IN THE MATTER OF THE ONTARIO *LABOUR RELATIONS ACT, 1995*

-and-

IN THE MATTER OF AN ARBITRATION

BETWEEN:

PRESTRESSED SYSTEMS INCORPORATED
- the Employer

-and-

LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 625
- the Union

AND IN THE MATTER of a grievance of Robert Venosa

Arbitrator: Howard Snow

Appearances:

On behalf of the Employer:

Jean Leslie Marentette	- Counsel
Chris Davidson	- Production Manager

On behalf of the Union:

Stephen Krashinsky	- Counsel
Walter Dunn	- Business Manager
William Moreland	- Business Representative
Robert Venosa	- Grievor

Hearing held May 17 and July 18, 2005, in Windsor, Ontario.

AWARD

I. INTRODUCTION

This grievance concerns the issue of harassment under the *Human Rights Code* and, in particular, whether a single unwelcome comment can constitute harassment under the *Code*.

As arbitrators have the authority under the *Labour Relations Act, 1995,* to interpret and apply human rights statutes, this complaint of a violation of the *Code* was pursued to arbitration.

Since the grievance was filed out of time under the collective agreement, the award also addresses the issue of the extension of the time limits.

II. THE EVIDENCE

Prestressed Systems Incorporated, the Employer, makes concrete products in Windsor for use in the construction of parking garages, apartment buildings, hotels, etc.

The grievor is Robert Venosa who is of Italian background, having moved to Canada in 1973. He has worked for the Employer for some 20 years and at the relevant time he worked as a "batcher" which required him to prepare the appropriate concrete mix for the product being made.

The Employer's production manager is Chris Davidson. He has worked for the Employer for approximately 18 years and had been production manager for about 10 years. Two supervisors work under Mr. Davidson and they usually deal with the grievor and give him the orders for the concrete.

The grievor's work location is noisy and is in a different building from Mr. Davidson and the

supervisors. The orders for concrete are provided to the grievor over a two way radio system. In addition to the grievor, Mr. Davidson, the two supervisors, the finisher, the quality control technician and the re-bar worker all have radios. Comments made over the two way radio may be heard by any of the above, or by anyone near a radio.

April 2, 2004, Mr. Davidson attempted to order concrete from the grievor, however there were communication problems. Mr. Davidson thought he had ordered concrete but when he later called to check on his order, the grievor advised him that he had not placed an order or at least that the grievor had not heard the order.

The grievor testified that he routinely responded "10-4" when he received an order and in that way he said the person requesting the concrete knew he had heard the order. The grievor said that if one of the supervisors did not get a 10-4 they would continue calling him until they were sure that the grievor had the order and the grievor gave the 10-4.

The grievor said that when Mr. Davidson called to check on his concrete order he first thought Mr. Davidson was joking. The grievor said that after further discussion Mr. Davidson became frustrated and yelled at him over the radio: "You fucking immigrant, you want me to come up there and teach you how to speak English?"

The grievor was very upset by this comment and he initially wanted to confront Mr. Davidson, but he was concerned he might do something inappropriate and instead remained at work.

The grievor was concerned that he would be unable to effectively pursue the matter unless someone else who heard the comment over the radio supported his recollection . When Tino Angolino, one of the lead hands, advised the grievor that he had heard Mr. Davidson's comment, the grievor asked Mr. Angolino if he would back him in a complaint. Mr.

Angolino told the grievor that he should first ask Mr. Davidson for an apology. If no apology was made, Mr. Angolino said he would support the grievor. The grievor testified that he felt that he should not have to ask for an apology as Mr. Davidson should have known he was in the wrong.

The next day, April 3, the grievor spoke to Nino Prepolec, his Union steward. They agreed that Mr. Prepolec would investigate the matter before filing a grievance.

Mr. Prepolec testified that he spoke to Mr. Angolino who reported hearing the comment but was unwilling to give a written statement. Mr. Prepolec said he also spoke to the two supervisors who said they had heard the comment.

Mr. Prepolec then talked with Mr. Davidson about a week after the comment. The conversation was brief and took place in passing outside the plant. Mr. Prepolec said he advised Mr. Davidson that the grievor was very upset about the incident on the radio and that Mr. Davidson replied that he was going to apologize to the grievor when he had time. Mr. Prepolec said he did not specify which incident he was talking about but he believed Mr. Davidson knew what he was referring to because the incident was well known at work. Mr. Prepolec said that Mr. Davidson did not seek clarification as to which incident Mr. Prepolec was discussing.

Mr. Prepolec said he next spoke to the grievor and told him Mr. Davidson "would be up to apologize." Mr. Prepolec said that the grievor indicated that would be fine.

The next day when Mr. Prepolec learned that Mr. Davidson had not yet apologized, Mr. Prepolec called Mr. Davidson to inquire about the apology and Mr. Davidson said it had slipped his mind. Mr. Prepolec said he left it at that and waited for the apology. When none came, he referred the matter to the Union Local. This grievance was filed May 5, 2004.

Before the grievance was filed there was an April 27 meeting with Mr. Davidson, Mr. Prepolec and the grievor. The meeting took place after Mr. Prepolec advised Mr. Davidson on April 26 that the grievor wanted to file a human rights complaint. Mr. Davidson made notes of that meeting and his notes, his recollection and the recollection of the other two participants were generally consistent. It was clear at the meeting that Mr. Davidson asserted that the comment was not intended to offend, that he had just been kidding, and that Mr. Davidson apologized to the grievor and offered to put his apology in writing. However, the grievor indicated an apology would not be sufficient and he further advised that he wanted a promise that the "white hats" would leave him alone. By this comment the grievor was indicating that he wanted to be free from supervision at work. Mr. Davidson responded he could not make such a promise and the meeting ended.

Mr. Davidson testified that he had no memory of making the comment April 2 and no memory of any earlier conversations with Mr. Prepolec regarding an apology. He testified that he was still willing to apologize in writing.

The parties agreed that if the two supervisors were called they would testify that they heard the comment and that they had told Mr. Prepolec they had heard it.

Finally, the grievor testified that in late 2001 he was transferred in a discriminatory manner which resulted in a reduction in his income. However, the evidence of the grievor's income during that period indicated that he had suffered no reduction.

III. PROVISIONS OF THE COLLECTIVE AGREEMENT AND STATUTES

The following is the key provision of the parties' 2002-2004 collective agreement:

ARTICLE 6
GRIEVANCE PROCEDURE

Should any difference arise . . . as to the interpretation, application, administration or alleged violation of the provisions of this agreement, an earnest effort shall be made to settle the same. Any grievance not filed and presented to management within the time frames specified below is forfeited/lost by the Employee and union. . . .

STEP ONE - The grievance shall be submitted in writing to the management within two (2) working days after the cause or first knowledge of the issue but in any event not longer than 10 days after the incident of grievance . . .

The following are the key sections of the *Human Rights Code:*

PART I
FREEDOM FROM DISCRIMINATION

. . .

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, . . .

(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, . . .

PART II
INTERPRETATION AND APPLICATION

10 (1) In Part I and in this Part,

. . .

"harassment" means engaging in a course of vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome;

. . .

The following are the key sections of the *Labour Relations Act, 1995:*

48 (12) An arbitrator . . . has power,

. . .

(j) to interpret and apply human rights . . . statutes . . .

48 (16) . . . an arbitrator . . . may extend the time for the taking of any step in the grievance procedure under a collective agreement, despite the expiration of time, where the arbitrator . . . is satisfied that there are reasonable grounds for the extension and that the opposite party will not be substantially prejudiced by the extension.

IV. UNION POSITION

The Union submitted that I should conclude Mr. Davidson had made the comment "You fucking immigrant, you want me to come up there and teach you how to speak English?" Moreover, the Union asked that I find Mr. Davidson recalled making the comment as he asserted he had just been kidding.

The Union submitted that the comment was a serious matter as Mr. Davidson was the production manager responsible for getting the product made. He should be held to a high standard of conduct.

The comment would be inappropriate even if it had been made in private but in this case the comment was made over the radio system and heard by several other persons. In many workplaces such a comment would then routinely be communicated throughout the workplace, and it seemed many of the Employer's workers were aware of this incident. This comment was insulting and demeaning to the grievor, attacking him on the basis of his immigrant status.

The Union said that a clear signal should be sent that this comment was inappropriate.

As for the timing of the grievance, the Union asked that I find the steward, Mr. Prepolec, spoke to Mr. Davidson on two occasions, Mr. Prepolec hoped that an apology would be made but, although there was mention that Mr. Davidson would go the grievor and apologize, Mr. Davidson did not do so. Given the talk of an apology, the Union said it was reasonable for the Union to have delayed filing a grievance. In addition, the Union said the Employer was not prejudiced by the delay in filing a grievance. The Union asked that I extend the time for filing a grievance under Section 48(16) of the *Labour Relations Act, 1995*.

The Union sought the following remedies:

1. An order that Mr. Davidson provide a written apology.
2. An order that the Employer not harass, abuse, threaten, yell at, demean, insult or otherwise belittle and abuse the grievor.
3. An order that Mr. Davidson attend an anger management course.
4. An order that the Employer discipline Mr. Davidson with a one week unpaid suspension.
5. An order that points 1-4 above be done in a disciplinary meeting which the Union and the grievor could attend.
6. An award of $5,000 damages for the grievor.

The Union relied upon the following authorities: *Re Clarendon Foundation and Ontario Public Service Employees Union, Local 593* (2000), 91 L.A.C. (4th) 105 (Sarra); *Re Oshawa/Clarington Association for Community Living and Canadian Union of Public Employees, Local 2936-02* (2003), 121 L.A.C. (4th) 333 (Simmons); *Re The Crown in right of Ontario (Ministry of Correctional Services) and Ontario Public Service Employees Union* (1994), 42 L.A.C. (4th) 342 (Dissanayake); *Teamsters Canada, Local 419 and Tenaquip Ltd.* (October 23, 2002) unreported (E. Newman); *Re Toronto Transit Commission and Amalgamated Transit Union* (2004), 132 L.A.C. (4th) 225 (Shime); and *Re Tyee Village Hotel and Hotel, Restaurant & Culinary Employees & Bartenders Union, Local 40* (1999), 81 L.A.C. (4th) 365 (Albertini).

V. EMPLOYER POSITION

The Employer said the grievance was out of time. The collective agreement contained a mandatory time limit of two working days for filing a grievance in writing and further indicated that a failure to meet the time limit meant that the grievance was lost. The time from the alleged comment on April 2 until the written grievance was filed May 5 was well

beyond the two day limit and therefore the grievance was lost.

The first time the issue was clearly raised was April 26, the day before the meeting attended by Mr. Davidson, Mr. Prepolec and the grievor. If I accepted that Mr. Prepolec had raised the matter orally before that, Mr. Prepolec acknowledged that no details were provided until April 26 or 27.

Moreover, although the Employer denied the grievance May 10, the Union did not seek arbitration until July 29. While the collective agreement does not include a specific time limit for the referral to arbitration, the Employer asked that I infer that the referral must be done in reasonable time, that I conclude the Union did not refer the matter to arbitration within a reasonable time, and that the grievance was thus abandoned.

The Employer said that it would be prejudiced by an extension of the time limits as Mr. Davidson could not recall making the comment. Had the Union met the time limit it would be more likely that Mr. Davidson would have a better memory of the day and of the alleged comment.

In the alternative, if the time limit was extended the Employer noted that there was no violation alleged of the collective agreement. The violation could only be of the *Human Rights Code*. The Employer said there was no discrimination under Section 5(1). There was at most a single isolated incident and the Employer submitted that one comment does not amount to harassment under Section 5(2).

If the grievance was well founded, no remedy would be needed. Assuming the comment had been made, it appeared to have been made either out of frustration or as a joke, not as an attempt to injure or harm the grievor and, as soon as the matter was clearly brought to his attention in the April 27 meeting, Mr. Davidson apologized and offered to put the apology

in writing. The offer of a written apology was, in effect, rejected by the grievor who wanted instead a promise of no supervision. Mr. Davidson could not agree to this new demand. The grievor had initially sought only an apology and any additional remedy now would be a reward for the grievor's attempt to extort something further.

As for the remedies sought by the Union, the Employer said I did not have jurisdiction to direct the discipline of Mr. Davidson.

The Employer asked that the grievance be dismissed.

The Employer relied upon the following authorities: *Parsonage v. Canadian Tire Corp.* (1995), 28 C.H.R.R. D/42 (House); *Re Petro-Canada Lubricants Centre and Communications, Energy and Paperworkers Union, Local 593* (2000), 89 L.A.C. (4th) 378 (Kirkwood); and *Re Canadian Union of Public Employees and Office and Professional Employees' International Union, Local 491* (1982), 4 L.A.C. (3d) 385 (Swinton).

VI. CONCLUSIONS

There are several factual issues to be clarified although none of those factual matters were contested. First, I conclude that Mr. Davidson did yell at the grievor over the radio with the comment "You fucking immigrant, you want me to come up there and teach you how to speak English?", that the comment was upsetting to the grievor, and that the comment was heard by others in the workplace. Secondly, I accept that soon after the comment Mr. Prepolec twice raised the matter with Mr. Davidson, understood that Mr. Davidson would apologize, and that Mr. Prepolec anticipated that an apology would end the matter. Thirdly, I accept that Mr. Davidson's apology at the meeting was a sincere apology and that his offer of a written apology was also sincere.

I first consider whether the grievance was out of time. The collective agreement requires a written grievance to be filed within 2 working days. This did not happen here and under the agreement the grievance was filed out of time. The collective agreement states that if a grievance is not filed on time it is "forfeited/lost".

However, many collective agreements contain short time limits and over the years there has been dissatisfaction in the labour relations community with the impact of missed time limits such as this. As a result, the *Labour Relations Act* was amended some years ago to allow arbitrators to relieve against the impact of missed time limits by extending the time for taking steps in the grievance procedure (see Section 48(16) *supra*). This is a discretionary provision and requires the arbitrator to consider (1) whether there are reasonable grounds for the extension, and (2) whether the other side will be "substantially prejudiced."

On the first issue, I note that Mr. Prepolec had raised the matter with Mr. Davidson soon after the event and understood that Mr. Davidson was going to apologize. In my view, it was reasonable for Mr. Prepolec to allow Mr. Davidson some time to make his apology. He then spoke to Mr. Davidson and a meeting was held April 27 at which time Mr. Davidson apologized. I conclude that the Union through Mr. Prepolec acted responsibly through this period. As the Union had raised its concerns and acted responsibly, I find that there are reasonable grounds to extend the time limit for the Union to file this grievance.

The second issue is will the Employer be substantially prejudiced by such an extension. While Mr. Davidson testified he did not recall the incident, that alone does not lead to substantial prejudice. It is possible that he might not have been able to recall the incident two working days after the event, so that his poor memory may well be unrelated to the delay in filing. Moreover, assuming that the grievance had been filed at a time when Mr. Davidson could recall the comment, I am unable to think of anything he might have been able to say which would so influence the outcome that it would amount to "substantial prejudice" if I

now extend the time limit for filing the grievance.

As a result, I exercise my discretion to extend the time limit in the collective agreement for filing the grievance. The grievance is timely.

As an aside, although neither party made a submission on this point and therefore I place no reliance upon it, because of the six months given to bring a complaint under the *Human Rights Code*, I would be more inclined to extend time limits in such a matter than I might be in a case which alleged a violation of the parties' collective agreement itself.

The Employer also submitted that the grievance had been abandoned because the Union took some 2.5 months (i.e. May 10 to July 29) to refer it to arbitration. In the absence of any time limit in the collective agreement for referring the grievance to arbitration, I accept that the Union must refer the grievance within a reasonable length of time. However I do not think 2.5 months was beyond a reasonable length of time and I cannot conclude that the grievance was abandoned by the Union.

I next turn to whether Mr. Davidson's comment violated the *Code.*

There was no evidence of discrimination in respect to the grievor's employment in the sense that his job, pay, hours of work, vacation, benefits, etc., were all unaffected and I conclude that there was no violation of Section 5(1).

I have more difficulty with the issue of harassment under Section 5(2). I have included the definition of harassment from the *Code* above. There are several aspects of that definition.

Harassment requires that the comment is "known or ought reasonably to be known to be unwelcome." In this case I have no trouble in finding that Mr. Davidson's comment was

known, or ought reasonably to have been known, to be unwelcome. I cannot think anyone in a position such as the grievor would welcome such a comment and I do not believe that Mr. Davidson, or any reasonable person in his position, would think such a comment would be welcome.

Moreover, I find that the comment was disturbing or annoying and therefore "vexatious."

But the Employer said it was a one time comment and because the definition requires a "course" of comment, this single comment cannot amount to harassment.

While I accept that there are some situations where it is only following the first comment that a person can be expected to know that the comment is unwelcome, and thus it is only after more than one comment that it becomes harassment, this is not such a case.

As a general point, each word in a statute must be given meaning. However, the use of the word "course" to describe comment or conduct is uncommon. I accept that the word could have the meaning urged by the Employer, but I do not think that was the legislators' intention. While I accept that often the vexatious comment or conduct will need to be repeated before it is harassment, and that repeated comments or conduct could be said to be a "course" of comment or conduct, I have great difficulty in thinking of any reason why the legislators would have intended to require that a comment such as this, which so obviously referred to the grievor's ancestry, place of origin and ethnic origin, and which was vexatious and unwelcome, would have to be repeated to amount to harassment under the *Code*. Given the purposes of the *Code,* I can think of no reason why the legislators would have intended that in employment every employee would be allowed to make one vexatious comment of a racist or ethnic nature to every fellow employee and, only after the second or third such unwelcome and vexatious comment, would it be considered improper.

Instead I think the use of "course" is simply intended to indicate that, in examining comment or conduct, it is permissible to examine otherwise isolated comments or conduct occurring over a period of time; that is, each comment or conduct need not be vexatious and unwelcome on its own, but rather the entirety of the comment or conduct, that is the "course", must be viewed. Adjudicators are directed to look at and assess the totality, or "course", of comment or conduct, whether that be one comment or several. In summary, I believe that the legislators intended that a single comment could be harassment.

I declare that Mr. Davidson's comment to the grievor "You fucking immigrant, you want me to come up there and teach you how to speak English?" was harassment and a violation of the *Human Rights Code*.

I note that Mr. Davidson apologized orally for the comment April 27, 2004, and that he offered to put the apology in writing. Mr. Davidson testified before me that he was still willing to put his apology in writing.

I find this is an appropriate case for a written apology. I direct Mr. Davidson to apologize in writing to the grievor and also provide a copy to the Union.

While I have decided a written apology is appropriate, I see no need for a general order that the Employer not "harass, abuse, threaten, yell at, demean, insult or otherwise belittle and abuse the grievor." Such a general order is not needed to remedy this wrong. In addition, it is not clear to me that such a statement would be an accurate reflection of the Employer's obligations and it is not my role to create new general obligations. I therefore make no order along the line requested by the Union here.

I note that the grievor has worked for the Employer for some 20 years. Mr. Davidson has worked for the Employer for some 18 years and been production manager for 10 years. Thus

the grievor has worked under Mr. Davidson's direction for at least 10 years and they have worked for the same Employer for 18 years. One unacceptable comment should not be used now to re-write their entire working relationship. The grievor would have accepted an apology if it had been offered immediately, but it was not forthcoming. As time passed, the grievor wanted more in order to resolve the matter. In my view, the grievor's initial view of the matter was more realistic. While I acknowledge the grievor's rising frustrations from the delay in getting a resolution, it was his grievance over the comment, not the length of time it took for the matter to be processed, which was referred to me for resolution.

I turn now to the other remedies sought by the Union.

While I have considered the possibility of an award of damages, I do not find it appropriate in this case. This is not a monetary dispute. An award of money appears to be more a matter of punishment than a measure of compensation.

Some of the other remedies sought by the Union are unusual remedies and should be approached with caution. I note that the Employer submitted that I did not have authority to direct the discipline of Mr. Davidson.

Over the years there have been differences of opinion on the remedial authority of arbitrators regarding, for example, damages, reinstatement, rectification, and estoppel, but they have generally been resolved in favour of arbitrators having the authority which is needed to finally resolve the difference brought before them. As a general comment, I am of the view that, as arbitrator, I have that authority which is needed to remedy any wrong which I might find. But remedies should be considered on the basis of what is needed to resolve the difference. Once an arbitrator has decided what is needed to resolve the violation, only then might it be necessary to consider any law on the issue of the arbitrator's authority to adopt a particular remedy.

In this case I conclude that my declaration of a violation of the *Code,* Mr. Davidson's oral apology in April 2004, and my order that Mr. Davidson provide a written apology to the grievor with a copy to the Union, taken together, are a reasonable remedy for this "one off" comment made after a lengthy work relationship. I am not persuaded of the need for Mr. Davidson to be suspended, nor for Mr. Davidson to be required to take an anger management course, nor for the written apology to be provided in a meeting, and I decline to order any of those remedies in this case.

In summary, the grievance is allowed as indicated above. I remain seised to deal with any issues which may arise in the implementation of this award.

Dated in London, Ontario, this 16th day of September, 2005.

Howard Snow, Arbitrator