

IN THE MATTER OF AN ARBITRATION

BETWEEN:

CON-DRAIN COMPANY (1983) LTD.

(the “**Employer**”)

AND:

LABOURERS’ INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 183

(“the “**Union**”)

IN THE MATTER OF:

MK

(Grievance filed on behalf of MK dated November 5, 2020)

ARBITRATOR:

Kevin M. Burkett

APPEARANCES FOR THE EMPLOYER:

Richard J. Charney	- Counsel
Lauren Ditschun	- Counsel

APPEARANCES FOR THE UNION:

John Evans	- General Counsel
Ryan McKeen	- Associate Counsel
Leo Campione	- Sector Coordinator
Jack Ribeiro	- Business Representative

DECISION

The Parties and their Relationship

1. The Employer is a significant contractor in the construction industry in and around the Greater Toronto Area (the “GTA”) and a signatory bound to the Union. The Union, in turn, operates largely but not exclusively in the GTA and surrounding area. The Union is the largest local of the Labourers’ International Union of North America and is the largest construction local union in North America.
2. Both parties are sophisticated players and respected leaders in the construction industry and labour relations.
3. The parties are contractually bound for labour relations purposes to the Greater Toronto Sewer and Watermain Contractors Association (the “GTSWCA”) collective agreement effective from May 1, 2019 to April 30, 2022 and have enjoyed a long and mature collective bargaining relationship which spans over fifty years.
4. While the parties have had disagreements and disputes over the years, they have for the most part enjoyed a sustained period of stable and respectful labour relations. They have a history of working out their differences, without the need to have an arbitrator impose one.
5. These parties, better than most, realize the mutual gains which can be achieved by working collaboratively as opposed to battling one another endlessly through the grievance and arbitration process. That is not to suggest that there have not been differences and even heated debates between them. Rather, they have found a way to rise above the emotion and work together and their mutual success speaks as much about their relationship as it does their resolve.
6. The parties in this case, like how the parties have dealt with their disagreements in the past, have in large measure resolved much of their dispute independently and, in turn, have asked me to incorporate those agreements relating to the factual findings and remedies into this decision, which I do. I was also invited to provide context for the decision and whatever additional commentary I deemed appropriate.

7. The parties recognize, and I commend them both for this, that there is need in the context of this dispute to be part of the collective solution. The parties hope their approach undertaken here may act as a catalyst for future change in the broader construction industry.
8. Much has been said about the construction industry and how in some respects it operates outside the realm of conventional labour law or the reach of arbitrators. That is simply not true and nothing more than an antiquated view of employment in the construction industry. While there are readily discernible differences regarding labour in the construction industry when compared to non-construction or the industrial sector, the fact is that the law applies equally to all employers unless specific statutory exceptions are built into the statutory and regulatory requirements.
9. For our purposes and the purposes of this award, I find that the *Occupational Health and Safety Act* (the “OHS”) and the *Human Rights Code* (the “Code”) apply equally to construction employers. In fact, some would argue that the provisions of the OHS are even more onerous for construction employers than non-construction employers. As for the Code, it applies equally to all employers including construction employers in this Province.

The Dispute Giving Rise to the Grievance

10. This case involves a grievance filed on behalf of a member of the Union who is gay, Muslim, physically disabled and working in the construction industry. The Union claims their member was mistreated and in addition, discriminated against, and harassed by his direct supervisor over a prolonged period of time who was at all times aware of the Grievor’s sexual orientation, physical disability and religion (the “impugned conduct”).
11. It should be noted that while the Grievor now openly identifies his sexual orientation as gay, this was not always the case during his tenure with the Employer. As well, the Grievor’s physical disability, which is known as ectrodactyly, is a congenital disorder which impacts his hands (which is readily apparent) and his feet. Having said that, the Employer had no issues or difficulties with the Grievor’s physical disabilities nor did the Grievor request any workplace accommodations during the period of his employment.
12. For the purposes of this decision, it is not necessary to specifically name the Supervisor responsible for the impugned conduct. In some respects, it would give arguable prominence to the Supervisor by having him mentioned by name and the parties have specifically requested that he not be named in the body of this decision. The parties have also agreed that the Grievor will not be identified by name.
13. The Supervisor has now been terminated for cause. The decision to terminate his employment was made after the Grievor came forward with the allegations of misconduct and after the Employer fully investigated the impugned conduct.

14. Coming forward and raising the allegations which he did, through the Union, could not have been an easy decision for the Grievor. But for him coming forward, none of the positive aspects arising out of this award would have occurred. The Grievor deserves credit for coming forward.
15. There is no dispute that the Employer took the Grievor's claims seriously after receiving the grievance dated November 5, 2020. As it should. The Employer retained experienced and senior legal counsel who then immediately engaged with the Union and their legal counsel. Counsel for the Employer asked for and received detailed particulars shedding additional light on the claims and allegations raised. Those particulars were received on November 19, 2020 and again on December 4, 2020.
16. All parties knew and appreciated readily that the alleged misconduct if proven was, and is, offensive and abhorrent and unmistakably completely unacceptable in any workplace, including within the construction industry.

The Investigation Process

17. The Employer, early in the process, retained the services of a neutral third-party investigator to undertake an independent inquiry into most of the allegations of misconduct. The investigator interviewed no less than fifteen (15) employees. The investigator thereafter reviewed the factual allegations against the statutory back drop and issued a comprehensive report to the Employer.
18. The investigator by all accounts undertook an open and measured approach to the task at hand, which included allowing the Union to participate and assist in some of the investigation process. While the Union was not in attendance for each of the interviews, it was involved and participated in many. This to my mind is an important step because it allows the Union to be heard and participate in the process and more fully and better understand the conclusions and findings reached by the investigator at the end of the day. This is a process that should be encouraged not discouraged.
19. Ultimately, the investigator upheld most, but not all, of the claims made and set out those findings in a comprehensive and well-organized report.
20. With the benefit of the comprehensive findings and conclusions of the investigator, the Employer promptly terminated the Supervisor for cause. Shortly thereafter the Employer advised the Union of its decision and did so in writing.
21. Another key aspect of this case to my mind was the Employer's decision, on a without prejudice basis, to share the investigator's report with Union's legal counsel who could fully review and consider the matter with the Union and Grievor to be satisfied that the process undertaken was fair and neutral and, with respect to the findings so made, reasonable.

22. The decision to share the investigators report with the Union allowed the parties to bridge the gap on most of the facts and find significant common ground. This was the right decision at the end of the day.

Human Rights

23. Human rights and race-based conflicts in the workplace can have a profound effect on the business undertaking and employee morale. These types of conflicts can create much ill will between employers and employees, and the unions which represent those employees.
24. The fact that these sophisticated parties choose to work collaboratively here speaks not only volumes of the integrity of these parties but also illustrates to my mind once again that those in the broader labour relations community can break new ground on the way they approach difficult and complex human rights cases.
25. The human rights issues at play in this case represent what are basic and fundamental human rights that are enshrined in legislation and statutory requirements. The law is focused on creating equality for all in the context of one's employment.
26. In saying this I do not intend to suggest that there is some hierarchy of rights based on the analogous grounds, as they are often referred to, which are enshrined in the Code. There are not.
27. The Code is predicated on equality – not greater or preferential treatment but equal treatment. The Code ensures that in terms of employment all employees are entitled to be treated equally. To put it another way, and all things being equal, no employee should be treated differently or in an unequal manner because of the various analogous grounds set out in the Code.
28. Human rights legislation in Canada enjoys special status within our legal system and certainly in the context of labour law. It has been regarded and referred to as *quasi-constitutional* in nature.

Recent Events

29. Litigation in the context of labour relations, like other forums of litigation, is predicated on an adversarial system of justice. How the adversaries (and the parties) choose to operate within this system of justice is an entirely different issue.
30. I take judicial notice of the recent events occurring throughout North America involving social injustice relating to racism and unequal treatment because of race. How these events will impact labour relations and the grievance and arbitration process in the years to come remains unclear.

31. However, it appears certain that now more so than ever the resulting negative press associated with being on the wrong side of a legal determination in cases such as this may have more serious repercussions now than in the past.
32. It is also worth noting that the collaborative process engaged in here with experienced and knowledgeable legal counsel has also saved much time, effort, and significant costs by getting the parties where they needed to get to quickly and avoiding the short comings and trappings of traditional litigation.
33. To my mind what the parties were able to accomplish here is a hallmark of working together, in difficult circumstances given the issues involved, to achieve a just result that addresses the needs and interests of the process and the parties. That is not to suggest that through the hearing process that there were not difficult issues to overcome or strong positions advanced. There clearly were. Attempts to characterize the misconduct in a particular way to make it appear not as bad as what it was or *vice versa*, was resisted and I encouraged the parties to deal with the facts and to remove the emotion that often accompanies these types of situations and simply deal with “the facts” in a straightforward and dispassionate way.
34. It is not surprising that both parties took some issues with some of the findings of the investigator. I wish to be clear that the points of dispute were isolated and narrow. I encouraged and pressed the parties to avoid trying to cherry pick the findings and deal with all the findings as a package, which ultimately the parties were able to do.

Factual Findings

35. The findings of fact set out below are intentionally focused and succinct, and without editorial comment. That was entirely intentional. The profanity has been neutralized as it does not need to be repeated in the award.
36. The relevant and material factual findings are as follows:
 - a. In June 2016 on the Grievor’s first day of work, the Supervisor asked him in front of a group of co-workers “is your d*** f****d up like your hand?”
 - b. In the summer of 2016, the Supervisor, in front of a group of co-workers physically grabbed the Grievor’s beard with such force that the Grievor’s beard hair was removed.
 - c. On one occasion in the fall or winter of 2016 the Supervisor, in the context of a threat, suggested that he would reveal the Grievor’s sexual orientation to others, which would reasonably include his father.

- d. In the winter of 2017, the Supervisor laughed when the Grievor discovered a model of a sexual position called “the spit” that was constructed by a co-worker.
- e. In March 2017, the Supervisor, while the Grievor was a passenger in his truck, grabbed the Grievor’s head and pushed it towards his crotch. This was done at a time when the Supervisor was greeting one of the Grievor’s co-workers who observed the incident.
- f. In 2016 and 2017 the Supervisor called the Grievor on the telephone and made comments to the Grievor such as: “take your coworkers c**k out of your mouth and let me have a conversation with you” and called his work colleagues names such as “lazy c**t” and “fat f**k”.
- g. In the summer of 2018, while the Grievor was working along side his father the Supervisor said, “hey, if you can take a d**k in your a**, you should be able to push that pipe”.
- h. On one occasion the Supervisor warned the Grievor’s father that his co-worker was Jewish by commenting “he’s Jewish eh” and “don’t want no war of attrition here”.
- i. On various occasions the Supervisor told the Grievor’s father that he “is Hezbollah” and to “go to the Taliban”.
- j. On March 19, 2019 the Supervisor called the Grievor’s uncle and a co-worker “C*****r one and c*****r two” and called them “f*****g idiots”. He then said “That’s the problem with Muslims. We need to nuke those countries... If I hear one more f*****g thing coming from your f*****g Muslim mouth, I’ll send you to f*****g Putin”.
- k. The Supervisor sometimes said the words “fag” or “faggot” at work sites and would use the word “c*****r” when referring to the Grievor’s co-workers. In particular, in response to comments from the Grievor alleging that the Supervisor was discriminating against him because he was gay he responded “I don’t care if you’re a fag”.
- l. In March 2019 the Supervisor, in a discussion with the Grievor’s co-worker, used the word “finocchio” in the presence of the Grievor.
- m. In March 2019, the Supervisor told the Grievor’s uncle that he could not speak Arabic, although Italian is sometimes spoken on the job site.
- n. On December 5, 2019, the Supervisor raised his voice and said to a co-worker “Do not call me again, do not call me again. I’m going to f*****g slap you in the head if you call me again. Like, literally”.

- o. In or around September 2020, as well as several other occasions, the Supervisor told the Grievor that he only had a job because of his father.
- p. During the investigatory meeting on November 3, 2020 the Supervisor became visibly agitated when the Grievor spoke and the Supervisor raised his voice, became red in the face, stood up and charged towards the door of the trailer, which was adjacent to the Grievor. Another member of management who was also at the meeting physically stopped the Supervisor and sat him down so the meeting could continue.

November 3, 2020 Meeting

- 37. This was one point of dispute which was not fully dealt by the investigator. I will however not duplicate the investigators collateral findings about the meeting as noted above. I will deal with the content of the meeting not otherwise dealt with.
- 38. On October 29, 2020, the Grievor notified members of management that he had been a victim of discrimination and harassment and sought to make a formal complaint to the Employer against his Supervisor.
- 39. A meeting was scheduled for November 3, 2020 at the Employer's offices to deal with the Grievor's discrimination and harassment complaint.
- 40. Between October 29, 2020 and November 3, 2020, the Grievor continued to work under the direction and control of the Supervisor.
- 41. The meeting of November 3, 2020 was by all accounts not very productive. Such meeting was attended by Business Representatives for the Union, members of management for the Employer, as well as the Grievor and the Supervisor. Unfortunately, no one objected to the Grievor and Supervisor being present in the same meeting, the purpose of which was to inquire into the Grievor's complaint.
- 42. At one point a discussion, unrelated to the Grievor's complaint, occurred where the Grievor was informed by members of management that he would not likely be recalled to work after the seasonal winter layoff.
- 43. On November 3, 2020, immediately following the meeting, the Grievor resigned from his employment.
- 44. The Employer to its credit now acknowledges and I so find that the Supervisor should not have continued to oversee the work of the Grievor leading up to the November 3, 2020 meeting, that the Supervisor should not have attended the meeting on November 3, 2020 and it was improper to advise the Grievor at this meeting that he was not likely to be recalled after the seasonal winter layoff.

Statutory and Policy Considerations

45. The following provisions relate to the relevant statutory and policy considerations in the context of this case.

a) *Occupational Health and Safety Act, RSO 1990, c. O.1*

“*workplace harassment*” means,

- (a) engaging in a course of vexatious comment or conduct against a worker in a workplace that is known or ought reasonably to be known to be unwelcome, or
- (b) workplace sexual harassment.

“*workplace sexual harassment*” means,

- (a) engaging in a course of vexatious comment or conduct against a worker in a workplace because of sex, sexual orientation, gender identity or gender expression, where the course of comment or conduct is known or ought reasonably to be known to be unwelcome, or
- (b) making a sexual solicitation or advance where the person making the solicitation or advance is in a position to confer, grant or deny a benefit or advancement to the worker and the person knows or ought reasonably to know that the solicitation or advance is unwelcome.

“*workplace violence*” means,

- (a) the exercise of physical force by a person against a worker, in a workplace, that causes or could cause physical injury to the worker,
- (b) an attempt to exercise physical force against a worker, in a workplace, that could cause physical injury to the worker,
- (c) a statement or behaviour that it is reasonable for a worker to interpret as a threat to exercise physical force against the worker, in a workplace, that could cause physical injury to the worker.

1(4) A reasonable action taken by an employer or supervisor relating to the management and direction of workers or the workplace is not workplace harassment.

b) *Human Rights Code, RSO 1990, c. H.19*

5 (1) Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, record of offences, marital status, family status or disability.

(2) Every person who is an employee has a right to freedom from harassment in the workplace by the employer or agent of the employer or by another

employee because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sexual orientation, gender identity, gender expression, age, record of offences, marital status, family status or disability.

...

7 (2) Every person who is an employee has a right to freedom from harassment in the workplace because of sex, sexual orientation, gender identity or gender expression by his or her employer or agent of the employer or by another employee.

c) *Con-Drain's Prevention of Violence and Harassment Policy*

Workplace and Sexual harassment:

- (a) engaging in a course of vexatious comment or conduct against a worker in a workplace that is known or ought reasonably to be known to be unwelcome,
- (b) engaging in a course of vexatious comment or conduct against a worker in a workplace because of sex, sexual orientation, gender identity or gender expression, where the course of comment or conduct is known or ought reasonably to be known to be unwelcome,
- (c) making a sexual solicitation or advance where the person making the solicitation or advance is in a position to confer, grant or deny a benefit or advancement to the worker and the person knows or ought reasonably to know that the solicitation or advance is unwelcome.

Workplace Violence:

- (a) the exercise of physical force by a person against a worker, in a workplace, that causes or could cause physical injury to the worker,
- (b) an attempt to exercise physical force against a worker, in a workplace, that could cause physical injury to the worker,
- (c) a statement or behaviour that it is reasonable for a worker to interpret as a threat to exercise physical force against the worker, in a workplace, that could cause physical injury to the worker.

Reasonable action taken by an employer or supervisor relating to the management and direction of workers or the workplace is not workplace harassment (e.g. includes such things as scheduling, annual performance review and corrective actions)

Violations and Orders

46. The following relief is ordered by me and incorporated into this award on consent of the parties.

47. The Employer accepts for the purposes of this award that it is liable and/or vicariously liable for the acts of its Supervisor confirmed in the factual findings and additional findings relating to the November 3, 2020 meeting set out above.
48. I make the following declarations:
- a. I declare that the Employer has violated, in whole or in part, based on the above findings and additional findings relating to the November 3, 2020 meeting, the OHSA, and in particular section 25(2) which requires that "...an employer shall..." "(h) take every precaution reasonable in the circumstances for the protection of a worker".
 - b. I declare that the Employer has violated, in whole or in part, based on the above findings and additional findings relating to the November 3, 2020 meeting, the Code and in particular sections 5(1), 5(2) and 7(2).
 - c. I declare that the Employer has violated, in whole or in part, based on the above findings and additional findings relating to the November 3, 2020 meeting, the Employer's own Prevention of Violence and Harassment Policy and the GTSWCA collective agreement.
49. Based on the above noted violations, I hereby order that the Employer pay to the Grievor as human rights damages the amount of \$50,000 forthwith and no later than 30 days from the date of this award. Such payment shall be by cheque and provided to the Union for delivery to the Grievor.
50. In addition, I make the following systemic remedies:
- a. The Employer is ordered to forthwith conduct a review of its Prevention of Violence and Harassment Policy (the "**Policy**"). Such Policy will be amended to include a section on human rights. Specifically, the Policy will outline the Employer's commitment to upholding and enforcing the Code, explain what is or may be unacceptable conduct in the workplace and encourage employees who are victims of or witness to alleged violations of the Code to report these violations to the Employer forthwith, and will outline an appropriate complaint procedure for employees to be followed.
 - b. The Employer is further ordered at the Employer's expense, to mandate that all employees who are represented by the Union engage in appropriate training, for not less than two (2) hours on paid time, regarding workplace harassment and discrimination, with a focus on the prohibited grounds enumerated in the Code, complaint procedures and the need to come forward if they witness any alleged violations.

- c. The Employer is further ordered at the Employer's expense to mandate that all management staff engage in appropriate training regarding workplace harassment and discrimination, with a focus on the prohibited grounds enumerated in the Code and the legal obligations of all management to protect the rights of employees and to take every reasonable precaution to ensure the safety of the work force at the Employer's expense, among other things.
 - d. The Employer is further ordered to include a section on human rights in its employee newsletter, in a prominent location, which will summarize the Policy as it relates to workplace harassment, discrimination, and human rights, encourage employees to report any violations of the Code to the Employer and outline the procedure to report Code based violations.
 - e. The Employer is further ordered to review and monitor its workforce (both bargaining unit members and otherwise) to ensure compliance with all Code and OHS requirements.
 - f. The Employer and any of its subsidiaries and/or joint ventures which the Employer or any of its subsidiaries actively participate are further ordered not to employ the Supervisor as an employee or engage the Supervisor as an independent contractor.
51. I further direct that the Employer, through its legal counsel, confirm in writing to counsel for the Union how and when it has complied with the directions and orders directed herein.
52. I shall remain seized to deal with any issues arising out of the administration, application, interpretation or enforcement of the terms and conditions set out in this Award.

Dated at Toronto this 15th day of June, 2021

"Kevin Burkett"

KEVIN BURKETT