In the Matter of an Arbitration
Under s.48 of the *Labour Relations Act, 1995*

BETWEEN:

REDPATH SUGAR LTD.

(The "Employer")

And

UNIFOR, LOCAL 2003

(The "Union")

(Grievance of Jovan Mojsoski)

Before: Eli A. Gedalof, Sole Arbitrator

APPEARANCES

For the Employer

Stephen Shore, Counsel, Ogletree Deakins International LLP
George Carter, Assistant Refinery Manager

For the Union

Denis Ellickson, Counsel, CaleyWray LLP
Ross Laing, Chief Steward
Phil Barbara, Alternate Chief Steward
Jovan Mojsoski, Grievor
Melina Mojsoski, Observer

AWARD

INTRODUCTION

1. This is a grievance arising from the termination from employment of the grievor, Jovan Mojsoski (the "grievor"), filed under the collective agreement between Redpath Sugar Ltd. (the "Employer") and UNIFOR, Local 2003 (the "Union"). Prior to his termination, the grievor was employed in the packaging department at the Employer's sugar refining and packaging plant. The matter was duly referred to me for arbitration, and was heard over a combination of 8 days and evenings of evidence and argument.

2. The grievor's employment was terminated on July 29, 2016 for unsatisfactory job performance, as a result of an incident that took place on July 22, 2016. In particular, the grievor is alleged to have improperly conducted quality control weight checks on the bags of sugar he was filling. At that time the grievor was subject to the terms of a last chance agreement, signed on July 15, 2016, which provided for his discharge in the event he was "guilty of unsatisfactory job performance, as determined solely by Redpath." The Employer takes the position that its determination in accordance with the terms of the last chance agreement is not subject to arbitral review, or in the alternative that the grievor's performance was in fact unsatisfactory, and that in either case the grievance must be dismissed. The Union argues that the last chance agreement is unlawful and unenforceable, and takes the position that the grievor's performance was not unsatisfactory. Instead, the Union alleges that the grievor was terminated for arbitrary, discriminatory and bad faith reasons, including on the basis of his ethnic origin and place of origin contrary to the Ontario *Human Rights Code*.

3. At the first day of hearing, I heard preliminary objections brought by the Employer, seeking to have the grievance dismissed. For reasons provided then, I declined to dismiss the grievances. In particular, I found that while the parties were free to make any arguments they wished to make concerning the effect of the last chance agreement in closing, the terms of the last chance agreement could not prevent the Union from pursuing its allegation that the grievor's termination was contrary to the *Human Rights Code,* or that the Employer had acted in a manner that was arbitrary, discriminatory or in in bad faith. Those allegations were properly before me and should not be addressed in a factual vacuum in the absence of evidence. Following this ruling, and without prejudice to any party's position with respect to onus on any particular issue, the parties agreed that the Employer would first call its evidence to establish a *prima facie* case that the grievor's termination fell

within the scope of the last chance agreement, after which the Union would call all of its evidence, to which the Employer would have a full right of reply.

THE EVIDENCE

4. The Employer operates a sugar refinery and packaging plant on the Toronto waterfront. The grievor began working for the Employer in August of 1988. At the time of his termination on July 29, 2016, he had almost 28 years of service. The grievor worked in the packaging department as an operator, typically on the machine that fills 4kg bags of sugar but also from time to time on the Altivity packaging machine, which fills 20-40kg bags. The operator's job includes operating and monitoring the packaging machine, and performing a series of quality control checks. The quality control checks include periodic verification that the filler and scales are working properly and the bags are being filled to the correct weight. They also include metal detector and magnet tests to ensure that none of the sugar is contaminated with metal. Operators are required to conduct the weight checks 5 times during a shift, and to record the results of the tests on a quality control document. In its July 29, 2016 termination letter, the Employer set out the grounds for termination as follows:

> As a result of a recent investigation into an incident that occurred during your shift on July 22nd, 2016, it has been found that your job performance was unsatisfactory in that you did not complete your production quality documentation to the standard required and in keeping with the SQF audit requirements. Specifically, while on the Altivity station on that day, you recorded weight checks for 19.00hrs and again for 21.00hrs as having been completed on scale #2 when that scale was not in operation at those times.

5. In terminating the grievor, the Employer relied on the terms of the last chance agreement. As these terms are central to the parties' arguments, I set them out in full here:

> LAST CHANCE AGREEMENT
>
> Jovan Mojsoski acknowledges that he is in violation of Redpath's properly promulgated Plant Rules in that he has been subject to verbal counseling and three (3) progressive discipline events regarding his recurring failure to perform required quality checks, contrary to food safety and quality check protocols. The progressive discipline was issued as follows;
>
> 7 August, 2014: 1-day suspension
>
> 29 January 2015 3-day suspension

20 November 2016~~5~~ [sic] 5 day suspension

Further, Jovan Mojsoski acknowledges that on 28th June 2016, he once again failed to complete all required quality checks. This is a repeat violation of;

Plant Rule #2 "Comply with all food safety, GMP, HACCP and Quality requirements for your job. Report any incident or suspected incident of product contamination or concerns to your supervisor immediately. Complete all your required quality checks documentation accurately".

As such, the Company has cause to terminate Jovan Mojsoski from employment.

However, it is agreed that in lieu of termination Jovan Mojsoski shall be afforded one last chance at employment with Redpath. It is agreed as follows:

1.) Should Jovan Mojsoski be guilty of unsatisfactory job performance, as determined solely by Redpath, within 24 months following the date of this agreement he will be discharged from employment.

2.) Said discharge shall be presumed to be for just cause under the Collective Agreement and shall not be grievable under the Collective Agreement. Nor shall Redpath be obligated to respond to any grievance filed in contravention of this agreement.

3.) The instant Agreement is non-precedential in nature and shall not be cited by Jovan Mojsoski or the UNIFOR, local 2003 in any future grievance, grievance meeting, arbitration or other legal or quasi-legal proceeding.

"signed"
_____
Jovan Mojsoski
Date:

"signed"
_____
Yashar Rahnavard
Redpath Sugar, Ltd.
Dated: *7/15/2016*

"signed"
_____
UNFIOR, Local 2003
Date:

6. In its case in chief, the Employer called George Carter, its assistant refinery manager. Mr. Carter did not witness the events of July 22, 2016, but was responsible for overseeing the investigation into those events, and was the manager responsible for issuing the termination letter. In reply, the Employer called Ralph Meier, the grievor's shift supervisor who reported the performance issued that formed the basis for the decision to terminate the grievor, and who is the subject of the Union's allegations of harassment and discrimination in breach of the *Human Rights Code*.

7. Mr. Carter explained in detail the quality control and food safety protocols in place for the packaging line that the grievor was working on on July 22, 2016. He emphasised how important these procedures are from the perspective of food safety, client satisfaction and regulatory compliance with the Canadian Food Inspection Agency. It is unnecessary to set out this evidence in detail. Suffice it to say that it is clear from Mr. Carter's evidence that the Employer has very good reasons for requiring that employees carry out the quality control checks as required, and for ensuring that employees accurately record those checks on the forms provided. Although there are several levels of checks and balances in the Employer's systems, the most extreme potential consequences arising from a failure to properly perform and record the checks would be shipping unsafe or unsatisfactory product or regulatory sanctions up to loss of certification. The failure to perform the checks properly can also result in recalls which are costly and damaging to the Employer's reputation.

8. On July 22, 2016, the grievor was working on the afternoon shift. He began working on his regular line but was soon moved to the Altivity machine, filling 20kg bags of sugar. The Altivity machine has four blowers that use compressed air to blow sugar into the bags, and each have a scale to ensure the bags are filled to the correct weight. Although Mr. Carter testified that the bags dropped from the blowers in sequence, all other witnesses more familiar with the machine confirmed that they may drop out of order. In order to conduct the weight check, the operator is required to track three bags from each blower head, verify and record the weight of each bag, and record the average weight of the three bags for each blower. On the afternoon shift, these checks are done around 15:00, 17:00, 19:00, 21:00 and 23:00 o'clock, or every two hours. Although this tests sounds very straightforward, I note that all of the witnesses who worked on the machine confirmed that it is virtually impossible to reliably track the bags from the head of a given blower to the scale used to verify the weight, given the orientation of the machine, the path travelled by the bags and the fact that the bags frequently fall out of sequence.

9. Mr. Carter testified that operators are provided two kinds of training in support of properly conducting and documenting the quality checks. First, new operators are paired with an experienced operator who can demonstrate how to carry out the work. Second, the Employer provides regular—typically monthly—quality training, which can cover a variety of topics including quality control and documentation. The company's records show that it last provided the grievor with group training on the quality control documentation in April 2015, and that the grievor passed the training. I note, however, that the grievor's evidence, supported by that of his co-workers and not seriously challenged, is that employees were routinely given the answers to the tests before handing in their work.

10. According to Mr. Carter, there are different types of documentation error and employees are instructed to address them in different ways. The basic distinction is between mistakes that are "correctable" and those that are "non-correctable". Correctable errors are those that can be fixed after the fact, because the correct information required by the form continues to be available. These mistakes could include an operator forgetting to fill in their name or errors in the nature of "typos", where for example the operator transcribes the wrong information or inserts it in the wrong place, but is in possession of the correct information. Correctable errors can be fixed by the operator by striking out the incorrect entry with a single line, initialling the strikeout, and writing in the correct information in space provided on the form. Use of white-out is strictly prohibited, and Mr. Carter testified that it is not even allowed in the plant. Non-correctable errors are those made in circumstances where the correct information is not available for entry. These errors could include a forgotten or skipped quality control check, where it is not possible to go back in time and conduct a check that was not done in the first place. They could also include falsification of the documents. Where an operator makes a non-correctable error, Mr. Carter testified that they are supposed to stop the line and immediately inform a supervisor. The supervisor can then investigate the error and determine what if anything should be done to address it.

11. Mr. Carter reviewed the July 22, 2016 Packaging Quality Record for the Altivity machine, on which the grievor had recorded his checks for the afternoon shift. There were no issues identified with respect to the portions dealing with the metal detector tests, quality of packaging or traceability. Mr. Carter identified several issues, however, with respect to the weight checks.

12. He noted that in the space provide for "Afternoon Shift Supervisor Comments" Mr. Meier had indicated that while verifying paperwork he had found that the grievor had "completed weight for packer #2 at 21:00 when it was not running. Told operator that he should have wrote DNR [did not run]."

13. With respect to the entries that were made, Mr. Carter identified several errors, including errors he did not believe were correctable, and errors that were in any event not corrected in the appropriate manner. There is no dispute that Scale #2 was not operating from the time of the 19:00 weight check to the end of the grievor's shift. The grievor entered "DNR" under the column for the final 23:00 weight check on Scale #2, as required. But under the columns for 19:00 and 21:00, the grievor made entries that appear to be weight checks, which he then struck out with multiple lines (as opposed to a single line) and initialled. The grievor also made entries for Scale #1 under the columns for 19:00 and 21:00, which he struck out with a single line and initialled. He then included a note under "Afternoon Shift Operator Comments" that reads:

> WORK ON 4kg LINE 15:00-15:30
> WRONG MARK ON 1900 & 2100
> SCALE #2 WAS DOWN MARK ON SCALE #1
> WEIGHT WAS
>
> | | 1900 | | 2100 |
> |---|---|---|---|
> | | 2005 | | 2006 |
> | | 2007 | | 2003 |
> | | 2012 | | 2003 |
> | AVERAGE | 2008 | AVERAGE | 2004 |

14. The values input for Scale #1 which are struck out with a single line and initialed and which continue to be legible, are the same as the numbers written under the operator's comments. As will be discussed further in addressing the grievor's testimony, the grievor's evidence was that he had written in the correct numbers for Scale #1, been convinced by Mr. Meier that he had made a mistake and should have put values in for Scale #2 when in fact he had not, and had ultimately provided the correct information under the Operator's comments. To the extent that the paperwork was incorrect, the grievor explained that he was confused at the time because Mr. Meier was shouting at and berating him, including by use of ethnic slurs.

15. According to Mr. Carter, the grievor's error was not correctable because he could not be confident that the checks had been carried out properly in the first place. The fact that the grievor had input unique values for both Scale #1 and Scale #2, when only one of those scales was operating, undermined the validity of any of the checks. Further, even if the error was correctable, the grievor had not properly done so because he scratched out several entries rather than using a single strikethrough. Further, there were several instances where the grievor had accidentally written a "4" instead of a "2" at the start of the weight—having just moved from his usual 4kg line—and overwrote the

4 to turn it into a 2 rather than striking it out and writing in the correct number elsewhere. Mr. Carter acknowledged in cross examination, however, that this was not a basis for terminating the grievor.

16. In addition to identifying his concerns about the form, Mr. Carter also spoke about the investigation the Employer conducted prior to terminating the grievor. I will address the investigation further below. I note at this point, however, that consistent with the Employer's position that the grievor's paperwork was on its face unsatisfactory and that its discretion to determine so was unfettered and absolute under the terms of the last chance agreement, the investigation was cursory. It was carried out in part by a manager who no longer works for the Employer and was not called as a witness. Mr. Carter identified two additional conclusions from the investigation that he believed supported the grievor's termination.

17. The first was that while he considered the grievor's explanation that he had made an error because Mr. Meier was yelling at him, he rejected this explanation because the grievor's errors were spread out over two weight checks, and Mr. Meier would have been working in another area of the plant for much of that time span. Instead, he accepted Mr. Meier's version of events, set out in a brief written statement, which made no mention of Mr. Meier yelling at the grievor.

18. The second was that Mr. Carter was advised that when Mr. Meier confronted the grievor with his error, the grievor asked for white-out. Mr. Carter emphasised the seriousness of this alleged transgression several times in his evidence, stating that "for an operator to ask for white-out, it's hard to overstate how much that is a problem. Everybody knows white-out isn't even allowed on site." The allegation that the grievor had asked for white-out was not, however, ever put to the grievor prior to his termination, and the grievor testified that he did not even know what it was. Based on all of the evidence before me, and for the reasons set out below, I find that the grievor did not make such a request, and that Mr. Meier included the inflammatory allegation in order to ensure that the grievor was terminated.

19. Mr. Carter acknowledged that documentation mistakes are not uncommon and that the grievor's errors were not of a nature that, in isolation, would warrant termination. Mr. Carter felt that termination was justified, however, in light of the grievor's record and the last chance agreement. Mr. Carter reached this conclusion after conducting a suspension meeting with the grievor, having regard to the paperwork and the facts as set out in Mr. Meier's statement, including the alleged request for white-out, without speaking to the witnesses who had been identified by the grievor's manager.

20. In response to the Employer's case in chief and in support of its allegations of discrimination and harassment, the Union called the grievor, in addition to his co-workers Peter Stephens, Alan Duck, Kerry Feltham, Mary Argiropolous and Allen Plourde. The Union also called the grievor's daughter, Melina Mojsoski, who testified about the changes she has witnessed in her father's wellbeing following his termination from employment.

21. The grievor was born in Macedonia and immigrated to Canada in 1982. His first language is Macedonian. He is able to communicate in English but his comprehension is limited and it is clear that he speaks and understands English with difficulty. He explained that he learned his English mostly in the workplace from his coworkers, and has had no formal training. His daughter helps him fill out forms, such as his EI application, as he is not able to understand them on his own. At the workplace training sessions described by Mr. Carter, the grievor said that he did not always understand the questions on the tests he was given, and would make mistakes if he tried to answer them himself. If he was patient and waited for the supervisor to give the answer, he could score 100%. In his evidence he was provided with examples of questions and testified that he did not understand them. He did confirm in cross-examination, however, that he knew he was supposed to cross out mistakes with a single line and initial. And he knew that he was supposed to complete the weight checks at around the times indicated on the forms, and not after the fact, and that he should not include weight checks for scales that were not operating. Thus, while it is clear that the method of training adopted by the Employer was far from an effective way of communicating with the grievor, it is also clear that the grievor understood what was required of him in completing the checks.

22. The grievor also testified that he could not understand the specific terms of the last chance agreement and he did not read the document. Rather, he understood that if he had not signed the last chance agreement he would be fired. He testified that the document was not explained to him but that he was afraid for his job so he signed it. He maintained in cross-examination that the substance of the document was never explained and he was only told that if he did not sign it, he would be fired. After signing the paper, he continued to be fearful and was ashamed to be having problems at work. After signing the last chance agreement, the grievor was not provided with any further training or instruction concerning the quality control checks.

23. According to the grievor, Mr. Meier had a long history of targeting him for abuse. Mr. Meier would "all the time" when he saw the grievor call him names such as "refugee", "gypsy", "immigrant", "idiot" and "asshole", and tell him that because the grievor "doesn't even speak English" he does not deserve to work for the company. If the grievor was in the lunchroom or locker room

on a break with a group of employees, Mr. Meier would target him specifically, call him names, and tell him to get back to his station while saying nothing to the other employees on the same break. When working on the grievor's machine, he would disregard anything the grievor had to say about the problem, notwithstanding the grievor's extensive experience with the machine, and physically push the grievor out of the way. The grievor was challenged on how Mr. Meier could have so persistently harassed him without a formal complaint and without it being observed by other witnesses. According to the grievor, he did complain about Mr. Meier's behaviour to the shift stewards, and he was told to just try to avoid Mr. Meier and not talk to him too much. He also maintained that others would have witnessed Mr. Meier's conduct.

24. On July 22, 2016 the grievor began his shift on his usual 4kg machine, but at around 15:30 was told by the supervisor on shift at that time, Wayne Welsh, to shut down his machine and instead run the Altivity. Before long, a problem developed with Scale #1, which was not filling bags correctly. The grievor reported the problem to Welsh, and it was soon corrected by the electrician on shift. The 17:00 weight check for Scale #1 is properly marked "DNR" as it was not running at the time. Just before 19:00, Scale #2 appeared to develop the same problem. By this time, Mr. Meier was the supervisor on shift so the grievor reported the problem to him. The grievor tried to explain what the earlier problem had been, but Mr. Meier insisted that he knew exactly what the problem was. In the course of carrying out what Mr. Meier thought would be the fix, he dropped approximately 2-3 tons of sugar on the floor of the plant. Mr. Meier told the grievor to clean up the sugar with a shovel and proceeded to operate the machine again. According to the grievor, he told Mr. Meier that while it was his job to clean up the sugar, it was also his job to operate the equipment. At this point, the grievor says that Mr. Meier exploded at him. He told the grievor that he would send him home and began shouting at him and calling him names. He told that griever that it was not the grievor's job to tell him what to do, and that the griever was therefore refusing to work. He blamed the grievor for the problem and was continued yelling at him, calling him an "idiot", "refugee" and "immigrant". The grievor was extremely distressed by this interaction, and as Mr. Meier continued to work on the problem, the grievor moved back and forth between his duties operating he machine and cleaning up the spilled sugar.

25. According the grievor, he initially filled out the paperwork correctly, inserting values for the now functioning Scale #1 at 19:00 and 21:00 and leaving Scale #2 blank. At around 21:00, however, he said that Mr. Meier asked him why he had put values in for Scale #1. The grievor believed that he must have made a mistake in doing so, so he crossed out the entries and initialled them and instead filled in new weights for Scale #2. A that time, Mr.

Meier began yelling at him demanding to know why he had put weights in for Scale #2 when that was the scale that was shut down. According to the grievor, Mr. Meier was yelling at him and called him a "fucking idiot". The grievor asked for the paper back to fix it and, according to the grievor, Mr. Meier refused, telling him he was not going to touch anything and "this is your last night, you fucking refugee." Mr. Meier told the grievor he was ripping off the company for thousands of dollars and "I guarantee this is your last day at Redpath." According to the grievor he continued to "beg" to get the papers back but Mr. Meier refused. When the grievor tried to reach for the clipboard, Mr. Meier took it back again and said "this is your last day, you are not going to touch nothing, you fucking immigrant". The grievor eventually managed to grab the clip board, but by this time he was so distressed he did not know what he was doing and that was when he stared "scribbling" on the weights.

26. After this interaction, the grievor was left to finish his shift and production continued. At the end of the grievor's shift he was collecting the magnet sample and when he returned to the Altivity station, he saw Mr. Meier taking the papers away. The grievor still had to make his final entry from the last magnet check, and so he followed Mr. Meier asking for the papers back and explaining that he needed to complete them. Mr. Meier refused to give the papers back, saying that he did not care and that the grievor was not going to touch them. At this point the grievor encountered Alan Duck, who intervened on the grievor's behalf and convinced Mr. Meier to give him the papers which he then returned to the grievor to complete. The grievor asked Mr. Duck how he should fix the problems with the paperwork, and with Mr. Duck's guidance and spelling assistance, the grievor completed the "Afternoon Shift Operator Comments" described above. The grievor maintained that the weights input for Scale #1 were the actual weights, properly recorded at the time.

27. The grievor was challenged on his version of events in cross examination, especially with respect how he ended up with unique numbers for Scales #1 and #2 at 19:00 and 21:00 hours, when only one blower was in operation. The grievor explained that after being convinced by Mr. Meier that he had made a mistake, he just filled in numbers for Scale #2 as the bags were coming off at around 21:05, "just to fill out the numbers". He maintained, however, that the numbers he had originally input for Scale #1 were correct. When asked why he did not then just use those numbers, the grievor explained that Mr. Meier was yelling at him, he was under great pressure, stressed, worried for his job and confused. The easiest thing seemed to be to just fill in new numbers as the bags went by on the scale in front of him.

28. The grievor worked his next usual shift on July 25 and began his shift on July 26, until he was asked to attend a meeting with management and was asked about what had happened on the previous Friday. The grievor explained what had happened and was then told that he was being sent home and would be called for another meeting. That meeting took place, with Mr. Carter now in attendance, on the Friday. The grievor said that he explained what happened with Mr. Meier the previous week. He was never asked about white-out, and Mr. Meier's statement was not put to him for response. According to the grievor not only did he not ask Mr. Meier for white-out; he does not know what it is. The grievor was subsequently terminated from employment as set out in the letter.

29. The Union called several other witnesses to testify about the quality control procedures, training and the way that Mr. Meier treated the grievor.

30. Peter Stephens is a 24-year employee who also occasionally runs the Altivity machine. He confirmed the grievor's description of the training provided. In his view, there was nothing unusual about the documents the grievor had completed, and he had made similar mistakes in the past and corrected them in the comments section just as the grievor had done. He said a supervisor would come find him, point out the mistake, and he would be given an opportunity to fix it. He agreed in cross-examination that these corrections would be of mistakes such as those that Mr. Carter had described as "correctable".

31. Mr. Stephens had worked with Mr. Meier for 12-13 years, and described his demeanor and conduct at work as "poor". According to Mr. Stephens, Mr. Meier would be "stressed to the max" within minutes of starting his shift, and would have "mini breakdowns", yelling and constantly looking like he was on the verge of crying. Although Mr. Stephens did not usually work on the same shift as the grievor, he did hear Mr. Meier yelling at the grievor on occasions during shift change. Mr. Stephens wanted to testify because he believed that that the grievor's dismissal was completely wrong. He believed that the grievor had previously been suspended for things that would not have resulted in punishment for anybody else. According to Mr. Stephen's, the way that the grievor was constantly picked on in the workplace was an ongoing joke amongst employees. If an employee wanted to take a smoke break, for example, somebody would joke that they should bring the grievor with them "because they'll go after Jovan".

32. Alan Duck was a 28.5-year Redpath employee who recently retired. Mr. Duck was working on July 22, 2016, and observed Mr. Meier yelling at the grievor at the end of the grievor's shift. Mr. Duck had been yelled at by Mr. Meier before, but described this instance as louder than he had ever heard

before. Mr. Duck approached and asked Mr. Meier not to speak to people like that. Mr. Duck felt that the situation was escalating and wanted to know what was happening. The grievor explained that Mr. Meier had said there were mistakes in the paperwork but would not return the sheet so that the grievor could correct them. According to Mr. Duck, Mr. Meier responded that "No Jovan, you have made mistakes before, you will just have to suffer the consequences this time." Mr. Duck continued to try to convince Mr. Meier to let the grievor have the sheet back, and eventually prevailed. Mr. Duck was not questioned about these events prior to the grievor's termination. He did, however, tell the investigating manager about what he had seen after learning that the grievor had been terminated. He also provided a written statement, although this was not apparently provided to the company until much later.

33. Kerry Feltham is a 22-year Redpath employee who operates the 4kg machine, is also the co-chair of the Joint Health and Safety Committee ("JHSC") and has a special assignment as plant trainer. He confirmed the grievor's description of the company's training program and expressed his own concerns about its effectiveness, given that it does not ensure that any given employee has in fact learned and understood the material. With respect to the grievor in particular, Mr. Feltham explained that while the grievor's English was sufficient to communicate, he would explain things to the grievor differently in light of his language skills. He also confirmed that Mr. Meier was under constant stress and would yell at employees he was supervising, and he had witnessed Mr. Meier yelling at the grievor on multiple occasions. Mr. Feltham had repeatedly heard Mr. Meier call the grievor stupid, and had heard him say that the grievor should have "stayed in his village" or words to that effect. Mr. Feltham had confronted Mr. Meier about the way he treated the grievor in particular, asking him "why do you feel the need to always pick on Jovan" and encouraging him to work more cooperatively, to which Mr. Meier responded, "because he's stupid and he doesn't listen to me." Mr. Feltham reported this to a manager who promised to take it up with Mr. Meier. Mr. Feltham did not hear anything further about this. In cross-examination, Mr. Feltham confirmed that he was not aware of any formal complaints concerning Mr. Meier's harassment of the grievor, including to the JHSC, and that he had not elevated any such complaints with senior management. He also agreed in cross examination that several employees had complained that Mr. Meier picked on them, often about matters that were strictly work-related. However, he maintained that he was concerned about the manner in which Mr. Meier was belittling the grievor in particular.

34. Mr. Feltham was also very familiar with the Altivity machine, having been involved in its installation and set-up and having run it many times. According to Mr. Feltham, given the route the bags must follow from the blower head to the scale used by the operator, and given that bags frequently

fall out of sequence, it was in 2016 very challenging to accurately track the bags for the weight measurements. An operator would, though, be required to make best efforts to get it right and randomly assigning numbers would not be proper. The system for verifying weights has since changed and is much more reliable. Mr. Feltham saw no problems with the form as it was ultimately submitted by the grievor for July 22. He testified that he had made the same mistake himself and had corrected it in a similar fashion, although he could not identify whether this had happened two years ago or five years ago. He acknowledged that this might mean that a particular weight might not have been assigned to the right scale, but maintained that as long as all the weights were within the proper range he would not be overly concerned (a view that was evidently shared by the Employer given that it shipped the product from the grievor's shift).

35. Mary Argiropolous has worked for Redpath since 2006 and worked as an operator in 2016. She also described Mr. Meier as frequently "picking on" the grievor, singling him out from groups of people, such as telling him to return to work from break while everybody else was permitted to continue the break. She described Mr. Meier as "yelling and screaming" at the grievor and calling him "stupid idiot". She also described Mr. Meier yelling at her, and yelling at another employee who was from India to the point that she fainted. According to Ms. Argiropolous, he yelled at a lot of other employees who did not stand up to him.

36. The Union's final witness was Allen Plourde. Mr. Plourde is a 22-year employee with Redpath and works as a forklift operator. Mr. Plourde had worked with Mr. Meier for 20 years and had raised his own complaint with management about the way that Mr. Meier talked to him. According to Mr. Plourde, Mr. Meier "always had it out for Jovan". Mr. Plourde described the same singling out from the group of the grievor by Mr. Meier as the other witnesses.

37. The union also lead evidence concerning the effect of the termination on the grievor's well-being. Subsequent to his termination, he suffered stress and depression, for which he has received medication and has been under a doctor's care. He participated in a six-week psychiatric program with Centennial Hospital and continues under the care of a psychiatrist. According to the grievor, after missing only one day of work in 28 years in order to attend a funeral, the shame of his circumstances and the resultant financial pressure has caused him to withdraw from his family and social life. This account of the effects of the grievor's termination were affirmed by his daughter, who also testified in this proceeding. A copy of the grievor's medical records were entered on consent as evidence of what the doctor would testify to if called. The records confirm that the grievor was treated for major depression,

anxiety, insomnia and panic attacks and identify difficulties with poor energy, poor concentration and psychomotor retardation. By November 2016, the grievor was deemed totally disabled from performing any work. His doctor has ongoing concerns if the grievor is placed back in a stressful work structure again. In cross examination, the grievor confirmed that his medical problems began with his termination, and not as a result of events in the workplace prior to his termination.

38. In reply, the Employer called Ralph Meier. At the time of the grievor's discharge, Mr. Meier was carrying out two roles for the Employer. On the one hand, he was the long-serving packaging technician responsible for servicing and repairing the machinery and packaging department. On the other hand, from 2011 to 2016 he also held the position of packaging supervisor, with responsibility for supervising the grievor when they worked on the same shift, as they did on July 22, 2016. Mr. Meier described his supervisory responsibilities as ensuring the operators were doing their quality checks as required, verifying periodically the paperwork, and dealing with the operators with respect to any issues that arose. According to Mr. Meier, the supervisor is ultimately responsible for making sure that the checks are performed and recorded properly. In describing those checks, including how they are to be carried out and, where appropriate, corrected, Mr. Meier essentially affirmed Mr. Carter's testimony.

39. In his examination in chief, Mr. Meier described having a mixed relationship with the grievor, particularly when it came to his role as a supervisor. Sometimes when he was instructing the grievor to do something there were no problems and it was "great", but other times he said the grievor would "argue about it" and both would raise their voices. The suggestion that the grievor yelled at Mr. Meier was not put to the grievor in his evidence, and other witnesses attributed the yelling only to Mr. Meier and described the grievor as quiet, polite and restrained in the face of Mr. Meier's shouting and insults. Mr. Meier also testified that sometimes the two would call each other names, although he did not provide any examples of names the grievor had called him, and he did not think it was "worth the effort" to write the grievor up for anything. Also in his examination in chief, Mr. Meier agreed that he had probably called the grievor "lazy" and had called him an "asshole" and "stupid", but denied that he had made comments about his lack of English, used ethnic slurs or said he should have "stayed in his village". He cited his relationships with other immigrants and people whose first language was not English as grounding his certainty that he did not use those terms. He claimed to have never received a complaint about the way he treated co-workers, or to have ever been aware that the grievor had any issues with him. It was clear in cross examination that this claim was not true.

40. In terms of the events on July 22, 2016, Mr. Meier described receiving a call that packer #2 on the Altivity machine was not working, and his attempts to trouble shoot and correct the problem, which were not initially successful. As he described it, after attempting to solve the problem in and around the area where the grievor operated the equipment, he went to the blower room to work on the problem there. Stayed there for 1-1.5 hours, during which he had no interaction with the grievor, and emerged around 21:30 pm. It was at this time that he says he saw the paperwork with values for packer #2 filled in, which he knew were incorrect because he had locked out that part of the machine.

41. According to Mr. Meier, he asked the grievor how he could have weights when the packer was not working, received no explanation, and left the paperwork there to carry on his functions. Mr. Meier did not stop the line or instruct the grievor to stop the line, or describe any other steps at that time to address the problem. The next time he saw the paperwork, it was 22:30 and he described it as "scribbles, arrows, just unacceptable". He told the grievor it was unacceptable, and it was at this time that he said the grievor asked him for some white-out. According to Mr. Meier, he understood the grievor wanted to cover his mistakes and falsify the documentation. He responded to the grievor by saying "are you fucking stupid or what." When asked how the grievor responded to this, Mr. Meier said the grievor said he was confused. Mr. Meier said he then picked up the paperwork and walked away.

42. According to Mr. Meier, the grievor followed him asking for the paperwork back, which Mr. Meier refused to give him. Mr. Meier was then approached by Alan Duck, who asked what was going on and also asked Mr. Meier to give the papers back to the grievor so he could correct them. Mr. Meier again refused to give the paperwork back, and testified that he did not because the error was not one that could be corrected, although the grievor was eventually permitted to make the note on the forms described above. Mr. Meier left the documents to be reviewed by Quality Control on Monday. Mr. Meier was subsequently asked to prepare a statement by Mr. Carter and the packaging manager, and after some delay produced the following statement:

> At approximately 21:30 I went to verify Jovan's paperwork and found something very disturbing. I found that Jovan had marked on his weight check sheet weights when packer #2 was not running. I asked him how he could have completed a weight check when the line was not running. He said he made a mistake. I asked Jovan how he could make the same mistake twice. There were no correction marks to indicate that he recognized there was a mistake made. He said that while I was troubleshooting an issue on the Altivity he got confused. He said I was raising my voice to him when I gave him a task of cleaning up sugar that

> was on the floor. I was definitely not. Jovan had asked me to get some white-out so he could correct his mistakes. I replied definitely not. I pointed out to Jovan that corrections are to be one line and initialed. He kept saying that he was confused. He said he had trouble differentiating which bag came from which packer. After I spoke with him I observed that he had "scratched" out the numbers.

43. It is clear from the evidence as a whole, including especially Mr. Meier's cross examination, that this statement provides an inaccurate and incomplete account of what took place.

44. In cross examination, Mr. Meier acknowledged that he could be aggressive and come across to people as a bully, and that he probably has anger issues. He did not dispute that yelling at employees and calling them "asshole", "idiot" and "fucking stupid" is not acceptable behaviour for a supervisor.

45. He also acknowledged that in his evidence in chief he had not accurately explained why he was no longer a supervisor. In fact he was removed from the supervisor position because he could not handle the pressure and he agreed that this pressure caused him to be aggressive with the people he supervised. He agreed that he was removed as a supervisor because the employer was not satisfied with his performance. In September 2015, he was suspended for five days after failing to put production on hold following a failed metal detector test. The product had to be withdrawn at significant expense and potential reputational damage to the Employer.

46. With respect to the griever specifically, Mr. Meier's evidence requires careful consideration. On the one hand, he denied that he was racist and did not feel that he was singling out the griever or other employees for whom English is not their first language. On the other hand, when specifically pressed on allegations of his conduct toward the grievor, he frequently responded that if witnesses had said he had done it, then he was not going to deny it. He repeatedly declined to deny the allegations and rather responded that he did not recall and/or that they were probably true. Further, while he maintained his name calling was not directed toward the griever as a result of his ethnicity, he acknowledged that he had used these insults against a person whose greatest distinguishing feature was his lack of English. He agreed that he had possibly called the griever a "gypsy". He did not deny "picking on Jovan for every little thing", but maintained that that was not what he thought he was doing. He initially denied telling the griever to "go back to his village" but later acknowledged he was not in a position to deny he had said it.

47. With respect to the July 22 incident, Mr. Meier either confirmed or did not deny many aspects of the grievor's account of what took place. He agreed that his interaction with the grievor that day began with an altercation after his own efforts to trouble shoot the malfunctioning blower resulted in dumping 2-3 tons of sugar on the floor. He agreed he was angry about the sugar and the grievor was questioning him about his approach to the problem and about operating the machine. Mr. Meier was "pissed off" with the grievor. He raised his voice and could not deny that he was "calling the grievor names".

48. He testified that he was working around the grievor on the machine for around an hour, before going to work on the problem in the blower room for a further 1 to 1.5 hours. He acknowledged that his work was hot, loud and frustrating, and he could not remember many details of his interaction with the grievor. However, he did maintain that when he reviewed the grievor's paperwork at around 21:30 p.m., the grievor had input values for all four blowers. He also maintained that at 22:30 when the grievor asked to have the paperwork back so that he could fix it, the grievor asked for white-out and he responded, "are you fucking stupid or what". However, he also acknowledged that there is no white-out in the production area, that it is not something he would ever possess to give and that everybody knows this. He confirmed that until Mr. Duck intervened, he refused to give the grievor back the paperwork, and that he did not make any efforts to go over the problem with the grievor and determine whether it could be resolved. In his mind there was nothing that could be done to correct the problem. He denied that he told the grievor he had cost the company thousands of dollars and that it would be his last night. In fact, although Mr. Meier testified that the problem was from the outset one that could not be fixed, he did not stop production to address it and in fact the product was released without issue. Finally, Mr. Meier agreed that he was probably never asked in the investigation about yelling at the grievor or calling him names.

ARGUMENT AND ANALYSIS

Employer Argument

49. The Employer divided its argument into three issues:

i) Was the grievor's termination contrary to the *Ontario Human Rights Code*;

ii) Was the grievor's termination under the last chance agreement reviewable on the "arbitrary discriminatory and bad faith" standard;

iii) Was the grievor subjected to discrimination and harassment in his employment and entitled to damages separate and apart from whether his termination was appropriate.

Termination and The Human Rights Code

50. The Employer argues that it is necessary to distinguish between discrimination in the course of the grievor's employment and discrimination in the termination itself. The Employer denies that it discriminated in either sense. But relying on *Arunachalam v. Best Buy Canada Ltd. et al.* 2010 HRTO 1880 (CanLII) and *Michelin v. Johnson,* 2014 HRTO 321 (CanLII) it emphasises that in order to make out a case for reinstatement, the Union must demonstrate that the termination itself was discriminatory, and not simply that the grievor was discriminated against in respect of his employment.

51. In assessing the propriety of the termination, the Employer argues that whatever history may have existed between the grievor and Mr. Meier, that history played no role in the grievor's prior discipline and the resultant last chance agreement. Meier was not involved in that prior discipline. The last chance agreement was entered into by both parties and the grievor, and all agree that the discipline up to that point was appropriate. In this context, the Employer argues that given the grievor's mistake in carrying out and documenting the quality control checks and given the terms of the last chance agreement, the termination was warranted.

52. The Employer further argues that the absence of any formal complaint concerning Mr. Meier's conduct, and the absence of any credible explanation for such absence, belies the claim that this conduct was as serious or persistent as the Union now claims. According to the Employer, the grievor has clearly invented or grossly exaggerated events and comments that did not occur. The Employer finds support for this conclusion in the testimony of the grievor's daughter, who described her father as happy in all elements of his life up to the point that he was terminated. Neither had the grievor exhibited any signs of psychiatric stress or sought psychiatric help prior to his dismissal. Further, while the Union called several witnesses to corroborate the grievor's claims of harassment, they variously described Mr. Meier as stressed and angry and even as having picked on Jovan, but with the exception of the "village" comment could not provide concrete examples of Mr. Meier harassing the grievor on the basis of any grounds prohibited by the *Code*.

53. To the extent that Mr. Meier appeared to agree in cross-examination that he may have gone beyond shouting at the grievor and to have singled

him out or used ethnic slurs, the Employer argues that Mr. Meier's evidence must be reviewed carefully to assess what he really meant by those answers. The Employer relies on arbitrator McDowell's decision in *UNIFOR Local 2003 and Redpath Sugar Ltd.,* 2017 CanLII 68359 (ON LA), emphasising that the arbitrator's task is to assess all of the evidence together, always with regard to the available objective touchstones, and to try to piece together what actually happened. The Employer argues that when viewed in light of the full evidentiary record, Mr. Meier's apparent admissions against interest reflect more so the skill of the cross-examiner and the manner in which questions were phrased than what actually happened. In this light, the Employer argues that Mr. Meier agreed with statements that were clearly not true and failed to deny statements that were clearly false. As counsel put it, had one suggested to Mr. Meier on a Thursday that it was in fact Tuesday, he probably would have said "I can't deny it". The goal of the arbitrator's exercise, argues the Employer, should not be to give effect to a technical reading of the evidence, but rather to try and figure out what actually happened.

54. In short, the Employer argues that there is no credible evidence of *Code* based harassment, and no causal connection between such harassment and the decision to discharge the grievor.

Arbitrary, Discriminatory or Bad Faith

55. The Employer argues that once it has overcome the allegation that the grievor's termination was contrary to the *Code*, the last chance agreement precludes any further arbitral review, including on an "arbitrary, discriminatory or bad faith" standard. The terms of the last chance agreement provide that the determination of whether the grievor's performance was unsatisfactory is made "solely by Redpath" and that the discharge resulting from that determination is "presumed to be for just cause under the Collective Agreement and shall not be grievable under the Collective Agreement." The Union is in contravention of the last chance agreement in pursuing this matter, and the Employer argues that under the terms of that agreement it is not even obligated to respond. In support of its argument that the parties have contracted to exclude this matter from arbitral review, the Employer relies on *Ontario (Alcohol & Gaming Commission) v. O.P.S.E.U.*, 2001 CarswellOnt 6443 (Whitaker), *ATU, Local 1587 and Ontario (Metrolinx – Go Transit)*, (2017) 284 L.A.C. (4th) 420 (Abramsky), *Crestbrook Forest Industries Ltd. v. I.W.A.-Canada, Local 1-405,* (1996) 59 L.A.C. (4th) 237 (Munroe), *Arunachalam v. Best Buy Canada,* 2010 HRTO 1880 (CanLII) and *Michelin v. Johnson,* 2014 HRTO 321 (CanLII). In response to the Union's reliance on the "arbitrary, discriminatory and bad faith" limit to the exercise of management rights, the Employer does not dispute that arbitrators have implied an obligation to act

reasonably in appropriate cases, but argues that nothing precludes the parties from contracting out of such an obligation, and that is what the parties have here done.

56. Even if the Employer's application of the last chance agreement is subject to review on an "arbitrary, discriminatory or bad faith" standard, however, the Employer argues that its decision to terminate the grievor under the agreement was warranted. In particular, the Employer argues that the evidence establishes that the grievor clearly made an error that could not be corrected in documenting the weights on a scale that was not running. He then compounded that error by improperly trying to "correct" it with what had to be false values. The input of unique values under each column, argues the Employer, belies any claim by the grievor that he initially entered the values for the three operating lines correctly, was convinced, incorrectly, that he had made a mistake, and then attempted in good faith to correct the error he had been induced to make. The grievor's tortured explanation was simply an attempt to blame his own error on Mr. Meier, rather than owning up to what he had done. In the face of such poor-quality control work and in the absence of any credible explanation for the error, the Employer argues that Mr. Carter was entirely justified in reaching the conclusion that the grievor's performance was unsatisfactory. Indeed, the Employer argues that the grievor's dishonesty in describing what took place concerning the quality control checks both justifies the Employer's response in terminating him, and undermines the credibility of his claims to have subjected to *Code*-based discrimination.

Damages for Discrimination or Harassment

57. The Employer relies on its prior submissions in support of its position that the Union has not made out a case of *Code* based discrimination or harassment, such that the grievor would be entitled to an award of damages. To the extent that the grievor has established that he has suffered, that suffering was caused by his termination from employment (which the Employer maintains was warranted), and not from harassment or discrimination in the course of his employment. The Employer relies on *Ceva Logistics Canada ULC and UNIFOR, Local 222* 2014 CanLII 52627 (ONLA) (Marcotte), *JD Norman Industries and Unifor Local 195,* 2014 CanLII 81690 (ON LA) (Snow) and *Redpath Sugar Ltd., supra*, in support of its argument that in the absence of a nexus between any discriminatory treatment and the grievor's termination, and in light of the absence of any compelling evidence that the grievor was subjected to any substantive discriminatory treatment, the Union has not made out a case for a remedy under this head.

Union Argument

58. The Union argues that this is a clear case of harassment, bullying and discrimination, and that in these circumstances the Employer cannot rely on the terms of the last chance agreement. The grievor is an immigrant to Canada and speaks limited English. He was repeatedly subjected to abuse by his supervisor, Ralph Meier, who told him he should have "stayed in his village" and called him an "immigrant", "lazy immigrant", "gypsy", "fucking idiot", "asshole" or "stupid" on a recurring basis, including at the time of his alleged unsatisfactory performance. The Union acknowledges that the grievor may not have been subjected to these insults and epithets as frequently as he believed, but argues that his perception is understandable given the regularity of the abuse and his fragile mental state. While the Union's witnesses did not testify to having heard some of the more offensive epithets, they all confirmed that the grievor was singled out by Mr. Meier, who picked on him in particular about every trivial matter. While Mr. Meier denied that he picked on the grievor or threatened to terminate him because of his ethnicity, the Union argues that the evidence is clear that this is precisely what he did, and that the Employer violated s.5(2) of the *Code*.

59. The Union argues that in deciding to terminate this 28-year employee, the Employer was not acting in good faith. The investigation, it argues, was a sham marked by an almost complete failure to inquire into what actually happened. The grievor was not provided with a meaningful opportunity to participate or respond to the false allegations against him, and the Employer simply accepted the version of events proffered by Mr. Meier; a version of events that omitted Mr. Meier's misconduct toward the grievor. The allegation that the grievor had asked for white-out—a fact that appears to have been very significant to Mr. Carter—was not even put to the grievor for a response. The grievor made a minor and correctable error, under circumstances where he was not working on his regular machine, the machine was malfunctioning, there had been a significant sugar spill, and he was being abused and belittled by his supervisor who caused the spill and then ordered the grievor to clean it up while threatening his employment. This took place only days after the grievor had signed a last chance agreement he did not understand. All that the grievor understood was that he would be fired if he did not sign. In the very brief period following the execution of the last chance agreement the Employer not take any steps to address any deficiencies it found in the grievor's performance. It provided no training or feedback to the grievor whatsoever. He had not received training in 2016, and the Union described the training he had received prior to then as a "farce".

60. In deciding between Mr. Meier and the grievor's version of events, the Union argues that Mr. Meier was not a forthcoming witness, denying the extent

of his own misconduct until left with no option but to acknowledge it. In all the circumstances, the Union argues that it is entirely plausible that it was Mr. Meier who mistook the paperwork, given that he had just spent over two hours in a loud, hot environment and in a state of frustration and anger.

61. The Union argues that to the extent that the grievor made an error with the paperwork, it was not a culpable error or was *de minimus*, because the evidence establishes that other employees had done the same thing without any discipline or consequences whatsoever. Further, there is ample evidence that any error the grievor made was caused by Mr. Meier, who from almost the start to the end of the shift was yelling and spewing vitriol at the grievor and threatening him that it would be his last night working for the company. Had a member of the bargaining unit behaved this way, argues the Union, it would likely be that person being terminated. Whereas the evidence establishes that any other employee would have been given a meaningful opportunity to address the issue, the grievor was sworn at, belittled and fired without being afforded any such opportunity. To rely on any error the grievor made under these circumstances is arbitrary, discriminatory and in bad faith. The Union further takes issue with the Employer's argument that its actions under the last chance agreement are not reviewable on this standard. There is, argues the Union, an obligation on the Employer to exercise its discretion in a reasonable manner and in particular in light of the obligation to provide a harassment-free workplace. The last chance agreement and the Collective Agreement must be interpreted and applied in this light.

62. In support of its argument, the Union relies on *Toronto Transit Commission and ATU (Stina),* (2004) 132 L.A.C. (4th) 225 (Shime), *Toronto Transit Commission and Amalgamated Transit Union, Local 113 (Dunphy)*, 2018 CanLII 89086 (ON LA) (Stout), *Unimin Canada Ltd. and CEP, Local 306-0*, 2016 CanLII 51075 (ON LA) (Steinberg), *Teranet Land Information Services Inc. and O.P.S.E.U,* (1994), 40 L.A.C. (4th) 418 (Mitchnick), *Abex Industries Ltd. and U.F.C.W., Loc. 173W,* (1995) 48 L.A.C. (4th) 253 (Brown), *Canadian Forest Products Ltd. and P.P.W.C., Loc 25 (Aken)*, (2002) 108 L.A.C. (4th) 399 (McPhillips). These cases, argues the Union, firmly entrench the principle that even where an agreement between the parties affords the Employer an otherwise unfettered discretion, that discretion does not permit the Employer to treat the grievor in an arbitrary, discriminatory or bad faith manner. He must, argues the Union, be given a fair opportunity to comply with the terms of the last chance agreement. Instead, the Employer created a workplace in which the grievor was bound to fail, and then provided the grievor with no meaningful opportunity to tell his side of the story before terminating his employment.

Analysis

63. I begin my analysis by considering the status of the last chance agreement between the parties, and the extent to which the Employer's discretion under that agreement is or is not limited by the *Ontario Human Rights Code* and any obligation to exercise that discretion in a reasonable manner. This case turns on the extent of these implied limits, because it is abundantly clear from the evidence that the Employer has otherwise acted within the terms of the last chance agreement. In particular, the last chance agreement provides that "[s]hould Jovan Mojsoski be guilty of unsatisfactory job performance, as determined solely by Redpath, within 24 months following the date of this agreement he will be discharged from employment." Mr. Carter's evidence makes clear that Redpath did in fact make the determination that the grievor was guilty of unsatisfactory job performance, and it made that determination within the requisite time period. The termination is therefore, in accordance with the strict terms of the last chance agreement, presumed to be for just cause and not grievable.

64. Last chance agreements are an established feature in the landscape of labour relations settlements, and arbitrators have consistently recognized the importance of giving them their proper effect. As set out in *Re O-Pee-Chee Co. and Glass Molders, Pottery, Plastics and Allied Workers International Union, Loc. 49 (McDonald),* July 13, 1995 (Rayner), cited in, among other decisions, *Re Crestbrook Forest Industries Ltd. and I.W.A.-Canada, Loc. 1-405 (Thomson)* (1996), 59 L.A.C. (4th) 237 (Munroe) and *Re Camco and United Steelworkers of America, Local 3129* (2000), 91 L.A.C. (4th) (Bendel) at p. 355:

> The general arbitral approach to such agreements, often referred to as 'last chance' agreements is to require strong and compelling reasons in order to vary the result which flows from a breach of the agreement. The reason behind such an approach is quite evident. If the arbitrator used his power to mitigate the penalty flowing from the breach of the agreement without regard to the terms of the agreement, the likely long-term effect would be that such agreements would not be used to settle disciplinary disputes. Employers would simply refuse to give employees a 'last chance' if, at the end of the day, the agreement had little or no effect in the arbitrator's deliberations when considering whether to mitigate a penalty. If is obvious that it is desirable to encourage parties to enter settlement agreements such as the one in question. The employee receives another chance to retain his job and the parties know what standard of conduct is required in the future. The expense of arbitration proceedings may be avoided.

65. It is clear therefore that whatever else this case turns on, it cannot turn on my substituting my own judgement for that of the Employer in terms of

the validity of the Employer's performance standards or its judgement concerning the importance of any deviation from those standards. The Employer argues that the terms of this particular last chance agreement do not merely limit my discretion to mitigate penalty but in fact oust my jurisdiction to review the basis for the Employer's decision to terminate the grievor at all. The Union counters that however broad the Employer's discretion is purported to be under the terms of the last chance agreement, there is an implied obligation not to exercise that discretion in a manner that is arbitrary, discriminatory or in bad faith. However, there is nonetheless a bright line on which both parties agree: if the grievor's termination was in violation of the *Ontario Human Rights Code*, even the strictest possible last chance agreement—and the last chance agreement in this case is certainly that—cannot shield the Employer's action from arbitral scrutiny and the imposition of appropriate remedies.

66. Section 5 of the *Code* reads as follows:

> **Employment**
>
> **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.
>
> **Harassment in employment**
>
> (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.

67. There is no dispute that the parties cannot contract out of these statutorily guaranteed protections.

68. Where the parties differ is on the facts, specifically whether the grievor was discriminated against at all and, if so, whether any discriminatory treatment he suffered played a role in his termination. This latter distinction is important because I accept, as the Employer has argued, that while a finding of discriminatory treatment will give rise to a remedy, that remedy will not include overturning the termination (especially in the context of the last chance agreement) if the discriminatory treatment was not a factor in the termination (see, e.g., *Best Buy Canada Ltd., supra,* at para. 39). But

considering all of the evidence before me, I am satisfied that the Union has met its onus in establishing that the grievor's ethnic and place of origin was a factor in his termination.

69. In reaching this conclusion, I have carefully considered the parties' arguments concerning how I ought to approach the evidence of the grievor and Mr. Meier in particular. I fully accept counsel for the Employer's submission that the arbitrator's task is to look at the evidence as a whole and to make best efforts to determine where the truth most likely lies, rather than giving the evidence a technical interpretation that does not accord with reality. I accept that the mere fact that a witness may concede a point adverse to their own interest does not necessarily make it so, where it is clear on the evidence as a whole that the truth is otherwise. As counsel argues, it is necessary to consider the evidence not only for internal consistency, but also for consistency with the surrounding facts and in light of the "objective touchstones" that are otherwise established. However, it bears emphasising that in the absence of credible and contradictory evidence, a witness's own admission against interest on a point that is central to the dispute between the parties is likely to be given considerable weight.

70. The Employer argues that in the absence of corroborating evidence, either by the Union's other witnesses or in the form any prior formal complaints, it is clear that the grievor's account of Mr. Meier openly using explicit ethnic slurs on a near constant basis is either fabricated or grossly exaggerated. I agree that the grievor's account must be exaggerated. On the one hand, it is clear that the grievor was persistently targeted and belittled by Mr. Meier in a manner that can only be described as workplace bullying. In addition to the grievor's testimony about this treatment, it was corroborated by the Union's other witnesses, none of whom were shaken in their account of it, and all of whom I find to be entirely credible. On the other hand, none of those other witnesses described the persistent use of terms such as "gypsy" or "immigrant" that the grievor described in his testimony. Had Mr. Meier been so open and explicit as the grievor described, it is likely those employees would have eventually heard it. The more common theme was that Mr. Meier would berate the grievor for doing the same things that other employees were doing without comment, and that he would repeatedly swear at the grievor and call him names such as "fucking stupid", "idiot", "asshole" and "lazy". Mr. Meier either agreed or declined to deny that he had treated the grievor in this manner.

71. However, I also find that there is ample evidence that while Mr. Meier's use of explicit slurs was likely not so common as the grievor described, he did target the grievor for abuse on the basis of his ethnic origin or place of origin. Significantly, the allegation that Mr. Meier said that the grievor should have

"stayed in his village" was confirmed by Mr. Feltham, who's evidence I find was forthright and unembellished. Mr. Meier ultimately conceded that the allegation was possibly true. Further, while it is clear that Mr. Meier also berated other employees, the evidence makes clear that he targeted the grievor in particular, in a manner that distinguishes him from all other employees. Mr. Meier did not deny this. He agreed that the language he used against the grievor was not language that he used against employees whose first language was English. He agreed that it was possible that he had called the grievor a "gypsy".

72. The Union acknowledged that its other witnesses did not confirm that Mr. Meier was constantly using explicit ethnic slurs, but argued that in all the circumstances this does not mean that I should discredit the grievor's account. Rather, the Union argues that where an individual has been subjected to persistent abuse that includes being targeted for one's ethnicity or place of origin, it is normal to interpret that abuse, as a whole, as directed toward or motivated by those characteristics. In other words, once an individual knows that they are being targeted as an "immigrant", to call them "lazy" is to effectively call them a "lazy immigrant". There is significant validity to the Union's argument. The racial or ethnic element in discriminatory statements or treatment need not be explicit, and it is no less harmful for having been implied. The grievor's exaggeration does undermine the weight that I give his evidence on this issue and his evidence as a whole, but it does not cause me to discount it entirely, or to conclude that Mr. Meier's admissions against interest in cross-examination have no grounding in reality. It is clear that Mr. Meier held a particular antipathy toward the grievor at least in part because of his status as an immigrant from a non-English speaking country. It is equally clear that in his capacity as the grievor's supervisor Mr. Meier expressed that antipathy and discriminated against the grievor, through at least the occasional use of ethnic slurs and by targeting him for differential treatment including belittling him in front of his co-workers.

73. I also find that having regard to the evidence as a whole, the Union has met its onus in establishing that the grievor's ethnic or place of origin was a factor in his termination. I reach this conclusion for several reasons.

74. First, it is clear that Mr. Meier's antipathy toward the grievor was a significant factor in both the events that took place on July 22 and—crucially—in the way in which those events were communicated to Mr. Carter. I am satisfied that the grievor made a mistake in filling out the weight checks for Scales #1 and #2 during the period that Scale #2 was not operating. I also find that it is unlikely that the error unfolded as the grievor described (i.e., that he first put in the correct numbers, was misled by Mr. Meier into changing them and thereafter corrected them to the original numbers). But I am also

satisfied that at the time of the error the grievor was in an extremely agitated state, and that this state was caused by the discriminatory treatment directed at him by Mr. Meier, including the threat to send him home and that it would be his last day working for Redpath. Of equal significance, I find that Mr. Meier's abusive language, threats of termination and refusal to provide the grievor with any fair opportunity to address his mistake was a substantial cause of the improper manner in which the grievor attempted to correct that mistake. Further, I find that the grievor did not ask for white-out; a substance with which he was not even familiar and which he would have no reason to believe Mr. Meier would or even could provide to him. This was a deliberately provocative allegation that I find was fabricated and included in Mr. Meier's statement in order to ensure that the grievor would be terminated. Again, for the reasons set out above this is an expression of Mr. Meier's antipathy toward the grievor that I cannot separate from his ethnic or place of origin.

75. In the result, while I do not attribute any discriminatory conduct to Mr. Carter personally, the foundation for his decision to terminate the grievor was tainted by the discriminatory conduct of the grievor's immediate supervisor in virtually every respect. The grievor was terminated on the basis of: a) an error that was caused at least in part by the discriminatory and highly abusive manner in which the grievor was treated by his supervisor both prior to and on July 22; b) the manner in which he sought to correct that error in circumstances where his supervisor interfered with his ability to do so properly; and, c) a deliberately false and provocative allegation from the supervisor that the grievor had asked for a prohibited substance, to which the grievor had no opportunity to respond.

76. These circumstances are highly distinguishable from those in the *Best Buy* decision relied upon by the Employer. That case involved a probationary employee who was terminated after it was discovered that she was pregnant, and in circumstances where one of the employee's immediate supervisors had made harassing comments about the applicant's pregnancy. Much as in the instant case, the applicant sought to establish that the termination was discriminatory on the grounds that much of the information leading to the decision to terminate had originated with the discriminatory supervisor. In that case, however, the tribunal found the decision to terminate was not tainted by that discriminatory conduct, because it was grounded in an otherwise objectively grounded assessment of the applicant's performance: (at para 39):

> I find that Mr. Cacheiro [the responsible manager] made an objective appraisal of the applicant's work based on his own observation and the consistent feedback he received from employees observing the applicant's work, including Ms. Rattan [the offending supervisor] and the other

> Operations Senior. The applicant has, accordingly, not met her burden of proof to show that her pregnancy was a factor in the dismissal. It has not been shown that the applicant's pregnancy was a factor in the termination of her employment, or that the pregnancy, as opposed to her performance, was a reason she was not trained on the Rep 2 position. Accordingly, the dismissal did not violate the *Code*.[1]

77. In the instant case, there is no such neat divide between the discriminatory conduct of the supervisor, and the basis for Mr. Carter's decision to terminate the grievor. The supervisor's discriminatory conduct was at least partly responsible for causing in the first place the error for which the grievor was terminated and was clearly responsible for exacerbating it in interfering with the grievor's ability to correct it properly. His antipathy toward the grievor, which I have found was motivated in part by prohibited grounds of discrimination, caused him to portray a false version of the events of July 22 to Mr. Carter. Mr. Carter accepted Mr. Meier's version on its face with minimal investigation. With respect to the request for white-out, a point that was repeatedly raised as an egregious breach of the workplace rules and an important basis for the Employer's decision to terminate under the last chance agreement, the Employer did not even provide the grievor with an opportunity to respond.

78. To be clear, I am not here saying that the failure to conduct an exhaustive investigation or to meet a particular level of diligence would be fatal to the Employer's case were I deciding this matter under the strict terms of the last chance agreement. Rather, they are relevant to the extent that the Employer did not take any steps to inoculate its decision to terminate the grievor from the discriminatory conduct of its supervisor. In terminating the grievor in this manner, the Employer breached the *Human Rights Code*.

79. In light of my findings it is also clear that in terminating the grievor the Employer acted in a manner that was arbitrary, discriminatory and in bad faith. Having regard to my decision under the *Code,* however, it is unnecessary to determine whether the terms of the last chance agreement preclude the Union from challenging the termination on that basis.

CONCLUSION

80. For all of these reasons, I find that the Employer discriminated against the grievor because of his place of origin and ethnic origin contrary to s.5 of the *Code*. This discrimination was a material factor in the grievor's termination from employment. The terms of the last chance agreement cannot operate to

[1] The tribunal made a similar distinction in *Nishnawbe-Gamik Friendship Centre*, 2014 HRTO 321 (CanLII).

restrict the grievor's rights under the *Code* and they do not operate to restrict my remedial authority to rectify a breach of the *Code.* I therefore order that the grievor be reinstated to employment forthwith, without loss of or interruption to service and seniority. I note, however, that in light of the medical evidence before me, any return to active duty is subject to grievor's medical condition and the duty to accommodate. I also order that the Employer compensate the grievor for losses arising from his unlawful termination and remit the issue of compensation for lost wages and any damages arising from the breach of the *Code* to the parties. I remain seized in the event that the parties are not able to reach an agreement on the appropriate quantum.

Dated at Toronto, Ontario, this 21st day of January 2019.

Eli A. Gedalof
Sole Arbitrator