during the period of his employment with Clark Construction Management Inc. (“Clark”).
2. Clark is a construction contractor bound to the provisions of the collective agreement (“the collective agreement”) between Metropolitan Toronto Apartment Builders’ Association and Labourers’ International Union of North America, Local 183, (“Local 183” or “the Union”) covering the period from May 1, 2019 to April 30, 2022.
3. Local 183 filed grievances dated June 19, and July 3, 2020, in connection with the mistreatment alleged by Downey. The claims in the two grievances were particularized in a detailed statement, also dated July 3, 2020.
4. Local 183 alleged that there were persistent comments and misconduct in the workplace relating to Downey’s race and colour. They also alleged that Clark was aware of the comments and misconduct, did not do anything to redress them, and then both improperly laid him off and did not recall him. They maintain that there have been breaches of the collective agreement, *the Human Rights Code, R.S.O. 1990, Chapter H.19 as amended (“The Human Rights Code”)*, and *The Occupational Health and Safety Act, R.S.O.1990, Chapter O.1, as amended, (“OHSA”)*.
5. The parties filed a Joint Book of Documents and presented their oral testimony in chief through sworn “Will-Say”, “Amended Will-Say”, and “Supplementary Will-Say” statements.
6. The parties agreed to proceed on the merits of the two grievances, and that I reserve any decision on potential damages, if applicable, to be determined following further evidence and argument after the release of this Award.

The Workplace

7. Downey is a labourer who worked for Clark between April, 2018, and February 19, 2020. During that time, he primarily worked on a construction project which included a condominium, hotel, and lower retail, located at 1 Bloor Street West (“Bloor”), in Toronto.
8. There were approximately twelve labourers who worked for Clark at the Bloor site.
9. The Clark supervisory personnel at Bloor were: Shawn Millican (“Millican”), the General Superintendent; Dan Stevens (“Stevens”), the Project Superintendent; and Wandell Langdon (“Langdon”), the Labourer Foreman. Langdon reported to Millican through Stevens. Millican also had responsibilities for other Clark projects. Ruben, (“Ruben”) worked for Safety First, and was the safety representative or safety consultant to Clark at the Bloor site.
10. There was a lunchroom available for the labourers at Bloor. It contained lockers and a charging station for the radios used by the employees at the site. The labourers usually ate their lunch at this location and sat at the table and chairs provided. All of the labourers went to the lunchroom at least twice a day. There was a whiteboard on the wall just behind the lunch table. The room also contained a desk and chair where Langdon did his paperwork.

The Downey Allegations

11. The Union alleged that Downey was the subject of derisive and discriminatory comments about his colour and the way that he spoke, both in the workplace and over the radios used by the employees. They also alleged that demeaning and discriminatory comments about Downey were written on the whiteboard hanging on the wall in the labourer’s lunchroom. Finally, they alleged that Downey’s lay off and the failure to recall him, occurred because Clark was aware of the racial discrimination and harassment that had been directed towards Downey, and chose to remove him from the workplace rather than deal with the abuse to which he had been subjected.
12. Downey was laid off on February 19, 2020, and not recalled after the layoff. He subsequently found out that other labourers were hired by Clark, notwithstanding the alleged shortage of work that was responsible for his layoff. The Union then filed the grievances which are dated June 19, and July 3, 2020..

The Initial Meeting with Sirrett

13. Downey returned to work following a medical leave of absence in March 2019. He met Sirrett who also was a labourer at Bloor. Sirrett had been hired by Clark in February 2019.
14. Downey testified that at their first meeting, Sirrett told him that he is “the most racist person that you will ever meet”. Sirrett told him about his cross tattoos. One of them was on his eyelid. He also had a tattoo with a burning inverted cross on his body.
15. Sirrett denied making the comment about being a racist, but acknowledged in his testimony that he understood why a Black person would be offended at being shown a flaming cross; he said it could be associated with the Klu Klux Klan. Downey confirmed that he took that inference from being told about the tattoos and the burning cross discussion initiated by Sirrett.
16. In cross-examination, Sirrett acknowledged that he was aware of all of the Downey allegations about racism, racist comments, and tattoos in these proceedings, but did not think that it was necessary to respond to them in his evidence in chief, because it was not “a big issue”, and he knew that “there would be lies and bullshit coming against him.”
17. I accept the evidence of Downey as to what was said by Sirrett at the first meeting. His testimony had an air of truth that is lacking in all of the denials by Sirrett, who not only denied making the statement about being a racist, described in this incident, but also denied every discriminatory statement attributed to him by Downey in these proceedings.
18. At their first meeting there was an admitted conversation about cross tattoos and that conversation also involved a discussion on the subject of skin colour. I also conclude that it was Sirrett who initiated the discussion, and made the comment about being a racist.
19. The comments attributed to Sirrett by Downey are entirely consistent with the remainder of Sirrett’s testimony and his demeanor throughout this arbitration hearing;

they are consistent with a pattern of conduct, comments, and text messages that are fixated on the issue of Black skin colour. Langdon acknowledged that there were race related issues between Sirrett and Downey.

The Shackles Incident

20. Downey testified about an incident with Sirrett, while they were working in the hole at Bloor, just after he returned to work following his leave of absence in March 2019. Downey stated that Sirrett tried to demean him in front of Langdon by attempting to give him orders about putting shackles on garbage cans which were to be lifted out of the hole. Sirrett had no authority to give Downey any orders and when Downey refused to comply with the order, Sirrett proceeded to call him lazy. Downey felt that Sirrett, in giving the order and making the comment, was trying to impress the foreman, Langdon, who was present at the time.
21. Neither Sirrett nor Langdon gave any testimony about this incident, and Downey was not cross-examined on the subject.
22. The events described by Downey, although not refuted, do not in my view, constitute racially discriminatory conduct or comment by Sirrett or Langdon.

The Radio Comments

23. Each labourer working at Bloor Street was issued a two-way radio in order to communicate with both supervisory and fellow employees. The radios were issued to facilitate a safe workplace and to assist in communication amongst employees at the large construction site. The radios had a number of channels in order to allow communication amongst workers who needed to speak, without bothering other workers. For example, there was a separate channel for communication on the crane operation.
24. Comments made over the radio would not necessarily be heard by all of the employees, some of whom would not be on the same channel as the speaker. However, any comments on the radio system would be heard by any number of people who happened to be on the same channel as a speaker.

25. Downey testified that both Sirrett and Langdon made racist comments about the way that he spoke and did so regularly over the two-way radio.
26. Sirrett denied making any such comments at all. Langdon acknowledged that there was teasing and joking over the radio amongst all of the labourers.
27. Downey testified that both Sirrett and Langdon often told him over the radio to take the marbles out of his mouth, asked if the way he spoke is the way that Black Nova Scotians spoke, and asked if he knew how to speak basic English. Both Sirrett and Langdon denied those allegations.
28. Downey also testified that Nick Clark, a labourer, made a comment over the radio that he wanted to have a spelling bee to determine the level of Downey's spelling and vocabulary. Downey was not cross-examined upon this evidence and Nick Clark did not give evidence. Downey's evidence on this subject is entirely consistent with the negative comments on the radio about him, his skin colour, and his manner of speaking as a Black man; those comments do not qualify as teasing or joking. I accept the truth of Downey's evidence about the statements made by Sirrett, Langdon, and Nick Clark.
29. Downey alleged that Langdon also referred to him over the radio as "Big Black Darryl", "Big Black Muscle" and "where is the Black guy?". Langdon denied all of those allegations.
30. Sirrett specifically denied ever making the comment about Downey having marbles in his mouth. However, Matt Zuliani ("Zuliani"), a fellow labourer, confirmed that he heard both Sirrett and Langdon make that comment over the workplace radio. I believe Downey's testimony about the radio comments. Langdon acknowledged that there was what he called teasing and joking on the workplace radio, but I have found that the comments were not teasing and joking.
31. Some labourers still employed by Clark gave testimony in which they either denied hearing the aforesaid radio comments, said that they did not hear them because they may have been on different channels, or said that they did not remember hearing them. I nevertheless find that there were regular discriminatory comments over the radio by Sirrett and Langdon directed at Downey.
32. As Labour Foreman, Langdon would have had responsibility to restrict the labourers' use of the radios to matters associated with their work. Instead, he participated in

the anti-Downey comments with Sirrett and Nick Clark, that were not teasing and joking, but went well beyond that description. They were racist putdowns of Downey on account of his skin colour and how he spoke as a Black man.

The Radio Sticker

33. Downey testified that he told Langdon about his name sticker having come off his workplace radio. He said Langdon volunteered to get him another name sticker. Downey testified that Langdon returned with a sticker that said “The Black Dude” or “The Black Guy”. He stated that from that time forward, that sticker was on his radio. Langdon denied the allegation.
34. Name tags for the radios were only used for a short period of time during Downey’s employment. Jay Cha, the Material and Logistics Co-Ordinator at Clark during the relevant time frame, testified that he was the person who made the name tags during the few months that they were used. He testified that he did not make any name tag for Langdon or Downey. He further stated that he would have refused to print a “joke” name on a name sticker.
35. There was no corroborating testimony from anyone that the alleged sticker was made, or was seen on Downey’s radio for a period of time or at all. I have concluded that the allegation respecting the sticker has not been proven.

The Eye Patch

36. Downey testified that he sustained an eye injury while working in March, 2019. A few weeks after he was injured, he observed that someone had written the word “Oh my eye!” on a hand drawn picture of Jeff da Rosa (“Da Rosa”) which hung on the wall in the labourer’s lunchroom, near Langdon’s desk. Da Rosa was a labourer who also worked at Bloor. Someone had also accentuated one of the eyes of the Da Rosa picture

with a black marker. The picture with the writing above, remained in the workplace for about a month afterwards.

37. The Union alleged that the “eye patch” picture was part of the belittling and mocking of Downey. There was no evidence about who had put the written comment on the picture. Consistent with his denials of all of the allegations, Sirrett testified that he could not even remember the modified picture hanging in the lunchroom. Langdon denied being the author of any of the writing or markings on the picture. He acknowledged that it remained on the wall for some time.
38. The mocking allegation about “oh my eye” and the comment on the picture of Da Rosa was not tied directly to Downey and there was no proof about who was responsible for it. However, that same caption also appeared as the second entry on a list posted on the whiteboard behind the lunch table in the labourer’s lunchroom. That list is described in the following paragraphs.

The Darryl Says List

39. In April, 2019, a list titled “Shit Darryl Says” was posted in the lunchroom in plain sight. It was on a whiteboard near the lunch table and the entries were made, apparently by different people, with marker pens. There were fourteen entries or comments on the list as follows:
 - a. JEFF MAKE ME A DOLL HOUSE
 - b. OH MY EYE!
 - c. HELP I’M LOCKED
 - d. YEAAAAAAAAAAAAHHHH!
 - e. I LIKE CHICKS WITH DICKS
 - f. Let me out da Heritage, I’m locked in
 - g. Me got to Learning Me Something
 - h. RUSTY DUSTY DONUTS
 - i. OH MY KNEE

- j. RRRRRROOT BEER
- k. JAKE TRIED TO HOLD ME HAND
- l. BUB (LIGHT BULB)
- m. HAM SPRING
- n. NO WAY

40. The Union alleged that the comments on the whiteboard were made to belittle and mock Downey because of the way that he spoke as a Black man. The entries above contained references to two of Downey's injuries, pronunciations in his manner of speaking, and other things that Downey had said in the workplace that the author(s) wished to ridicule. The Union alleged that this list was the next in a series of continuing attempts to ridicule Downey and is consistent with the radio comments.
41. Downey testified that he felt targeted, singled out, and embarrassed by the comments on the list. No such list or similar list was ever made or put up in reference to any other employee. Downey was the only Black labourer on site.
42. Langdon firstly testified that the list was not his idea. It contained entries made by a number of different people. He said it did not contain any of his writing and that he did not recall how long it remained up; he said that it could have been up for as long as four months.
43. During his cross examination, however, Langdon admitted that he had started the list himself, and given it the heading. He then testified that he did not know that others would write things under the heading that he had created. He again said that he did not make any entries on the list. There is a striking similarity between the handwriting of the title of the list which he wrote, and the handwriting of some of the entries on the list.
44. Langdon was untruthful in his testimony about the list. I have found that he not only started the list, but also made entries on it. In my view it was a complete falsehood for him to testify that he did not expect anyone to make any entries on the list after he had created and titled the list "Shit Darryl Says". The list was clearly an attempt to isolate and belittle Downey and an open invitation to all to join in the mockery and add their own examples to the list. I have concluded that the entries were intended to make fun of Downey. Some of that mockery was specifically directed at him as a Black man.
45. Langdon was the Labourer Foreman and chose to foment and participate in this activity that mocked Downey as a Black man. His actions were not teasing. He admitted

that the entries on the list were an attempt to make fun of the way Downey spoke. He denied that it had anything to do with the fact that Downey is Black. I do not believe that Langdon was telling the truth in making that statement. He was untruthful about the list. I have also found him to be untruthful about his comments over the radio. Both are consistent with a pattern of his misconduct towards Downey.

46. Langdon represented the first level of managerial authority for the labourers working at Clark. He not only allowed mockery and belittling of Downey when he did not take down the offensive list, he actually created the list, and effectively encouraged other employees to add to it.
47. Millican saw the “Darryl Says List” in the labourer’s lunchroom. He testified that he could not remember what was written on the list. Remarkably, he did, however, maintain that the list did not “target” Downey; according to him, it merely was a neutral list of things Downey said.
48. Stevens did not give any evidence, even though he was the Project Superintendent and had regular access to the labourer’s lunchroom where the list was on display. I conclude that he knew that the Darryl Says list hung there since it was in plain sight, and was there for an extended period. He did not do anything to remove it; he thereby participated in the discrimination against Downey.

Management Monitoring of Radios

49. The Union alleged that representatives of the management of Clark condoned the conduct of its employees who made discriminatory comments about Downey on the radio.
50. The Union further alleged that Clark is responsible for that conduct, in that Langdon not only neglected to take steps to bring that conduct to an end, but he was also directly involved in the impugned conduct.
51. Millican gave testimony that he did not know about such conduct. He was involved with a number of Clark construction sites, and did not monitor the labourers channel when he was on site at Bloor. He stated that he never heard any of the discriminatory comments on the radio.
52. Langdon on the other hand, not only heard the comments, he made some of them.

53. Since Stevens, the Project Superintendent for Bloor Street, did not testify, there was no evidence from him on the issue of whether he also heard the comments on the radio, and if he did, what he did to curtail them. In the absence of any testimony from him, I am prepared to conclude that he, as a regular on-site representative of Clark, heard the comments, and did nothing about them. As previously indicated both Stevens and Langdon were part of the management team with responsibility for the labourers; they both reported to Millican.

The Uncle Incident

54. In the fall of 2019, when Downey was emerging from the hole at the end of his work day, he received a message on the radio from Sirrett that “your uncle is here”.
55. When he got to ground level, Downey observed a black man across the street from the Bloor site. The Black man was wearing unusually bright coloured clothing.
56. Downey believed that Sirrett only made the comment on the radio because the man was Black. He felt offended because of the insinuation that he was related to the unknown man only because of the colour of his skin.
57. Downey became very angry and confronted Sirrett about what he perceived as the latest in a long list of racist comments from Sirrett. A number of the labourers were present. Downey told Sirrett that he had enough of his anti-Black comments and the next time he heard one, he would physically knock him out. Downey testified that his reaction was a result of pent up frustration and displeasure about discriminatory mistreatment and comments in the workplace from Sirrett and others, over the preceding number of months.
58. Downey left the site and when he returned to work the next day, Langdon tried unsuccessfully to placate him. Downey told Langdon that he was no different than Sirrett, and he therefore refused to talk to him.
59. Two days after the event, Langdon again tried to placate Downey. When he was not successful, Stevens intervened, and asked Downey what the problem was. Downey told Stevens that the workers had a problem with the colour of his skin. Stevens told Downey “that kind of conduct would not be allowed here.”

60. Stevens then called Millican and spoke to him. He then turned the telephone over to Downey to speak to Millican. Millican testified that Stevens never advised him that Downey told him that the workers at Clark did not like the colour of his skin. At the end of that conversation, Millican advised Downey to go home for a day or two and calm down. Downey was given two days off with pay.
61. Millican also told Downey that when he returned to the site, he would meet with him to talk about the situation. Clearly these events were significant enough to involve Clark's entire supervisory team. I have found that Millican knew or should have known that he was dealing with a situation that had racial connotations when he sent Downey home to cool off. During his testimony, Millican said that he did not know anything about any of the Downey allegations until he was advised about them in the context of this arbitration proceeding. He maintained that he merely sent Downey home as a matter of safety.
62. Millican's testimony that he did not know why Downey was so upset defies credulity. Millican was the General Superintendent and was drawn into the events by his Site Superintendent after his labourer foreman was unable to resolve the situation. It is incomprehensible that he would be called in to deal with Downey on the phone, said that he would follow through with him afterwards, gave Downey two days off with pay, and maintained that he didn't know the nature of the problem.
63. Millican should have known about the racial connotations of the Uncle Incident because he should have either asked his supervisory staff, or have been told by them, why Downey was so upset that it was necessary to give him two days to cool off. The two people reporting to him were Stevens and Langdon, both of whom knew why Downey was so upset. Stevens could have confirmed whether he told Millican about the skin colour comment but he did not testify.
64. Langdon thought the events of Downey's confrontation with Sirrett were significant enough to record in a notebook the day after the Uncle Incident. Those notes were not produced by Clark notwithstanding a number of Production Orders. Some Clark labourers were present for the events described and they also knew what had happened. Millican could have and should have known the details of the entire incident.
65. Millican testified that Downey subsequently refused to talk to him, saying that he only wanted to left alone to do his job. Millican advised Downey that he was prepared to speak to him any time about the matter. Downey testified that Millican did not attempt to speak to him about the incident again.

66. Nothing further was done by anyone at Clark by way of investigation or otherwise, regarding the Uncle Incident, any preceding discriminatory conduct or statements by Sirrett and Langdon personally, or over the radio, or the statement by Downey to Stevens that the workers at Clark did not like the colour of his skin. Millican testified that he didn't do anything because he didn't know there was anything to do. He stated that he thought that the matter had been resolved because Downey did not want to speak with him.
67. Walter de Sousa ("de Sousa"), a labourer, testified that he was present at the time of the outburst described in paragraph 57. He remembered Downey, at that time, stating words to the effect that ... "since you guys do not like me as a Black person". After the event, when he was with Langdon at the front gate at Bloor, de Sousa asked Langdon what had happened to precipitate the outburst. Langdon told him that he and his superiors would be looking into the incident to find out why Downey was so upset.
68. Approximately two weeks after the incident described in paragraph 57, Ruben, the safety representative or consultant, invited de Sousa to the Clark office on Yonge Street and asked him to provide a statement about what he had seen and heard in respect of the outburst. De Sousa provided a statement in his own handwriting, signed it, and gave it to Ruben. He was not given a copy of the statement. The statement was not produced by Clark notwithstanding Production Orders that were issued. Clark did not call testimony from Ruben in these proceedings. There was no testimony about what role, if any, Ruben was to fulfill in respect of his meeting with De Sousa, whether he was investigating, who asked him to become involved, the reasons he became involved, and what happened to the signed statement he was given.
69. Michael De Aguiar ("De Aguiar"), a labourer, also testified that he heard Downey refer to Sirrett as a racist in the outburst that occurred. Following the outburst, De Aguiar spoke to Ruben outside the gate at Bloor. He told Ruben that Downey accused Sirrett of making a racist comment. He was not asked to prepare a written statement for Ruben, nor was there any follow up with him by any supervisory representative of Clark.
70. I accept the truth and accuracy of the testimony of de Sousa and De Aguiar. I find that the outburst by Downey was the culmination of his reaction to the discriminatory comments and conduct to which he had been subjected over a period of time at the Bloor site and those comments and conduct were known to the supervisory employees at Clark.

The Layoff and Failure to Recall

71. Downey and Justin Brown were laid off by Clark on February 19, 2020. They were not recalled.
72. Millican was the General Superintendent and had thirty-six years experience in the construction industry. He testified that once a decision was made that there would be a layoff, that he had exclusive authority to decide which labourers would be affected. Before making those decisions, he testified that he took feedback from his Labour Foreman, his Site Superintendent, and outside contractors.
73. Millican testified that before designating the labourers to be laid off in February, he did an informal ranking of the persons in the labourer pool, and the criteria that he used in the ranking were, skill, attendance, feedback, and ability to work without supervision.
74. Millican testified that Stevens gave him feedback that Downey was one of the poorest performers. As noted many times, Stevens did not testify. Millican also testified that Langdon told him that the poorest performers were Downey, Sirrett, and another labourer from a different site. Langdon, however, testified that he was not consulted by Millican on the issue of Downey's layoff.
75. Millican testified that he ranked Downey and Brown as the lowest in performance and as a result they were chosen for layoff. He issued an email advising that both men were laid off because of a shortage of work. The workers were not told that they had been chosen for layoff because of their poor performance.
76. Subsequently, another labourer layoff decision was made. Sirrett and Carly del Bel were laid off on April 13, 2020. Once again there was an email from Millican advising that the two labourers were laid off because of a shortage of work. They were not recalled.
77. Clark hired four new labourers between March and July, 2020. Millican testified that the four new labourers had been picked on references, following background checks. Four labourers were laid off because they were poor performers. The laid off workers, including Downey, were not told that they would be recalled. Millican testified that the four labourers laid off were the only layoffs in his three years as General Superintendent at Clark.

78. No cogent evidence was adduced by Clark about any shortage of work at Bloor. It is a long term project and in the actual result of the layoffs and hires, there was no reduction in the number of labourers at the site. Clark dismissed four labourers and replaced them with four labourers whom they believed would be better workers. Two of the four, Downey and Sirrett, whom they replaced, were also the principals in many of the discriminatory misconduct allegations, which are the subject of this arbitration.
79. From the time that Sirrett arrived at Bloor, Downey was a target of discrimination in his employment at Clark. His employment was terminated on account of performance or shortage of work. I have found, however, that at least part of the reason for his dismissal was fallout from the discrimination to which Downey had been previously subjected. I have also found that discrimination was known to all of the managerial employees at Clark, including Millican, none of whom took any steps whatsoever to stop that discriminatory conduct or rehabilitate the workplace that had been poisoned for Downey.
80. Downey's layoff was a convenient way of making Clark's "problem" disappear. That "problem" was the continued poisoned workplace environment to which Downey had been, and continued to be, exposed to on a daily basis. Millican, Stevens, and Langdon knew about the problem and Millican was able to make the problem disappear by removing Downey from that workplace on a permanent basis, all in the context of a layoff on account of alleged shortage of work.

LIUNA Zero Tolerance Policy

81. During the course of final argument, Clark attempted to rely upon an excerpt from the website of LIUNA! Central and Eastern Canada. The excerpt is a letter dated July 9, 2020, from Joseph Mancinelli, LIUNA International Vice President and Regional Manager of Central and Eastern Canada, in connection with a zero tolerance on all forms of racism, hate, and bigotry.
82. The Union objected to my consideration of the letter on a number of grounds. I heard argument from the parties on the extent to which, if any, Clark could rely upon the contents of the letter.
83. I did not consider the letter or its contents. The untimely introduction of the letter is prejudicial to the Union. If Clark had wished to introduce the letter as evidence, it should

have attempted to do so during the evidentiary part of the hearing. Notwithstanding the many other objections to admissibility raised by the Union, to allow it into evidence at that late stage of the proceedings would be unfair, because it would effectively deprive the Union of any opportunity to respond to it.

THE STANDARDS

A. The Human Rights Code

84. *Section 5(1) of the Human Rights Code* provides basic protection to persons for equal treatment without discrimination, on a number of grounds, including race and colour, in respect of employment.
85. *Section 5(2) of the Human Rights Code* provides for basic protection for every employee to be free from harassment in the workplace, on a number of grounds including race and colour.
86. I have found that Downey's rights under both of the aforesaid sections of the *Human Rights Code* have been violated. Commencing with the arrival of Sirrett at Bloor, until the time of Downey's layoff in February 2020, he was subjected to discrimination both through unequal treatment and harassment on account of his race and colour.
87. The incidents involving that discrimination include comments on the employee radios that attempted to differentiate and discriminate against Downey on account of how he speaks as a Black man. Those comments also included descriptions of him by reference to the colour of his skin. The comments were made not only by Sirrett, but by Langdon, who was part of the supervisory team at Clark, which directed and controlled Downey's employment.
88. "The Darryl Says" list is an offensive example of Downey being singled out and mocked in the workplace on account of his race and colour. It was posted for all to see on the whiteboard in the lunchroom where the labourers gathered daily. The creation of that list and Clark's acquiescence in not taking steps to remove it, are a blatant example of Downey's unequal treatment on account of his race and colour. No other employee

was subjected to that kind of unequal treatment. It constituted continued harassment on a daily basis while the offensive list was publicly displayed in the lunchroom.

89. The Uncle Incident was the culmination of Downey's frustration at the failure of his employer and its supervisory representatives to recognize and stop the unequal treatment and harassment to which he was being subjected. I have found that Clark knew of the discriminatory treatment and harassment. Langdon, Stevens, Millican, and Ruben knew about such unequal treatment and harassment and did nothing to investigate or stop it. There was a course of conduct by the supervisory representatives of Clark which meet the definition of harassment under the *Human Right Code*. Clark is vicariously liable for the harassment in accordance with *Section 46.3(1) of the Human Rights Code* because its management knew or ought reasonably to have known about the harassment and failed to take appropriate steps to address it.
90. I have found that Clark knew or ought to have known about the violations of the *Human Rights Code* and had a positive obligation to act and respond reasonably. See *Laskowska v Marineland of Canada Inc. 2005 HRTO 30*
91. *Clark's* obligation in respect of the incidents described includes an obligation to properly investigate them, and Clark's failure to investigate constitutes an independent violation of *Section 5(1) of the Human Rights Code*. See *Zambito v. LIUNA Local 183 et al 2015 HRTO 605*.
92. Ultimately, Downey lost his job for reasons tainted by Clark's breaches of the *Human Rights Code*. Downey was not laid off; he was dismissed. The Clark management at Bloor, including Millican, Stevens, and Langdon, found a convenient way to rid themselves of Downey, by purporting to lay him off on the basis of a shortage of work. I have concluded that the dismissal was tainted by the discrimination to which Downey had been previously subjected, and that discrimination was the reason, at least in part, for the dismissal.

B. The Occupational Health and Safety Act

93. *Section 25(2)(h) of OHSA* provides that an employer must take every reasonable precaution to protect a worker.

94. *Section 32.0.7(1)* provides that an employer, in protecting a worker from workplace harassment, must take certain steps including investigation of incidents of workplace harassment, informing an employee of the results of the investigation, and review of the program developed to protect against workplace harassment.
95. I have found that Clark's conduct towards Downey, as described herein, constituted harassment under *OHSa*.
96. Clark did not have any policies with respect to human rights or workplace harassment. Specifically, Clark did not have any policies in respect of either discrimination under *the Human Rights Code* or any policies respecting workplace harassment under *OHSa*. No one at Clark had been trained with respect to either subject.
97. There was no investigation of incidents of workplace harassment which should have otherwise been conducted following at least, the incidents or comments made to Downey in both the workplace and on the radio, the posting of the "Darryl Says" list, and the Uncle Incident. There was no procedure with respect to either filing or investigating complaints regarding incidents of workplace harassment. I have found that Clark breached its obligation under both *Section 25(2)(h)* and *32.0.7(1)* of *OHSa*.

C. The Collective Agreement

98. The substantive rights and obligations of *the Human Rights Code* and *OHSa* are incorporated into the collective agreement and are enforceable in this arbitration proceeding. See *Parry Sound (District) Welfare Administration Board v. O.P.S.E.U., Local 324 [2003] 2 S.C.R. 157*. In the result, I have full authority to make a determination that the breaches of *the Human Rights Code* and *OHSa*, *supra*, constitute violations of the collective agreement and fall squarely within my jurisdiction.
99. Article 3.01 of the collective agreement provides that a discharge without reasonable cause shall be subject to the grievance procedure contained in the collective agreement.
100. Article 10.02 of the collective agreement provides that a new member (Downey was a new member, as defined) shall be entitled to contest a lay off on the grounds that it has been done in a manner that is arbitrary, discriminatory or in bad faith.

101. I have found that Downey was dismissed without cause and that his dismissal violated the collective agreement because it was arbitrary, discriminatory and conducted in bad faith. His lay off was tantamount to a dismissal and was conducted in a manner that was discriminatory, in contravention of the provisions of both *the Human Rights Code* and the collective agreement.

DISPOSITION

102. On the basis of the foregoing, I make the following declarations:

- a. Clark has breached the provisions of Section 5(1) of the *Human Rights Code* and the collective agreement with respect to employment, by not providing Downey with equal treatment without discrimination on account of race and skin colour.
- b. Clark created a poisoned work environment for Downey, contrary to Section 5(1) of the *Human Rights Code* and the collective agreement;
- c. Clark has breached the provisions of Section 5(2) of the *Human Rights Code* and the collective agreement by harassing Downey in the workplace because of race and colour;
- d. Clark has breached the provisions of Section 5(1) of the *Human Rights Code* by failing to investigate the incidents relating to the breaches of the Human Rights Code;
- e. Clark has breached the provisions of Section 25(2)(h) of *OHS*A and the collective agreement by not taking every precaution reasonable in the circumstances for the protection of its worker, Downey;
- f. Clark has breached the provisions of Section 32.0.7(1) of *OHS*A and the collective agreement by failing to protect Downey from workplace harassment by ensuring that the obligations contained in subsections (a), (b), and (c) of Section 32.0.7(1) of *OHS*A have been complied with;
- g. Clark has violated Section 8 of the *Human Rights Code* and the collective agreement by laying Downey off and failing to recall him;

- h. Clark has violated Articles 3.01 and 10.02 of the collective agreement by laying Downey off without reasonable cause, and that layoff was equivalent to discharging him in a manner that was arbitrary, discriminatory or in bad faith;
- i. Clark has violated Articles 3.01 and 10.02 of the collective agreement by not recalling Downey following the layoff;

103. I shall remain seized in respect of matters relating to any remedy or remedies to be granted in respect of the aforesaid declarations following evidence and argument described in paragraph 6 above.

Dated at Toronto this 18th day of January, 2022

Michael G. Horan, Arbitrator