

IN THE MATTER OF THE ARBITRATION OF
THE OCTOBER 14, 2005 GRIEVANCE PURSUANT TO
THE COLLECTIVE BARGAINING AGREEMENT

BETWEEN:

LEON'S MFG. CO. LTD.,
(hereinafter referred to as the "Employer" or the "Company")

AND:

RETAIL, WHOLESALE AND DEPARTMENT STORE UNION,
LOCAL 955,
(hereinafter referred to as the "Union")

Before: Gloria Cymbalisky – Nominee for the Union
Gary G.W. Semenchuck, Q.C. – Nominee for the Employer
William F.J. Hood – Chairperson

Appearing for the Union: Larry Kowalchuk
Appearing for the Employer: Larry B. LeBlanc, Q.C.

Hearing: September 12, 2006
Yorkton, Saskatchewan

AWARD

I. INTRODUCTION:

1. In this matter, the Union alleges that Ray Malinowski ("Ray"), the Chief Executive Officer of the Employer, violated the Employer's harassment policy by yelling at and verbally abusing a long-time employee. The allegation essentially is that in the presence of Leon Malinowski ("Leon"), President of the Employer at the time, but recently deceased, Ray swore at and called Glen Zulyniak ("Zulyniak") names. In particular, the allegation is that Ray called Zulyniak a "dog fucker" and said "why don't you older employees fuck off". Zulyniak became emotionally distraught, broke down and cried over this incident.

2. Ray's version of this incident differs substantially from Zulyniak's version. The incident stems around the timeliness and quality of improvements, made by or under the supervision of Zulyniak, to a front end loader that was custom mounted on a retail customer's tractor. Ray

denies that he called Zulyniak names, or used the phrase “dog fucker”. He acknowledges that the “f” word was used in the exchange, but denies that such use was attributable to any person. Furthermore, Ray denies saying “why don’t you older employees fuck off”.

3. Ray acknowledges that Zulyniak was frustrated in the exchange. Ray described Zulyniak as “Leon’s boy” and that Zulyniak “did not want to disappoint him”.

4. This award considers the credibility and memory of the witnesses to the incident. Furthermore, this award considers the harassment policy, its place in the Collective Agreement, its applicability to both the Employer and the employees, and finally, whether the incident in question results in a breach of the Collective Agreement by the Employer.

II. FACTS:

A. *Background:*

5. The Company is a family-owned agricultural short-line and industrial manufacturing business, primarily operating from facilities located in Yorkton, Saskatchewan. The Company’s products are sold through dealers located mainly throughout Canada and the United States and as well, to a lesser extent, internationally. The Company traces its roots to a blacksmith shop in Bankend, Saskatchewan formerly owned by Leon’s father and taken over by Leon in 1952. In 1967 Ray joined Leon in the business and later they built a manufacturing facility in Yorkton. Under the stewardship of Leon and Ray, the two Malinowskis grew the business to its present day status. Leon passed away some two weeks prior to this hearing. Leon was the “idea” person developing the concepts, looking after the manufacturing side of the business, while Ray was the business person looking after sales. The Malinowskis are joined by Ray’s children in this business.

6. Ram Industries, a sister company of sorts, also operates from Yorkton. The two companies are structured such that Ray is President of Ram Industries and Leon was President of the Company. However, and more so in the case of Ray, their presence passed over to the other businesses. Ray, for example, was physically more present at the Company’s facility than at Ram’s facility. Since Leon’s death, Ray sees it as his goal to succeed the business and the fruits thereof to the next generation, which includes his and Leon’s family.

7. It is our observation that these two businesses have a considerable presence in Yorkton. Also, it is our observation from the evidence that Ray is a person who speaks his mind and is not easily challenged. Ray is admittedly very passionate about the business; he and Leon would engage, from time to time, in passionate debates about the Company's products with one often playing devil's advocate. Our observation from the evidence is that when Ray is challenged, he is quick to engage and defend. We say this not to criticize, but rather to observe that he fits the mold of the typical Saskatchewan self-made and successful entrepreneur.

8. Zulyniak, other the hand, is not an entrepreneur. Rather, he is a skilled and valuable long-time employee of the Company, who worked hand-in-hand with Leon on the production side. Zulyniak commenced employment with the Company in 1972. For the latter part of his employment, he worked under the tutelage of Leon in the research and development department ("R & D"). Zulyniak's title was a "jig maker." Having perfected new products in R & D, Zulyniak would then make the jigs or molds such that the product could be produced in a manufacturing process rather than through the experimental approach taken in R & D. Included in this, Zulyniak would design mounting kits to attach front end loaders to tractors. The mounting kits are not interchangeable between different tractors.

9. It was clear from the evidence that there was some form of bond or relationship between Leon and Zulyniak that developed through their long association with each other in the workplace. It was apparent from the evidence that Ray did not have this relationship with Zulyniak. Ray was on the business side and, unlike Leon who was on the production or manufacturing side, did not work hand-in-hand with Zulyniak over the years. As referred to above, Ray, in his evidence, referred to Zulyniak as "Leon's boy". Zulyniak was a pallbearer at Leon's recent funeral.

B. *The Incident:*

10. John Malinowski, son of Ray and nephew of Leon, who, at the time of the incident, was the general manager and is now Vice President of Sales and Marketing of the Company, testified as to the supply and installation of a loader custom mounted on a Massey model 492 front end assist tractor for a retail customer. The customer was giving the Company a "second chance to make good." The Company had supplied this customer with a substandard loader in the past.

John Malinowski told Zulyniak that it was imperative the loader be properly attended to this time as to its "fit, finish, cosmetics and operational" stature, and that it should be gone through with a fine-toothed comb. John Malinowski stated that he personally would inspect and approve the loader before it left the Company.

11. The work was done in the latter part of September 2005. Zulyniak's responsibility was to pick the appropriate loader, make the mounting kit and mount the loader to the customer's tractor. Zulyniak picked what he thought was the most appropriate loader out of the Company's yard. It was not in very good shape, and had to be blasted and repainted.

12. The first paint job was not good and was rejected by Zulyniak. The loader was sent back to be repainted. It was then mounted to the tractor. There was a concern whether the loader was sticking out too far at the front end of the tractor. The conclusion, at the level that Zulyniak was dealing with at the time, was that it was acceptable. Involved at this level was Mr. Kannan, the production supervisor and plant manager, and Zulyniak's supervisor. When John Malinowski came to inspect it, he completely rejected it. John Malinowski testified that the work was "unacceptable", the paint job was "horrific" and he was embarrassed to think that the Company, and in particular, Zulyniak, would approve the loader, as mounted, ready for delivery to this customer. As a result, the loader had to be stripped, oil lines removed and the loader sent back for a new paint job. Although there was a concern that the loader looked a little big on the tractor, the consensus was that it was the best fit of the available loaders.

13. John Malinowski's inspection and rejection took place towards the end of the work day. Zulyniak, whose work was challenged and was now faced with the prospect of having to redo the work, was frustrated. He thought the work was okay and that his supervisor had approved it. He waved his arms in the air, threw his wrenches on the work table, and told the group that had been assembled by John Malinowski to preview the loader that he didn't care and was going to go home to get drunk and forget about it. As it turned out, he did not leave work early that day.

14. John Malinowski told his father, Ray, about the incident and Zulyniak's attitude stating that he did not care and that his answer was to go home and get drunk.

15. The loader was repainted and reinstalled on the customer's tractor. Prior to the tractor leaving the Company, Leon invited Ray to come to R & D and inspect the tractor. Ray met with Leon and they began debating how the loader looked on the tractor, whether it stuck out too far and could the hoses be connected differently. It was at this time, on Friday afternoon, that Zulyniak came into the picture and was asked what he thought about the loader installation. Zulyniak testified that when he came upon Leon and Ray they appeared to be having an argument and were mad. After Zulyniak joined Ray and Leon, he observed that Ray became very mad and Ray commenced to challenge him about the installation. Ray complained that the loader was mounted too far in front of the tractor, and although by now the paint job looked fine, Ray questioned why it needed to be done three or four times and why Zulyniak had accepted the previous work and was prepared to deliver a tractor when the painting was defective. Zulyniak attempted to justify the installation. He said that his supervisor, Kannan, had approved the work.

16. Leon did not participate in, but continued to observe, the conversation between Zulyniak and Ray, which lasted some 30 minutes. It is at this point the evidence as to what transpired during the conversation differs substantially.

17. Zulyniak's recollection is that after responding to Ray's challenge, the conversation went down hill rapidly. Ray started calling Zulyniak names. In particular, he called Zulyniak a "dog fucker" and accused him of walking around the shop talking on his phone on company time. Zulyniak acknowledged, in cross examination, that he did talk on the phone during company time, and that the Company had looked the other way. Ray recounted to Zulyniak that his solution to the earlier incident, when the group thought the paint job was atrocious, was to go home and get drunk at 4:45 p.m. Ray stated that Zulyniak, a "30-year man," did not care and he "did not give a fuck anymore" and challenged Zulyniak as to why he stayed there. Ray said "why don't the older employees fuck off". Zulyniak responded and said that he did care and that was why he stayed at the Company, and that he liked his job. Zulyniak said that the Company was lucky to have an employee who cared, to which Ray responded that Zulyniak "got paid for every fucking hour" he worked. Leon then started to talk about different things, and according to Zulyniak, cooler heads prevailed. The conversation ended with Ray telling Zulyniak to have a good weekend.

18. Zulyniak left and saw Kannan, his supervisor and production manager. He told Kannan what had occurred with Ray and in Kannan's presence broke down and cried. Kannan put his arm around Zulyniak and told him to go home and they would talk about it on Monday.

19. Zulyniak saw Kannan on Monday morning, but Kannan appeared to not want to do anything about the incident. Kannan never did get back to him. There was no evidence that Kannan pursued the matter or that the chairperson of the Workplace Harassment Review Board ("WHRB"), referred to in the Workplace Harassment Policy (discussed later), became involved. Kannan was not called by the Employer to testify at the hearing.

20. Shortly after this incident (Zulyniak forgot exactly when, but thought it was within the week), Zulyniak reduced to writing his recollection of the events in a memo that reads as follows:

FRIDAY SEPTEMBER 30, 2005

The job I was working on was a mid mount kit and installation of a 7005 loader on a MF 492 FWA. I had to go and get some dump stops in the production area of the shop. When I returned to R&D, Ray and Leon Malinowski were in my area observing the loader that I had mounted. The first question from Ray Malinowski was, "Do you think the loader is sticking out too far in front of the tractor?" I replied that it was, but having mounted same size loaders on the same size tractor and having picked up a 1800 pound round bale with no problem, that I felt it should be acceptable. I told him that Ken Lange and Kannan had looked at it earlier and Ken thought it was okay. Ray said to me "who the fuck is Ken Lange"?

After this all hell broke out. I told him that it was blasted and repainted three times. Ray told me that I didn't care anymore and if it weren't for Dwight Turta, I would have sent the tractor out. He told me that a 30-year man should show more care and that my answer to everything was to go home and get "drunk". I told him that he was lucky to have an employee like me, someone who cares. This is when he called me a "dog fucker", and always walking around the shop and talking on the phone. He asked me "Why do you stay here? Why don't you older employees fuck off?"

At this point I crossed my arms, faced him and listened as he proceeded with some more name calling and ranting. When he quit hollering for a moment, I asked if he was finished. He asked me if I had anything to say. I knew that if I had said something, this abuse would have continued, so I remained silent.

Finally, Leon interrupted Ray and started talking about the installation of the loader. At about 4:15 PM they both left.

Around 4:20 PM I found Kannan (plant manager), called him into R & D, took him outside and told him what had happened. I was so upset that I broke down and cried. He told me to go home and we would talk about it on Monday morning.

Glen Zulyniak

21. The above memo was delivered to the Employer with the grievance.

22. Ray's recollection of the content of this conversation is at odds with Zulyniak's. According to Ray, it was Zulyniak that asked him what he thought about the loader installation to which Ray replied the loader looked at little bit further ahead, but overall looked good on the tractor. It was then that Ray remarked "it's about time" and Ray's observation was that Zulyniak immediately became defensive and felt the need to respond. Ray acknowledges that he did bring up Zulyniak's prior response to criticism was to throw up his hands and go home to get drunk. Ray acknowledged that the conversation became faster and, in his view, was a "process of denials and excuses" by Zulyniak. He also observed that Leon had stepped back from the exchange. Ray acknowledged that Zulyniak's statement that they should be happy to have Zulyniak, a 30-year employee, "did not go over very well" with him. Ray's response was that Zulyniak was "well paid", that he "kills time when the boss is away" (referring to Leon), and that he is "paid for every hour".

23. Ray denied calling Zulyniak a drunk and that reference to drunk was relaying Zulyniak's response to the earlier criticism to go home and get drunk. When asked in direct evidence if he said "dog fucker" during the exchange, he categorically denied this and then volunteered that he had never used this expression in his life. Ray denied that he said "why don't you older employees fuck off" and that this would not be the Company's objective. His concern, however, was that "older employees know better" in reference to Zulyniak's acceptance of a defective loader for delivery to this particular customer. Ray admitted using the "f" word in the exchange, but that its use was not directed at Zulyniak or any person, but rather was in reference to a loader or the like. Ray did not think he called Zulyniak a name and, in his view, did not demean him. Ray testified that he thought Zulyniak used the "f" word in this exchange. In cross examination, however, Zulyniak denied use of the "f" word.

24. Ray, in cross examination, tempered his denial of ever using the expression "dog fucker" by saying he "didn't remember it", "didn't think so", and "would not have used the word". Counsel for the Union put to Ray the circumstances of a prior meeting in the Company's board room with members of the Union, including a Garry Burkart, where the suggestion was that Ray, during this meeting, used the expression "dog fuckers" to which Ray's answer was "I don't recall".

25. Also in cross examination, Ray denied that Zulyniak, in the exchange, said Ken Lange and Kannan had looked at the loader earlier and Ken thought it was okay, and did not remember saying "who the fuck is Ken Lange".

26. We observed that during Ray's cross examination he did not take lightly to the questioning and at times became very belligerent to counsel for the Union. At one point, Ray lost his temper and blew up. Ray is not one who takes a challenge lightly.

27. Also in cross examination, Ray volunteered that Zulyniak placed calls on Company time, takes liberties, and when Leon was away, Zulyniak's work slowed down.

28. Further in cross examination, and not in direct response to the question, Ray came back to that part of the conversation where it was made known to Zulyniak that they were very disappointed in his approach to solving the problem by going home and getting drunk, and that this was "not the way to solve the problem" and "they expect more from him". Ray then went on to say "he [Zulyniak] was frustrated" and was "very disappointed we knew work wasn't done" and that Zulyniak was "Leon's boy" and "he didn't want to disappoint him".

29. The Union called Garry Burkart ("Burkart") in rebuttal to give evidence in connection with the prior meeting among Ray and the Union executive. The purpose of such evidence related to Ray's previous use of the expression "dog fucker". The Company objected to the calling of such evidence relying on the collateral fact rule. The argument was that the Union was stuck with the answer received in cross examination in connection with this meeting and could not contradict it by further evidence. It was the Board's ruling, by majority, that the evidence sought was not collateral to the material issues in this grievance.

30. Burkart testified that the meeting in question occurred in 2003. The Union had taken issue with the reclassification of a member's job and sought to resolve their complaint in a meeting with Ray rather than through a grievance. Ray got upset during the meeting, and although the comments were not directed at those present, Burkart testified that Ray said "the Company doesn't tolerate dog fuckers".

31. Notwithstanding the verbal report of the incident in question by Zulyniak to his supervisor, the Company did not attempt to resolve the situation with Zulyniak, nor did they conduct or cause to be conducted an investigation into the incident. John Malinowski testified that he first heard about the incident two weeks later. When asked in cross examination what the Company would have done had it been brought to his attention earlier, he said they would have had a conversation with Zulyniak. When pushed further on cross examination, the true concern of the Company came out with John Malinowski's statement "we needed Glen to explain why the loader was in the shape it was". It did not appear that there was any real interest in carrying out any investigation and addressing the impact of the incident on Zulyniak. The focus was on the loader, not carrying out an investigation and to resolve the situation with Zulyniak.

32. Ray first heard of the harassment complaint when he received the grievance with the memo attached on October 14, 2005. He immediately attempted to contact Zulyniak to apologize and did provide an apology followed by the letter of October 17, 2005, which states as follows:

October 17, 2005

Glen Zulyniak

Further to my verbal apology, I wish to express here that I am sorry if any comments made during our "review of the loader" on Sept. 30, 2005 caused you discomfort.

My comments and responses were meant to be constructive for the project in question. There was no intent to cause you personal discomfort. For the record, I did not think your use of loud and f---word language to me was a personal attack on me, either.

I disagree with your summary of happening [*sic*] as presented in your Sept. 30, 2005 letter that was attached to a Oct. 14, 2005 Union Grievance I saw on Saturday, Oct. 15, 2005. This will be responded to accordingly.

You have good knowledge and experience with the Company and my wish is that you will give the Company and our customers the benefit of your best efforts in your area of work.

Best personal regards.

Sincerely,

Ray Malinowski

and his letter of October 18, 2005, which states as follows:

October 18, 2005

Mr. B. Kannan:
Ms. Linda Turta:

Re: October 14th Grievance with Glen Zulyniak – Sept. 30, 2005 Letter

The following is my response to the above grievance, letter, etc.

The Sept. 30th note is badly distorted and statements are made that are simply not correct. There are words and phrases attributed to me that I have never ever used in my life time.

Upon learning of this grievance and letter, I have apologized verbally and in writing to Glen Zulyniak for any discomfort he may have felt during our "review" of this particular job. My comments during the "review" were directed strictly to the performance and review of this particular loader mounting job, and in response to comments made by Glen Zulyniak and others relating to this job. My comments were honest and concise; and never was there any intent to cause Glen Zulyniak any personal discomfort.

This particular loader mounting process was being done for a local dealer. At the beginning it was explained to Engineering and particularly to Glen Zulyniak that it was very important that this be a "first class job" because the Dealer was giving the Company a final chance to deserve their loader business after a previous similar experience where the mounting process (also involving Glen Zulyniak) was described as being very inadequate. Company personnel explained to Glen Zulyniak, etc. the need for us to really do a good job this time.

During the "review" regarding this loader in question, discussion did take place regarding how far the loader was ahead of the tractor but the decision was to leave it as is because this was the best loader model we could currently offer. Comments were made that the loader finish, placement of hoses, etc. looked fine now that it was redone for the 3rd or 4th time after being rejected earlier in the process, as not satisfactory, by other management and quality assurance personnel.

It appeared Glen Zulyniak was very surprised that I knew about the earlier incidences of rejection of this presentation of the loader mounting as complete. He may have also been embarrassed to have this being heard by the President of the Company who was also in our presence.

Glen was earlier prepared to release the mounted loader when he knew it was scratched, scarred, and had various mounting parts inadequately secured. Other management and quality personnel rejected earlier work and insisted on re-doing the work (dismantling, repainting, re-mounting, etc.) on at least 3 earlier occasions on this same mounting job.

On one of the requests to correct problems Glen Zulyniak expressed resentment for having to correct the problems and told those present that rather than fixing the problem, he may choose to simply leave work and go home and get drunk.

At this Sept. 30th, 2005 "Review", Glen Zulyniak started denying earlier problems and the need for re-work and making the "drunk" comments; to which I expressed disappointment that he would not have been insisting on putting out a product that would be 1st class and impress the customer as was initially specifically requested.

At this point, Glen Zulyniak became very defensive and anxious; and commented about others to blame; that earlier jobs were adequate; that we are being too particular; that we should not question or criticize work from a person like him who has worked here for 33 years; that the Company is "lucky" to have him; and his work output should not be questioned.

My response was quite clear in that we are grateful for his services, and that he has been well taken care of by the Company who have paid him for every hour worked and more; who provided good benefits, who have looked the other way despite him frequently being on the phone during working hours on personal affairs; who have often tolerated his reputation for wandering around and not working when supervisors are absent, etc. I clearly indicated that overall we are appreciative and pleased with Glen Zulyniak's performance – and we pay for it – so to suggest the Company is lucky and that his work should not be criticized was not totally valid.

Glen Zulyniak also expressed himself with swear words and in a loud voice. I spoke passionately about quality output being very important as we have on numerous occasions over the years. Glen Zulyniak may have been embarrassed that I knew (and now the Company President knew) about the various problems regarding this project; and he may have been surprised that these points were being openly discussed; however he was not yelled at and was not verbally assaulted.

He was not called the "names" mentioned in the grievance and at no time was it suggested that all older employees should leave the Company.

I had and have no "anger" towards Glen Zulyniak, however it certainly was disappointing to review this situation, because I know Glen Zulyniak has the capabilities to do very excellent work when he puts his mind to it; and

this good work is "counted on" from an employee like Glen Zulyniak who has an understanding of how demanding our customers are and how competitive the marketplace is.

Witnesses to my various statements and versions of events:

- will attest to Glen Zulyniak proceeding to earlier prepare product for delivery while knowing the product did not meet standards requested.
- will attest to Glen Zulyniak's resentment at being requested to correct revealed problems.
- will attest to Glen Zulyniak's threat to leave work and get drunk [rather] than taking steps to correct the deficiencies stated.
- will attest to the fact that Glen Zulyniak was not personally yelled at or verbally assaulted in an abusive manner during this review meeting.
- will attest that Glen Zulyniak was not called the "names" stated [in the] grievance and supporting material.

This grievance has no basis in fact and will be refuted by myself and other witnesses if it proceeds further. In the meantime, I am available to discuss this matter again with any interested party to help clarify my position.

The Sept. 30, 2005 meeting was a review of performance regarding a certain project. It may have been uncomfortable for Glen Zulyniak but he certainly was not verbally abused in a personal way.

As stated earlier, I have apologized for any discomfort Glen Zulyniak may have felt; and I will request that future reviews are more low-key, providing Glen Zulyniak also undertakes to discuss issues and to not deny or refuse to do his best to serve our customers correctly.

Sincerely,

Ray Malinowski

33. Zulyniak testified that he did not believe the apology was sincere. Ray testified that he was sorry that he offended Zulyniak; that he did not want to hurt Zulyniak, and added that the offending situation was a business situation for him. The October 17 and October 18, 2005 letters from Ray were not introduced into evidence by the Employer, but rather by counsel for the Union during the cross examination of Ray.

C. *The Collective Agreement:*

34. The relevant provisions of the Collective Agreement are as follows:

ARTICLE 1 – PURPOSE AND CO-OPERATION

1.01 In consideration of the mutual value of joint discussions on matters pertaining to employer-employee relations, the parties hereto agree that the purpose of this Agreement shall be to set forth the terms and conditions of employment, relating to hours of work, rates of pay and other working conditions affecting the employees covered by this Agreement and to provide a grievance procedure and to maintain harmonious relations and to co-operate in promoting the efficient operation of the Company's business.

1.02 The Union and its members recognize the responsibility of the members to perform faithfully and diligently their respective duties for the Company and at all times to carry out their individual and collective responsibilities according to regulations, methods and procedures established by the Company and the members shall so perform and carry out their duties. The Union will work with and support the Company's efforts and actions to continuously improve labour efficiencies, quality and productivity standards.

ARTICLE 5 – MANAGEMENT RIGHTS

5.01 It is understood and agreed that the Company retains the exclusive right to operate and manage the affairs of the Company as those rights existed prior to the coming into force of this Agreement except to the extent as such rights may be abridged by a specific provision of this Agreement.

5.02 The Company shall not operate and manage its affairs in such a way as to be in contravention of a specific provision or specific provisions of this Agreement.

ARTICLE 22 – SAFETY AND HEALTH

22.01 **Occupational Health and Safety Committee:** There shall be an Occupational Health and Safety Committee which shall be composed of equal representation from the bargaining unit and the Company with not more than three (3) members from each.

...

ARTICLE 26 – DISCRIMINATION

26.01 No employee shall be discriminated against by either the Company or the Union by reason of activity in the Union or non-activity in the Union nor by reason of race, colour, age, sex, creed, or nationality.

D. The Grievance:

35. The grievance filed by Zulyniak on October 14, 2005 states as follows:

NAME: RWDSU Local 955 COMPANY: Leon's Mfg. Co. Ltd.

ADDRESS: 2154 Airport Dr., Saskatoon, Sask. S7L 6M6

HOME PHONE: 384-9885

FT __ PT __ HOURLY RATE: \$ _____ SENIORITY DATE: _____

GRIEVANCE AND SETTLEMENT REQUESTED:

The Employer and, in particular, Ray Malinowski, has and continues to harass, intimidate, threaten, discriminate against and verbally abuse employees. This is in violation of Articles 1.01, 5, 26.01 and the Harassment Policy under the terms of the Collective Agreement as well as the Saskatchewan Human Rights Code and the Occupational Health and Safety Act.

The latest such violation occurred on September 30, 2005 when Mr. Malinowski yelled at and verbally assaulted Mr. Glen Zulyniak. Mr. Malinowski called Mr. Zulyniak a "drunk", "a dog-fucker" and challenged generally all "older employees to fuck off". In this instance, Mr. Zulyniak was so upset and abused that he suffered emotional and psychological harm.

The Union is seeking the following remedies:

- a) that Mr. Malinowski be ordered to take an anger management counselling program recommended by the Saskatchewan Human Rights Commission;
- b) that Mr. Malinowski be prohibited from communicating with all in-scope employees until and if he successfully completes the above program;
- c) that Mr. Malinowski be ordered to pay general, aggravated and punitive damages in an amount not less than \$100,000.00 each to Mr. Zulyniak and all other employees who confirm and prove similar abuse, harassment and discrimination;
- d) that the Employer pay for a two-day seminar for all employees to attend and learn about their legal rights and obligations when dealing with harassment and discrimination. The Employer shall pay employees their actual wages to attend such seminar and to pay for all costs associated with the seminar. The seminar will be

conducted by the Saskatchewan Human Rights Commission in conjunction with the Union.

DATE FILED: Oct 14/05 SIGNATURE: "Garry Burkart"
 Garry Burkart, Representative
"Keith McTaggart"
 Keith McTaggart, A/Shop Steward
"Glen Zulyniak"
 Glen Zulyniak

D. Workplace Harassment Policy and Guidelines:

36. The document entitled "Leon's Mfg. Company Inc. Workplace Harassment Policy and Guidelines", effective December 1, 2000, states as follows:

I. STATEMENT OF COMMITMENT

Leon's Mfg. Company Inc. is committed to providing a safe, positive work environment where all employees are treated with courtesy, respect, and dignity. Achievement of a harassment free workplace requires mutual respect, co-operation, professional conduct and understanding of all employees.

II. DEFINITION OF HARASSMENT

The Occupational Health and Safety Act, 1993 [section (1) (l)] defines "harassment" as follows:

Harassment means any objectionable conduct, comment, or display by a person that:

- i) is directed at workers
- ii) is made on the basis of race, creed, religion, colour, sex, sexual orientation, marital status, family status, disability, physical size or weight, age, nationality, ancestry, or place of origin; and
- iii) constitutes a threat to the health or safety of the worker.

This policy defines "harassment" as follows:

Harassment is any unwanted conduct that offends or humiliates. It includes physical or verbal action on an individual or repeated basis which humiliates, insults, degrades or threatens the individual at whom it is directed. While not a complete list, examples of actions includes:

- verbal abuse or threats;
- unwelcome remarks, jokes, innuendoes or taunting about a person's body, attire, age, marital status, character, ethnic, or national origin, religion, sex or sexual orientation;

- displaying of pornographic, racist or other offensive/derogatory pictures;
- practical jokes which cause awkwardness or embarrassment;
- unwelcome invitations or requests, whether indirect or explicit, or intimidation;
- leering or other gestures;
- [condescension] or patronizing which undermines self-respect;
- unwelcome physical conduct such as touching, patting, pinching, punching;
- physical assault;
- threats of loss of one's job or other forms of reprisal if one does not comply with a request for sexual favours.

NOTES:

"*Unwelcome*" means an action which the individual knows or should reasonably know is not desired by the person at which it is directed.

When based on mutual consent, normal social contact between the sexes does not constitute sexual harassment. In the event that one party wishes to end the normal social contact, then the other party will respect their wish[e]s in the work environment. A breach of the party's wishes may, depending on the circumstances, be a violation of this policy.

Management of the workplace (e.g. work assignment, performance appraisal counselling, investigation, and implementation of disciplinary situations and actions, etc.) is not a form of personal harassment (subject to extenuating circumstances) and this policy does not restrict the responsibilities of managers and supervisors in performing these functions.

III. RESPONSIBILITIES

Leon's Mfg. Company Inc. has a duty to ensure, as is reasonably practical, that employees are not exposed to harassment in the workplace, and all employees have a duty to refrain from causing or participating in the harassment of another employee.

As an employee, you are encouraged to assist in the solution of workplace harassment issues. If an employee is being harassed, the situation cannot be ignored. The guidelines below must be followed:

- Communication of the incident to those not directly involved is inappropriate. Allow the resolution process to substantiate or not substantiate the allegations. Unfounded allegations of harassment are a reality. Significant damage can be done to an individual falsely accused.
- If you are in a management/supervisory position, you have the added responsibility to expeditiously address any complaints directed to you for resolution in accordance with procedure outlines. Failure to do so may result in disciplinary action.

- If you have witnessed an alleged offence, be prepared to support your fellow employee by providing a statement of the events you witnessed. If an investigation is initiated, this statement may be supportive of the complainant or the alleged harasser.

In accordance with the Occupational Health and Safety Act, 1993

This policy must be posted on all bulletin boards.

IV. RESPONSIBILITIES

1. If you perceive you are being harassed, you should indicate to the individual(s) that the behaviour is unwelcome and request it be stopped. This may be verbal or written. It is beneficial to record the events to help you remember the details over time (dates, times, locations, witnesses, what happened and you[r] response). However, lack of such record does not prevent the lodging of a complaint.

2. If the unwelcome behaviour continues, or you are not able to deal directly with the individual(s), you have the alternative of contacting you[r] immediate supervisor/manager, the immediate supervisor/manager of the individual, or the chairperson of the Workplace Harassment Review Board (WHRB).

3. Regardless of whether you go directly to the WHRB chairperson, or contact either supervisor/manager, the next step will be for that person to facilitate an attempt to resolve the situation directly with the complainant and the accused individual, without a formal investigation.

4. If the above process is successful, no record will be maintained on the personal file of either employee.

If this process is unsuccessful, a written complaint describing the situation including an account of the proceedings thus far, should be forwarded to the WHRB through the chairperson.

5. The WHRB chairperson will immediately proceed with an investigation. The investigation will include interviewing or obtaining statements from all parties concerned and any witnesses involved.

All proceedings will be kept confidential. No record will be kept on the complainant's personnel file, unless the complainant is proven to have intentionally filed a false complaint.

No action against an accused individual shall be taken until the investigation is completed. If guilt is proven and the employee is not dismissed, a record of the offence and decisions will be retained on the personnel file of the harasser.

6. Based on the evidence, the WHRB will make a determination of the complaint and forward a recommendation to the employee's Manager within 15 working days. The recommendation will consider the severity of

the harassment, damage caused, and recommend an appropriate course of action, including discipline.

In a case where the written complaint is against the employee's Manager, the recommendation will be forwarded to the President of the Company.

Disciplinary action in proven harassment complaints may include counselling, verbal reprimand, suspension or dismissal. Proven offences will be retained in harasser's personnel file. Similar actions may be taken against one who is proven to have intentionally filed a false complaint.

7. The employee's Manager will review the complaint, evidence, and the WHRB recommendations for approval or modification. At that time, he/she may choose to involve the appropriate supervisor. The WHRB will be informed of the executive decision. Any further action, including the implementation of discipline, will be the responsibility of the Manager.

Resolution of the complaint will be given top priority, investigation and dealt with promptly. The complaint and the accused individual(s) will be informed by their Manager or their supervisor of investigative findings and outcome. The situation will be resolved within 20 days.

Note: Nothing in this Harassment Policy Statement discourages or prevents a worker from referring a harassment complaint to the Occupational Health and Safety Division[;] under The Occupational Health and Safety Act, 1993; particularly sections 3 and 4; and The Occupational Health and Safety Regulations, 1996; particularly section 36. A worker may also file a complaint with the Saskatchewan Human Rights Commission under The Saskatchewan Human Rights Code, particularly sections 16, 17, 18 and 27. A worker retains the right to exercise any other legal avenues available.

III. ISSUES:

37. The issues are as follows:

1. Is the conduct harassment?
2. If so, is such a violation of the Collective Agreement by the Employer?

IV. LAW AND ARBITRAL JURISPRUDENCE:

A. Legislation:

38. *The Occupational Health and Safety Act, 1993* S.S. 1993, c. O-1.1 ("the OHSA") prohibits harassment in the workplace. The relevant provisions of such legislation are as follows:

2(1) In this Act:

...

(l) "harassment" means any objectionable conduct, comment or display by a person that:

- (i) is directed at a worker;
- (ii) is made on the basis of race, creed, religion, colour, sex, sexual orientation, marital status, family status, disability, physical size or weight, age, nationality, ancestry or place of origin; and
- (iii) constitutes a threat to the health or safety of the worker;

...

(p) "occupational health and safety" means:

- (i) the promotion and maintenance of the highest degree of physical, mental and social well-being of workers;
- (ii) the prevention among workers of ill health caused by their working conditions;
- (iii) the protection of workers in their employment from factors adverse to their health;
- (iv) the placing and maintenance of workers in working environments that are adapted to their individual physiological and psychological conditions; and
- (v) the promotion and maintenance of a working environment that is free of harassment;

3 Every employer shall:

- (a) ensure, insofar as is reasonably practicable, the health, safety and welfare at work of all of the employer's workers;
- (b) consult and co-operate with any occupational health committee or the occupational health and safety representative at the place of employment for the purpose of resolving concerns on matters of health, safety and welfare at work;
- (c) ensure, insofar as is reasonably practicable, that the employer's workers are not exposed to harassment at the place of employment;
- (d) co-operate with any other person exercising a duty imposed by this Act or the regulations; and
- (e) comply with this Act and the regulations.

4 Every worker while at work shall:

(a) take reasonable care to protect his or her health and safety and the health and safety of other workers who may be affected by his or her acts or omissions;

...

15(1) Subject to the regulations, at every place of employment where 10 or more workers of one employer work, the employer shall:

(a) establish an occupational health committee at the place of employment; and

(b) designate persons as members of the occupational health committee in accordance with this section.

(2) An occupational health committee must consist of at least two and no more than 12 persons.

...

39. *The Occupational Health and Safety Regulations 1996 RRRS provide as follows:*

36(1) An employer, in consultation with the committee, shall develop a policy in writing to prevent harassment that includes:

(a) a definition of harassment that includes the definition in the Act;

(b) a statement that every worker is entitled to employment free of harassment;

(c) a commitment that the employer will make every reasonably practicable effort to ensure that no worker is subjected to harassment;

(d) a commitment that the employer will take corrective action respecting any person under the employer's direction who subjects any worker to harassment;

(e) an explanation of how complaints of harassment may be brought to the attention of the employer;

(f) a statement that the employer will not disclose the name of a complainant or an alleged harasser or the circumstances related to the complaint to any person except where disclosure is:

(i) necessary for the purposes of investigating the complaint or taking corrective action with respect to the complaint; or

(ii) required by law;

- (g) a reference to the provisions of the Act respecting harassment and the worker's right to request the assistance of an occupational health officer to resolve a complaint of harassment;
 - (h) a reference to the provisions of The Saskatchewan Human Rights Code respecting discriminatory practices and the worker's right to file a complaint with the Saskatchewan Human Rights Commission;
 - (i) a description of the procedure that the employer will follow to inform the complainant and the alleged harasser of the results of the investigation; and
 - (j) a statement that the employer's harassment policy is not intended to discourage or prevent the complainant from exercising any other legal rights pursuant to any other law.
- (2) An employer shall:
- (a) implement the policy developed pursuant to subsection (1); and
 - (b) post a copy of the policy in a conspicuous place that is readily available for reference by workers.

B. Authority of Arbitrator:

40. An arbitrator's jurisdiction is grounded in the collective agreement. It is well recognized that arbitrators derive their jurisdiction either explicitly, or implicitly, from the collective agreement under which they are appointed. The first question an arbitrator faces, in any arbitration, is whether the subject matter of the dispute falls within the jurisdiction of the arbitrator. A labour arbitrator's jurisdiction, however, is not strictly limited by the four corners of a single document entitled "collective agreement". There are exceptions. Generally speaking, it is well accepted that management's right to operate the business is limited by the employee's statutory rights, even though those rights are not embodied in written form in the collective agreement (*Parry Sound (District) Welfare Administration Board v. O.P.S.E.U., Local 324* 2003 SCC 42 [*Parry Sound*]).

41. Iacobucci J., writing on behalf of the majority of the Supreme Court in *Parry Sound*, states at para. 23 as follows:

For the reasons that follow, it is my conclusion that the Board was correct to conclude that the substantive rights and obligations of the *Human Rights Code* are incorporated into each collective agreement over which the Board has jurisdiction. Under a collective agreement, the broad rights of an

employer to manage the enterprise and direct the work force are subject not only to the express provisions of the collective agreement, but also to statutory provisions of the *Human Rights Code* and other employment-related statutes.

42. The Supreme Court, in *Parry Sound*, found that substantive rights and obligations in employment related statutes are implicit in every collective agreement. Iacobucci J., in *Parry Sound*, writes at para. 28 and 29:

As a practical matter, this means that the substantive rights and obligations of employment-related statutes are implicit in each collective agreement over which an arbitrator has jurisdiction. A collective agreement might extend to an employer a broad right to manage the enterprise as it sees fit, but this right is circumscribed by the employee's statutory rights. The absence of an express provision that prohibits the violation of a particular statutory right is insufficient to conclude that a violation of that right does not constitute a violation of the collective agreement. Rather, human rights and other employment-related statutes establish a floor beneath which an employer and union cannot contract.

As a result, the substantive rights and obligations of the parties to a collective agreement cannot be determined solely by reference to the mutual intentions of the contracting parties as expressed in that agreement. Under *McLeod*, there are certain terms and conditions that are implicit in the agreement, irrespective of the mutual intentions of the contracting parties. More specifically, a collective agreement cannot be used to reserve the right of an employer to manage operations and direct the workforce otherwise than in accordance with its employees' statutory rights, either expressly or by failing to stipulate constraints on what some arbitrators regard as management's inherent right to manage the enterprise as it sees fit. *The statutory rights of employees constitute a bundle of rights to which the parties can add but from which they cannot derogate.*

[Emphasis added]

43. Recently, in *Isidore Garon Ltee v. Syndicat du Bois Ouvre de la Region de Quebec Inc.*, [2006] 1 SPS. C.R. 27, the Supreme Court of Canada clarified that only those substantive statutory provisions which are “compatible” with the labour relations scheme are incorporated in the collective agreement. Deschamps J., writing on behalf of the majority, clarified the rules as to what is compatible and incompatible and writes in para. 24 - 27:

24 The solutions adopted in the two lines of cases may seem contradictory: on the one hand, the general law is excluded because the collective scheme takes precedence; on the other, certain external norms are implicitly included in the collective agreement. However, this impression does not stand up to analysis. While the first line of cases addresses the

supplanting of individual rights that are incompatible with collective labour relations, the second relates primarily to the arbitrator's power to apply provisions that are implicitly included in a collective agreement. In the first line of decisions, the right relied on is incompatible with the collective scheme, while in the second, the norm is not only compatible with the collective agreement, but is also incorporated into it. For example, in *Parry Sound*, the application of the Ontario *Human Rights Code* to the employee was not disputed. The issue was the arbitrator's power to apply it. *Parry Sound* did not reverse *Paquet*, *McGavin*, *Hémond* or *Noël*. The principle that emerges from that case is that, if a rule is incompatible with the collective labour relations scheme, it cannot be incorporated and must be disregarded, as was the case in *McGavin*, *Hémond* and *Noël*. If the rule is found to be compatible and if it is a supplementary or mandatory norm, as in *McLeod*, *Weber* and *Parry Sound*, the arbitrator will have jurisdiction to apply it.

25 Before determining whether the norm is supplementary or mandatory, its compatibility must be ascertained. How do we determine whether a provision or rule is compatible? What rights are supplanted by the collective scheme? Underlying the first line of cases is the desire to give precedence to collective bargaining for all conditions of employment. *If the right claimed can be characterized as a condition of employment, it cannot be negotiated individually by the employer and the employee. The union alone performs this task, and it must do so for the employees collectively.*

26 What is a condition of employment? The question was asked by this Court in *Paquet*. The provision at issue was characterized as a condition of employment on the basis that it had a real connection with the contract of employment (p. 211). Since, in that case, check-off was directly related to the regulation of employer-employee relations, the Court held that the provision was a condition of employment. *Because of the monopoly on representation, no room was left for individual negotiation.* All employees, whether or not they were members of the union, were subject to check-off.

27 The precedence given to the collective scheme is sometimes taken to mean that freedom of contract is abrogated once a collective agreement is concluded: *Paquet*, at p. 212. However, it is clear that the employment relationship arises only when the employee accepts the employer's offer to hire him or her. *There is therefore no source in either Canadian case law or legislation for the theory that individual contracts are completely abolished in the context of the collective scheme. The individual contract does not cease to exist, but is simply suspended.* When a union's certification is revoked, the individual contract becomes effective again and once again becomes the only tool for managing the employment relationship. If it no longer existed, the employee would have to be rehired, which is not the case. *When the collective scheme ends, this does not terminate the employment relationship.* During the term

of the collective agreement, however, the individual contract of employment cannot be relied on as a source of rights.

[Emphasis added]

44. It is also well established that the collective agreement can consist of more than one document. Generally, for additional documents to be treated as part of the collective agreement, they must be in writing and signed by the parties (see *Canada Bread Co. Ltd. and Bakery & Confectionery Workers' Int'l Union, Local 322* (1970), 22 L.A.C. 98).

45. Ancillary or side documents which form part of the collective agreement and are enforceable in their own right are distinguished from unilateral promulgated statements of employment policies.

46. Management rules and policy is most often considered in cases involving management's wish to discipline a worker and is the extension of management's right to direct the workplace. The union's position often is that because the rule is unilaterally imposed by management without the express consent of the union, it should not necessarily be given any special stature. In other words, just because management makes a rule that says this is how it is going to happen does not mean that such rule can unilaterally be imposed upon the union and its members.

47. In the seminal decision of *KVP Co. Ltd. and Lumber & Sawmill Workers' Union, Local 2537* (1965), 16 L.A.C. 73 (Robinson) ["KVP"], rules were put forth as to when the employer could rely on its own policy to discipline employees that deviate from such policy. Employers were entitled to rely upon such policy if it meets the following criteria:

- (1) it is consistent with the collective agreement;
- (2) it is reasonable;
- (3) it is clear and unequivocal;
- (4) it was brought to the attention of the employee(s) affected before the employer attempts to act on it;
- (5) where the rule is invoked to justify discharge, the employee was notified that a breach of the rule could result in discharge; and

...

V. ANALYSIS:

A. *Are the Statutory Provisions of the OHSA Implicit in this Collective Agreement?*

48. The OHSA promotes the health and safety of workers. The statutory provisions of this legislation not only promote that workers be free of harassment, but also obligate the employer to, within reason, ensure that its workers are not exposed to harassment in the workplace. The OHSA requires the employer to develop a policy in writing to prevent harassment, the minimum of which includes a definition of harassment that includes the definition in the OHSA.

49. The OHSA, like human rights legislation, contains statutory provisions that are implicit in the Collective Agreement. These statutory provisions are compatible with the labour relations scheme. They apply to all workers. It is a condition of employment that all workers are afforded the rights under this legislation. It is not an individual right that can be bargained away. There is “no room left” for individual negotiation.

50. In our view, the statutory provisions of the OHSA are part of this Collective Agreement over which this arbitration board has jurisdiction. Simply put, the Collective Agreement requires that management comply with such legislation to the same extent as any covenant expressly provided for in the Collective Agreement.

51. In this case, the Employer, in compliance with its statutory obligations under the OHSA, did develop and implement a harassment policy. The Policy includes not only the definition of harassment under the OHSA, but also expands on that definition. The definition of harassment in the OHSA is discriminatory harassment. In other words, harassment under the OHSA is conduct that not only constitutes a threat to the health or safety of the worker, but is made on discriminatory grounds.

52. If wrong in this reasoning and the Policy, in its totality, is not implicit of the Collective Agreement because it is the result of the Employer’s compliance with statutory provisions, then we are of the opinion that the Policy is an additional agreement made between the Employer and the Union and as such is to be treated as part of the Collective Agreement.

53. The Policy is a statement by the Employer of acceptable practices in the workplace. The Policy sets a standard from which deviation by employees will be subject to discipline. The principal behind such Policy is to promote and maintain the safety and welfare of employees. The Policy is to have general application throughout the workplace. To be more specific, in our view, the Policy was not intended to have application only to Union members, but was a general statement as to how all employees can expect to be treated in the workplace, both by fellow workers and members of management.

54. In our opinion, the Policy made by the Company is their offer to the Union as to what, in the Employer's view, is acceptable and unacceptable conduct in the workplace. The Union is not bound to accept such offer and reserves the right to challenge such Policy when used by the Employer to support discipline. Such challenge could be along the basis set forth in *KVP*. However, the Union can accept the Employer's offer, and if so, such Policy becomes an ancillary document that is part of the Collective Agreement enforceable in its own right. Such acceptance must be communicated. In this case, the acceptance by the Union was communicated when the grievance was filed. In this case, if acceptance was not earlier communicated, it was communicated when the grievance was filed. The Union and the Employer have agreed that harassment as defined in the Policy, which includes personal harassment as well as discriminatory harassment, is not permitted in the workplace.

55. If again wrong in this reasoning, then it is our opinion that implicit in this Collective Agreement is the statutory definition of harassment found in section 2(1)(l) of the OHSA and the Employer's obligation pursuant to section 3(c) of the OHSA "the employer shall ...ensure, insofar as reasonably practical, that the employer's workers are not exposed to harassment at the place of employment".

B. Is the Conduct Harassment?

56. Having the benefit of hearing the evidence from all witnesses and observing their disposition, it is our view that, for the most part, Zulyniak's recollection of what occurred during the incident is better and more in line with the facts than Ray's recollection. We find as a fact that during the exchange Ray called Zulyniak a "dog fucker", asked him why he stayed there, and made a statement to the effect "why don't you older employees fuck off". In considering

whether Ray's conduct was harassment, we must and do take into account not just the offending words used in this exchange, but also the fact that the exchange took place in the presence of Leon. As pointed out above, in Ray's own evidence, he described Zulyniak as "Leon's boy", and acknowledged that Zulyniak was flustered during the exchange as "he did not want to disappoint Leon". Further, the exchange did not take place on a level playing field and had the potential to drive a wedge between Leon and Zulyniak. Zulyniak attempted to defend himself in Leon's presence, but was no match against Ray, the Employer and a person who, in our view, would and did not take lightly to a challenge of his assessment of the situation. Furthermore, Leon, his boss, stood idly by and did not come to Zulyniak's defence.

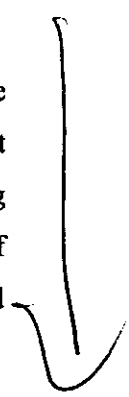
57. We are of the view that it is also significant that the Company did not pursue this issue and that when it was brought to the attention of Kannan, the immediate supervisor, nothing further was done until the grievance. There is no evidence that Kannan pursued the matter following the verbal report of this incident. The fact that he was not called as a witness permits us to draw an adverse inference and conclude that his evidence on this issue would have been detrimental to the Company on this point.

58. The definition of harassment in OHSA as a three-prong test. Harassment is defined as follows:

(l) "harassment" means any objectionable conduct, comment or display by a person that:

- (i) is directed at a worker;
- (ii) is made on the basis of race, creed, religion, colour, sex, sexual orientation, marital status, family status, disability, physical size or weight, age, nationality, ancestry or place of origin; and
- (iii) constitutes a threat to the health or safety of the worker;

59. In our view, the statement made by Ray "why don't you older employees fuck off", the context of the situation in which it was made, is harassment within the above-noted definition. It was directed at Zulyniak, it violated his health and was made on the basis of age. The playing field was not level. Ray was far more powerful than Zulyniak in such setting. The treatment of Zulyniak was an improper use of Ray's power. Zulyniak became emotionally distraught and



broke down and cried. In our view, this is the result one would expect from such misuse of power and treatment.

60. The above refers to discriminatory harassment. The Policy goes on to define harassment to include not only discriminatory harassment, but personal harassment. The Policy defines harassment as follows:

Harassment is any unwanted conduct that offends or humiliates. It includes physical or verbal action on an individual or repeated basis which humiliates, insults, degrades or threatens the individual at whom it is directed. While not a complete list, examples of actions includes:

- *verbal abuse* or threats;
- unwelcome remarks, jokes, innuendoes or taunting about a person's body, attire, age, marital status, character, ethnic, or national origin, religion, sex or sexual orientation;
- displaying of pornographic, racist or other offensive/derogatory pictures;
- practical jokes which cause awkwardness or embarrassment;
- unwelcome invitations or requests, whether indirect or explicit, or intimidation;
- leering or other gestures;
- [condescension] or *patronizing which undermines self-respect*;
- unwelcome physical conduct such as touching, patting, pinching, punching;
- physical assault;
- threats of loss of one's job or other forms of reprisal if one does not comply with a request for sexual favours.

[Emphasis added]

61. Even if one ignores the statement made in connection with "older employee", in our view, the statements made by and the conduct of Ray towards Zulyniak in that 30 minute conversation, in the presence of Leon, was harassment within the expanded meaning of harassment in the Policy. Ray demonstrated a complete lack of courtesy or respect for Zulyniak. It was offensive to bring a grown man to tears and humiliate Zulyniak in the presence of Leon, his boss, his mentor, and a person with whom he had such a long-term relationship with that, notwithstanding this grievance remaining outstanding, was still a pallbearer at his recent funeral.

62. The words used, and the context in which they were used, was insulting, degrading and completely undermined Zulyniak's self-respect. One need only ask what Ray expected to accomplish by such outburst, if it was other than to berate Zulyniak and make him less of a person in his own eyes and the eyes of Leon. The conduct looked at in its totality is nothing short of complete condescension that, whether intended or not, undermined the self-respect of Zulyniak.

63. This type of conduct and verbal action is not a permitted exercise of the Company's right to manage the workplace. Management clearly has the right to assign the work and evaluate the performance of such work. Management must exercise the rights to manage the workplace in a fair and reasonable manner. This was anything but fair and reasonable. What occurred in this case went far beyond a fair critique of Zulyniak's performance. Had Ray thought Zulyniak's comment that he should leave work and go home to get drunk was deserving of criticism, there were other proper channels available to pursue discipline.

64. The Company submitted that because Zulyniak did not elect to follow the procedure to handle the harassment complaint set out in the Policy, Zulyniak cannot rely on the Policy as a basis for the grievance. We disagree. First, the Policy was followed at least in part by Zulyniak. Section IV(2) provides that Zulyniak can contact his immediate supervisor, which he did. The onus then shifts in section IV(3) to the supervisor "to facilitate an attempt to resolve the situation". There is no evidence that his supervisor, Kannan, did this. The onus continues on the WHRB to proceed with an investigation if not resolved. We fail to see how Zulyniak can be faulted for pursuing his complaint by way of a grievance when it was not his, but rather his supervisor's, and then WHRB's, responsibility to pursue this independent of a grievance. Second, the Policy states "a worker retains the right to exercise any legal avenues available". In our view, there is nothing preventing Zulyniak from pursuing rights identified in the Policy by way of a grievance. As indicated in *Tranchemontagne v. Ontario (Director, Disability Support Program)*, [2006] S.C.J. No. 14, at para. 39, allowing many administrative actors to apply human rights legislation fosters a general culture of respect for human rights in the administrative system.

65. Simply put, there is nothing in the Policy that, on its face, limits the worker's rights to only avail oneself if the complaint is pursued through the confines of the Policy.

66. At this point, we would be remiss to not address one further point: in the course of our deliberation, the issue of how to address the introduction of Ray Malinowski's letter into evidence arose. The question was whether, having introduced the letter during the cross examination of Ray, the Union was bound by the content of the letter. We think not. Having introduced the letter, the Union surely cannot deny that it exists, that it was written by Ray, and on a certain date. However, it is not correct to say that we are bound to accept that the letter sets out the truth of how the incident transpired. We are to determine the facts based on all the evidence presented before us.

VI. CONCLUSION:

67. For the foregoing reasons, we are of the opinion that Ray harassed Zulyniak in the workplace, and as a result, the Employer breached its statutory obligations pursuant to the OHSA and the Policy implemented by the Employer, which are implicit in the obligations of the Employer in the Collective Agreement.

68. We sustain the grievance.

69. It was agreed by the parties that this board remain seized and retain jurisdiction with respect to the remedy. We therefore leave it to the parties to attempt to resolve the remedy by agreement, failing which this board shall determine such remedy.

DATED this 13th day of December, 2006.



William F.J. Hood, Chairperson

I concur.

Gloria Cymbalisky

I concur/disagree.

Gary G.W. Semenchuck, Q.C.

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DATED this 13th day of December, 2006.

I concur.

I concur/disagree.

William F.J. Hood, Chairperson

Gloria Cymbalista

Gloria Cymbalista

Gary G.W. Semenchuck, Q.C.

IN THE MATTER OF THE ARBITRATION OF
THE OCTOBER 14, 2005 GRIEVANCE PURSUANT TO
THE COLLECTIVE BARGAINING AGREEMENT

BETWEEN:

LEON'S MFG. CO. LTD.,
(hereinafter referred to as the "Employer" or the "Company")

AND:

RETAIL, WHOLESALE AND EPARTMENT STORE UNION,
LOCAL 955
(hereinafter referred to as the "Union")

Before: Gloria Cymbalisky – Nominee for the Union
Gary G.W. Semenchuck, Q.C. – Nominee for the Employer
William F.J. Hood – Chairperson

Appearing for the Union: Larry Kowalchuk
Appearing for the Employer: Larry B. LeBlanc, Q.C.

Hearing: September 12, 2006
Yorkton, Saskatchewan

DISSENTING AWARD

1. I have reviewed the majority Award and I disagree with the majority decision that the grievance is sustained. My dissent is based on the following reasoning.

2. The grievance refers to a violation of Articles 1.01, 5, 26.01 and the Harassment Policy under the terms of the Collective Agreement as well as *The Saskatchewan Human Rights Code* and *The Occupational Health and Safety Act*. Article 1.01 describes the purpose of the Collective Agreement. Article 5 describes management rights. Article 26.01 prohibits discrimination against an employee for union activity and prohibits discrimination based on race, colour, age, sex, creed or nationality. There was no evidence presented of any violation of Articles 1.01, 5 or 26.01.

3. The Harassment Policy of the Company is a separate document. There is no reference to the Harassment Policy in the Collective Agreement. The Harassment Policy makes reference to *The Occupational Health and Safety Act* and to *The Saskatchewan Human Rights Code* but the Policy stands on its own and provides a process for handling harassment complaints. Although the Grievor was aware of the Harassment Policy, he did not pursue the complaint process under that Policy. Instead, the Grievor chose to file this grievance and he must prove on a balance of probabilities that there has been a violation of a specific provision or provisions of the Collective Agreement as described in Article 23.01. As indicated above, there is no evidence of a violation of a specific provision or provisions of the Collective Agreement. However, that does not end the matter because *The Occupational Health and Safety Act* imposes certain obligations on an employer and those obligations are incorporated into the Collective Agreement (see the Supreme Court of Canada decision in *Parry Sound* referenced in the majority Award).

4. *The Occupational Health and Safety Act* defines harassment as “any objectionable conduct, comment or display by a person that:

- (i) is directed at a worker;
- (ii) is made on the basis of race, creed, religion, colour, sex, sexual orientation, marital status, family status, disability, physical size or weight, age, nationality, ancestry or place of origin; and
- (iii) constitutes a threat to the health or safety of the worker.”

That definition requires proving three distinct elements. The objectionable conduct must be:

- 1. directed at the Grievor;
- 2. made on the basis of age (the only element that has any possible relevance to this grievance); and
- 3. a threat to the health or safety of the Grievor.

5. Even assuming that the first two elements have been satisfied (in my view, the evidence does not support such a finding), there is no evidence to satisfy the third element that the health or safety of the Grievor has been threatened. Consequently, the evidence has not shown that there was harassment within the meaning of the definition in *The Occupational Health and Safety Act*. On that basis alone, the grievance must be dismissed.

6. The Grievor's own testimony was that Ray and Leon Malinowski were having a heated argument which the Grievor could hear as he approached them. In cross-examination, the Grievor admitted that both Ray and Leon could become quite passionate about the Company and its products. The Grievor actively participated in the exchange of views and testified that he told Ray that the Company was lucky to have an employee like him. The Grievor stated that the argument ended with Ray Malinowski telling the Grievor to have a good weekend. The Grievor also testified that, since September 30, 2005 when that incident occurred, he and Ray Malinowski have talked and there hasn't been any yelling except one other incident in the coffee room which wasn't directed at the Grievor.

7. What occurred on September 30, 2005 was a heated discussion with some harsh words but it does not satisfy the definition of harassment under *The Occupational Health and Safety Act*. The incident was a single incident on September 30, 2005 and, as soon as Ray Malinowski was aware that the Grievor had taken the comments personally, Ray Malinowski apologized to the Grievor and confirmed that apology in writing. There was no evidence that there was a continuing course of conduct or that the Grievor asked Ray Malinowski to stop making such comments and that Ray Malinowski persisted and repeated the same or similar comments after being asked to stop.

8. In paragraph 59 of majority Award, there is a great deal of reliance placed upon the power imbalance with statements such as "The playing field was not level" and "Ray was far more powerful than Zulyniak in such setting". There is and will always be

a power imbalance between a senior management person and an employee by the very nature of their positions. If that power imbalance were to be considered a critical factor, then virtually every conflict between management and employee could amount to harassment. In my view, that power imbalance should not be used to support a finding of harassment. In my view, the statements made by Ray on September 30, 2005 were made in the heat of the moment and such language is not unheard of in a workplace like this one. As the Union's witness, Gary Burkart, stated, language like that is heard all the time in his line of business.


9. I must also disagree with paragraph 66 of the majority Award relating to the production of Ray Malinowski's letter by the Union during cross-examination. Since the Union tendered that letter as part of its case, the Union is bound by the contents of that letter. That letter forms part of the Union's evidence and that evidence is not favourable to the Union or the Grievor. Taking all of the evidence into account, including that letter tendered by the Union, I cannot conclude that the Union has proved on a balance of probabilities that there was any harassment of the Grievor.

10. Determining whether conduct amounts to harassment requires an objective standard of assessment rather than a subjective one. The application of an objective standard was approved by Arbitrator Luborsky in *Re Cara Operations Ltd. and Teamsters Chemical, Energy and Allied Workers' Union, Local 647*, [2005] 141 L.A.C. (4th) 266 at 274. After adopting the definition of harassment by Arbitrator Shime in another decision, Arbitrator Luborsky states:

"The above definition indicates that an objective standard is to be applied in determining whether workplace abuse and/or harassment have occurred, as opposed to the subjective impressions of the alleged victim. This is consistent with the leading decision of the Supreme Court of Canada in *Janzen v. Platy Enterprises Ltd.*, [1989] 1 S.C.R. 1252, D.L.R. (4th) 352, wherein Chief Justice Dickson adopted an objective test to the definition of sexual harassment at p. 375 [D.L.R.]."

11. Although the Grievor may have been personally offended by statements made by Ray Malinowski, that is not the test to be applied. Applying an objective standard, the evidence does not satisfy me that there was any harassment. My assessment is not intended to cast doubt or reflect badly on the feelings of the Grievor. I am simply unable to conclude that the evidence amounted to harassment. Accordingly, I would dismiss the grievance.

DATED this 13th day of December, 2006.



Gary G.W. Semenchuck, Q.C.