HUMAN RIGHTS TRIBUNAL OF ONTARIO

B E T W E E N:

Giovanni Zambito

Applicant

-and-

LIUNA Local 183 and Central Eastern Canadian Organizing Fund

Respondents

DECISION

Adjudicator: Ken Bhattacharjee

Date: May 11, 2015

File Number: 2013-15531-I

Citation: 2015 HRTO 605

Indexed as: **Zambito v. LIUNA Local 183**

APPEARANCES

Giovanni Zambito, Applicant	)	Self-represented
LIUNA Local 183 and Central Eastern Canadian Organizing Fund, Respondents	)	Peter Thorup, Counsel

INTRODUCTION

[1] The applicant, who is of Italian/Sicilian descent, was a union organizer for the respondents. He filed an internal complaint, which alleged that a co-worker had subjected him to harassing comments about his nationality and family. The purpose of this Decision is to decide whether the respondents violated the applicant's rights under the *Human Rights Code*, R.S.O. 1990, c. H.19, as amended (the "*Code*") by failing to take reasonable steps to respond to and address his complaint.

BACKGROUND

[2] On July 15, 2011, the applicant began working as a union organizer for the Central Eastern Canadian Organizing Fund (the "respondent CECOF"), which assists LIUNA Local 183 (the "respondent union") in organizing non-union workers. In January 2013, the applicant filed an internal complaint against a co-worker, which led to an investigation and meetings with both of them to resolve the complaint. On September 12, 2013, the respondent CECOF laid the applicant off from his job.

[3] On September 16, 2013, the applicant filed an Application under s. 34 of the *Code* with this Tribunal, which alleged that the respondents discriminated against him with respect to employment because of his race, ancestry, place of origin, and ethnic origin. The central allegation was that the respondents discriminated against him by failing to properly investigate his internal complaint against the co-worker who had made harassing comments about his nationality and family. In section 7(c) of the main form (Form 1) of his Application, the applicant stated that the last event occurred on January 23, 2013, which is the date when the alleged incident with the co-worker occurred.

[4] However, in a supplementary form (Form 1-A) that the applicant attached to his Application, he also alleged that the respondents laid him off from his job because his uncle had brought a legal proceeding against the respondent union, and subjected him to various reprisals after he filed his complaint. It was not clear whether these were further *Code*-related allegations that formed part of his Application.

[5] On November 13, 2013, the respondents filed a Response, which denied that they had discriminated against the applicant or otherwise violated the *Code*. Specifically, the respondents stated that they thoroughly investigated the applicant's internal complaint against his co-worker, found that both of them had conducted themselves inappropriately, and issued verbal disciplinary warnings to both of them. They also stated that they laid the applicant off because of downsizing and his comparatively poor performance evaluations, not because his uncle had brought a legal proceeding against the respondent union. In any event, they stated, the nephew-uncle relationship is not covered by any of the prohibited grounds of discrimination under the *Code*. They further stated that the other disconnected allegations in the Application do not demonstrate any violations of the *Code*.

[6] On December 4, 2013, the applicant filed a Reply, which denied that he had conducted himself inappropriately, and stated that the respondents' investigation was biased. Furthermore, he stated, although his relationship with his uncle may not be covered by the *Code*, it still led to a poisoning of his work environment.

[7] The hearing of the merits of the Application took place over two days. At the outset of the hearing, the applicant indicated that he was pursuing two *Code*-related allegations: first, the respondents' response to his internal complaint was discriminatory, and second, his lay off was discriminatory. As a preliminary issue, I requested that the parties provide oral submissions on whether the applicant's allegation that he was laid off because of his uncle's legal proceeding against the respondent union is within the jurisdiction of the Tribunal. In his argument, the applicant pointed to the interpretative provision in s. 12 of the *Code*, which states:

> A right under Part I is infringed where the discrimination is because of relationship, association or dealings with a person or persons identified by a prohibited ground of discrimination.

[8] I ruled that this allegation was outside the jurisdiction of the Tribunal because, despite being pointed by me to the last few words in s. 12 of the *Code*, the applicant did not explain how his uncle is a person "identified by a prohibited ground of

discrimination." He made general statements about his uncle having a battle with the respondent union over issues such as elections and sick pay, but when I asked him to provide more details, he responded that he did not know the details of what happened between them, and that I should ask the respondents.

[9] I then heard the testimony of four witnesses: the applicant; John Evans, the lawyer who investigated the applicant's internal complaint; Mario Oliveira, the co-worker whom the applicant complained against; and Gerry Varricchio, the respondent CECOF's Director of Organizing who met with the applicant and Mr. Oliveira to resolve the complaint.

[10] The parties' documents were admitted into evidence and marked as exhibits on consent. The documents included the applicant's internal complaint, emails exchanged between the parties, correspondence from the respondents to the applicant, Mr. Evans' investigation report, and medical notes from the applicant's doctor.

EVIDENCE

[11] On January 23, 2013, the applicant was working at a picket line with several co-workers, including Mario Oliveira, who is a union organizer of Portuguese descent. He testified that they were discussing soccer and cars, and that Mr. Oliveira then told him that he was "not Italian", that he was "fucking Sicilian", and that his "grandmother and great grandmother fucked Black guys." In cross-examination, when it was put to the applicant he had made disparaging comments about Portuguese culture prior to Mr. Oliveira's comment, he denied that he had made any such comments.

[12] Mr. Oliveira's account of what happened is somewhat different. He testified that during the discussion, the applicant was disparaging Portuguese culture by boasting that Italian culture was superior to it, and citing Ferrari and Gucci as examples. He agreed that he told the applicant that he was not Italian, but stated that was because he thought that the applicant was Ukrainian. In cross-examination, however, he admitted that he was aware of the applicant's full name. Mr. Oliveira also agreed that he had talked about the female ancestors of Sicilians having sexual intercourse with Black men,

but denied that he was addressing the applicant. Rather, he stated, he was telling a co-worker about a scene from a movie (True Romance) where such a comment was made to a Sicilian gangster.

[13] On January 24, 2013, the applicant filled in and submitted an Employee Complaint Form to the respondents, which alleged that Mr. Oliveira had harassed him by making humiliating and degrading comments about his nationality and family. He then went off work on a sick leave between January 25 and February 1, 2013. While the applicant was off, the respondents assigned the respondent union's in-house counsel, John Evans, to investigate the complaint. Mr. Evans has practised labour, employment and human rights law for more than 20 years. He did not know either the applicant or Mr. Oliveira prior to the investigation of the complaint.

[14] On January 31, 2013, Mr. Evans interviewed Mr. Oliveira, two employees who had witnessed the incident, and three employees who had not witnessed the incident, but had spoken to the applicant shortly after the incident. Mr. Evans testified that several of the witnesses told him that the applicant had become enraged and was out of control after the incident, and that one witness told him that the applicant had threatened to kill Mr. Oliveira.

[15] On February 5, 2013, Mr. Evans interviewed the applicant. Mr. Evans testified that the applicant was confrontational and argumentative, and swore during the interview. He also stated that the applicant admitted that he had anger management issues. In his testimony, the applicant denied the allegations that his co-workers had made against him, and denied that he had told Mr. Evans that he had anger management issues. In cross-examination, he also denied that he has ever had anger management issues.

[16] However, when the applicant was cross-examining Mr. Oliveira, and Mr. Oliveira testified that he had heard that the applicant had not completed a court-ordered anger management course with respect to issues with his wife, the applicant then asked him who had told him that he had not completed the course. After I had finished hearing Mr.

Oliveira's testimony, I asked the applicant if he had completed an anger management course, and he admitted that he had. When I pointed out that he had testified earlier that he never had anger management issues, he stated that he does not have such issues now.

[17] Following the interview, the respondents' management sent the applicant home on a paid leave pending the conclusion of the investigation because of the alleged death threat. On February 7, 2013, Mr. Evans drafted a letter, which was sent to the applicant. The letter summarized the respondents' concerns about his behaviour following the incident, and required him to obtain a medical clearance confirming that he did not pose a threat in the workplace. The applicant did not receive the letter until February 22, 2013 because it was sent to his old address. On February 27, 2013, the applicant sent the respondents a letter from his doctor, which cleared him to return to work. The letter stated that the applicant had no history of violence, and, in the doctor's opinion, there were no risk factors for violence in the future.

[18] On March 9, 2013, Mr. Evans completed his investigation, and submitted a report with his findings and recommendations to the respondents' management. In his testimony, Mr. Evans identified the investigation report that he had written, and it was entered into evidence. The report made the following findings:

- On January 23, 2013, there was a general banter going on regarding Italian and Portuguese people/culture, and the applicant made a number of references to the Portuguese being an inferior group compared to the Italians, and specifically told Mr. Oliveira that the Italians are superior to the Portuguese. The applicant's denial that he had made any such comments was not credible. His comments were both offensive and inappropriate.

- Mr. Oliveira then verbally highlighted an excerpt from a movie where a character told a Sicilian gangster that the Moors, who are from Africa, had conquered the Sicilians, and that the gangster's great great grandmother had sexual relations with Black men. A Black employee who heard the comment was not offended by it. However, the comment was intended to reflect poorly upon Sicilian people generally, and the applicant specifically. Mr. Oliveira's suggestion that his comment was merely a discussion about a movie and was not intended to be

objectionable was not credible. His comment was objectionable and offensive.

- After Mr. Oliveira made his comment, the applicant made a comment to him to the effect that he could not have kids, which was understood by others to mean or suggest that Mr. Oliveira was gay. The applicant then spoke with other co-workers about the incident, and was ranting, out of control, and making numerous inappropriate comments about Portuguese people, including "Italians are the ones should control the union," "fuck the Portuguese," and "get rid of all the pork chops." He also referred to Mr. Oliveira as "that cocksucker Portuguese bastard." He also told a co-worker that he wanted to kill Mr. Oliveira. The applicant's denial that he had made these comments was not credible. His comments were both offensive and inappropriate. His reaction to Mr. Oliveira's comment was neither warranted nor in the realm of a reasonable response.

[19] The report recommended that Mr. Oliveira and the applicant both receive unpaid suspensions (three days for Mr. Oliveira and 10 days for the applicant), and that they both have disciplinary letters placed on their files.

[20] After receiving and reviewing Mr. Evans' report, Gerry Varricchio, who was the respondent CECOF's Director of Organizing, and Harold Lacroix, who was a Manager of the respondent union, decided not to follow the recommendation that the applicant and Mr. Oliveira receive unpaid suspensions. On March 14, 2013, they met individually with the applicant and Mr. Oliveira, and reviewed the contents of the investigation report with them. Mr. Varricchio testified that the applicant and Mr. Oliveira were both given verbal warnings. In cross-examination, the applicant denied that he was given a verbal warning. Rather, he stated, he was told that he had said things that were not right, and that he had to get along with others. In his testimony, Mr. Oliveira acknowledged that he was given a verbal warning. Mr. Varricchio testified that following the individual meetings, the applicant and Mr. Oliveira were brought together, Mr. Oliveira apologized to the applicant for the comment he had made, and Mr. Oliveira and the applicant then shook hands. Mr. Oliveira testified to the same. In his testimony, however, the applicant denied that there was a bringing together, an apology, or a shaking of hands.

[21] The applicant and Mr. Oliveira both returned to work and there were no further incidents between them thereafter.

ANALYSIS

[22] The Application relates to ss. 5 and 9 of the *Code*, which provide:

> 5. (1) Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, record of offences, marital status, family status or disability.
>
> (2) Every person who is an employee has a right to freedom from harassment in the workplace by the employer or agent of the employer or by another employee because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sexual orientation, gender identity, gender expression, age, record of offences, marital status, family status or disability.
>
> (…)
>
> 9. No person shall infringe or do, directly or indirectly, anything that infringes a right under this Part.

[23] The applicant has the onus of proving on a balance of probabilities that a violation of the *Code* has occurred. A balance of probabilities means that it is more likely than not a violation has occurred. Clear, convincing and cogent evidence is required in order to satisfy the balance of probabilities test. See *F.H. v. McDougall*, 2008 SCC 53 at para. 46.

[24] The Tribunal's jurisprudence recognizes that s. 5 of the *Code* imposes a duty on employers to investigate a complaint of discrimination. The rationale underlying the duty to investigate is to ensure that the rights under the *Code* are meaningful. In *Laskowska v. Marineland*, 2005 HRTO 30 ("*Laskowska*") the Tribunal explained at para. 53:

> It would make the protection under subsection 5(1) to a discrimination-free work environment a hollow one if an employer could sit idly when a complaint of discrimination was made and not have to investigate it. If that were so, how could it determine if a discriminatory act occurred or a

> poisoned work environment existed? The duty to investigate is a "means" by which the employer ensures that it is achieving the *Code*-mandated "ends" of operating in a discrimination-free environment and providing its employees with a safe work environment.

[25] The obligation to take reasonable steps to respond to and address such a complaint requires two things. First, the complaint must be communicated by the applicant, or be otherwise known to the employer, in a manner sufficient to engage this obligation. Second, the substance of the complaint must be about some potential violation of the *Code*. See *Naidu v. Whitby Mental Health Centre*, 2011 HRTO 1279 at para. 191. In the case at hand, it is undisputed that the applicant communicated a complaint to the respondents, and that the substance of the complaint was about a potential violation of the *Code*.

[26] In *Laskowska*, above, at paras. 59-60, the Tribunal set out a three-part test (the "*Laskowska* test") for assessing the reasonableness of an investigation:

> The six criteria of corporate "reasonableness" in *Wall* have been adopted in previous decisions of the Board of Inquiry. I adopt a conflated version of them. The criteria are:
>
> (1) Awareness of issues of discrimination/harassment, Policy, Complaint Mechanism and Training: Was there an awareness of issues of discrimination and harassment in the workplace at the time of the incident? Was there a suitable anti-discrimination/harassment policy? Was there a proper complaint mechanism in place? Was adequate training given to management and employees;
>
> (2) Post-Complaint: Seriousness, Promptness, Taking Care of its Employee, Investigation and Action: Once an internal complaint was made, did the employer treat it seriously? Did it deal with the matter promptly and sensitively? Did it reasonably investigate and act; and
>
> (3) Resolution of the Complaint (including providing the Complainant with a Healthy Work Environment) and Communication: Did the employer provide a reasonable resolution in the circumstances? If the complainant chose to return to work, could the employer provide her/him with a healthy, discrimination-free work environment? Did it communicate its findings and actions to the complainant?
>
> While the above three elements are of a general nature, their application must retain some flexibility to take into account the unique facts of each

> case. The standard is one of reasonableness, not correctness or perfection. There may have been several options – all reasonable – open to the employer. The employer need not satisfy each element in *every case* in order to be judged to have acted reasonably, although that would be the exception rather than the norm. One must look at each element individually and then in the aggregate before passing judgment on whether the employer acted reasonably.

[27] Some of the facts in the case at hand are in dispute. In assessing the credibility and reliability of the testimony of the parties' witnesses, I have applied the traditional test set out by the British Columbia Court of Appeal in *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A):

> (…) Opportunities for knowledge, powers of observation, judgment and memory, ability to describe clearly what he has seen and heard, as well as other factors, combine to produce what is called credibility….
>
> The credibility of interested witnesses, particularly in cases of conflict of evidence cannot be gauged solely by the test of whether the personal demeanor of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of the witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions…. Again, a witness may testify to what he sincerely believes to be true, but he may be quite honestly mistaken.

[28] I am also mindful of the Ontario Court of Appeal's comments on credibility and reliability in *R. v. Morrissey* (1995), 97 C.C.C. (3d) 193 (Ont. C.A.) at p. 205:

> Testimonial evidence can raise veracity and accuracy concerns. The former relate to the witness's sincerity, that is his or her willingness to speak the truth as the witness believes it to be. The latter concerns relate to the actual accuracy of the witness's testimony. The accuracy of a witness's testimony involves considerations of the witness's ability to accurately observe, recall and recount the events in issue. When one is concerned with a witness's veracity, one speaks of the witness's credibility. When one is concerned with the accuracy of a witness's testimony, one speaks of the reliability of that testimony. Obviously a witness whose evidence on a point is not credible cannot give reliable evidence on that point. The evidence of a credible, that is honest witness, may, however, still be unreliable.

[29] I find that the respondents met the first part of the *Laskowska* test. The respondent CECOF, which was the applicant's direct employer, had provisions prohibiting *Cod*e-related harassment and discrimination in its Personnel Policy and Practice Manual, and it had an Employee Complaint Form, which the applicant filled out and submitted on the day following the alleged incident of harassment by Mr. Oliveira. The applicant did not make any arguments to the effect that the respondents failed to meet the first part of the *Laskowska* test.

[30] I also find that the respondents met the second part of the *Laskowska* test. The respondent CECOF assigned Mr. Evans, who was in-house counsel for the respondent union, to investigate the applicant's complaint. Mr. Evans had significant expertise and experience in labour and human rights law, and did not know either the applicant or Mr. Oliveira prior to the investigation of the complaint. He began the investigation immediately; interviewed the applicant, Mr. Oliveira, and all the relevant witnesses within two and a half weeks; and completed and submitted his investigation report approximately four weeks after he completed the interviews. The complaint was resolved a week and a half later when Mr. Varricchio and Mr. Lacroix met with the applicant and Mr. Oliveira.

[31] The applicant made arguments to the effect that the respondents did not meet the second part of the *Laskowska* test. In essence, he argued that Mr. Oliveira and the other witnesses whom Mr. Evans interviewed were untruthful, and, because Mr. Evans believed them over him in some respects, his investigation was biased. He also argued that the investigation process was unfair because he was placed on a paid leave, but Mr. Oliveira was allowed to be in the workplace. I do not agree with these arguments for the following reasons.

[32] First, I found Mr. Evans to be a totally credible witness. He was a third party who had no interest in the outcome of the investigation. His testimony about the investigation process that he followed, including interviewing witnesses, making findings of fact, and making recommendations based on those findings, was straightforward, logical,

internally consistent, and detailed. His testimony about the investigation process was not shaken in cross-examination.

[33] Second, I do not accept the applicant's argument that Mr. Evans' investigation was biased because in some respects he found Mr. Oliveira and other witnesses to be more credible than the applicant. As a third party investigator, Mr. Evans' role was to interview the parties and witnesses, and to make findings of fact. The mere fact that the applicant disagreed with his findings is insufficient to establish that Mr. Evans did not reasonably investigate his complaint.

[34] In any case, the applicant and Mr. Oliveira both testified before this Tribunal, and my findings about what happened between them are similar to Mr. Evans' findings. I found that they both provided testimony that was credible and reliable in some respects, and lacking in credibility and reliability in other respects.

[35] Specifically, I accept Mr. Oliveira's testimony that the incident began with the applicant boasting that Italian culture was superior to Portuguese culture, and citing Ferrari and Gucci as examples. I did not find the applicant's testimony that there was merely a general discussion about soccer and cars, and his denial that he boasted that Italian culture was superior to Portuguese culture, to be credible. As will be set out in the next paragraph, I find that Mr. Oliveira directed a comment at the applicant about his female ancestors fucking Black men. In my view, it is more plausible that Mr. Oliveira's comment was a response to the applicant's boasting, rather than coming out of the blue, as the applicant suggested.

[36] It is undisputed that Mr. Oliveira told the applicant that he was not Italian, and then made a statement about the female ancestors of Sicilians fucking Black men. I accept the applicant's testimony that these two statements were connected, and that the second statement was directed at him. I did not find Mr. Oliveira's testimony that he thought that the applicant was Ukrainian to be credible. In my view, given that the applicant was boasting about the superiority of Italian culture, and Mr. Oliveira knew that his name was Giovanni Zambito, it is implausible that he did not know that the applicant

was Italian. I also did not find Mr. Oliveira's testimony that he was merely telling a co-worker about a scene from a movie, and he was not directing the second statement at the applicant, to be credible. In my view, given that the statement was made after the applicant was boasting that Italian culture was superior to Portuguese culture, Mr. Oliveira is of Portuguese descent, and the applicant is of Italian/Sicilian descent, it is more plausible that Mr. Oliveira was directing the comment at the applicant, rather than merely telling a co-worker about a scene from a movie.

[37] Furthermore, I accept Mr. Evans' testimony that when he interviewed the applicant during the investigation, the applicant was confrontational and argumentative, swore, and admitted that he had anger management issues. I did not find the applicant's denial that he had told Mr. Evans that he had anger management issues, or his denial that he has ever had anger management issues, to be credible. In cross-examination, the applicant was asked no less than four times whether he has or has had anger management issues, and his answer was an unequivocal denial each time. However, later in the hearing, when the applicant was cross-examining Mr. Oliveira, and one of Mr. Oliveira's answers upset him, he let it slip that he had, in fact, completed an anger management course. I also did not find the applicant's testimony that he no longer has anger management issues to be credible. During the hearing, the applicant glared at the respondents' witnesses, particularly Mr. Evans, for long periods of time, and he had several angry outbursts, including at one point stating that he was leaving the hearing and not coming back (he did, in fact, come back after I warned him about the potential repercussions of leaving the hearing before it was completed).

[38] Finally, I find that the respondents met the third part of the *Laskowska* test. Mr. Varricchio and Mr. Lacroix reasonably resolved the applicant's complaint by meeting individually with him and Mr. Oliveira, and discussing the contents of the investigation report with them. The applicant denies that he received a verbal warning, but acknowledged that he was told that had said things that were not right, and that he had to get along with others. Mr. Varricchio and Mr. Oliveira provided uncontradicted testimony that Mr. Oliveira received a verbal warning. Moreover, the parties agree that

the applicant and Mr. Oliveira both returned to work, and there were no issues between them following this meeting.

[39] Even if it is true, as the applicant alleges, that he and Mr. Oliveira were never brought together, Mr. Oliveira never apologized to him, and they never shook hands, the other steps that the respondents took constituted a reasonable resolution of the applicant's complaint. Specifically, the respondents met with him and reviewed the contents of the investigation report with him, and they also met with Mr. Oliveira, reviewed the contents of the investigation report with him, and issued him a verbal warning. These steps are sufficient to constitute a reasonable resolution of the applicant's complaint.

[40] In view of the fact that the respondents met all three parts of the the *Laskowska* test, I find that, overall, the respondents took reasonable steps to respond to and address the applicant's complaint of *Code*-related harassment. Again, it bears worth repeating that the standard by which the respondents' steps and response to the applicant's complaint is measured is one of reasonableness, not correctness or perfection. In my view, the respondents easily met this standard, and therefore did not violate the applicant's rights under the *Code*.

ORDER

[41] The Application is dismissed.

Dated at Toronto, this 11th day of May, 2015.

"Signed by"

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Ken Bhattacharjee
Vice-chair