COURT OF APPEAL FOR ONTARIO

CITATION: General Motors of Canada Limited v. Johnson, 2013 ONCA 502
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Doherty, Cronk and Watt JJ.A.

BETWEEN

General Motors of Canada Limited

Appellant

and

Yohann Johnson

Respondent

J. Brett Ledger, Neil Paris and Jay A. Nathwani, for the appellant

John R. Carruthers, for the respondent

Heard: May 3, 2013

On appeal from the judgment of Justice Alfred J. Stong of the Superior Court of Justice, dated June 8, 2012, with reasons reported at 2012 ONSC 3339.

Cronk J.A.:

I. Introduction

[1] From September 1997 until February 2005, the respondent, Yohann Johnson, worked for the appellant, General Motors of Canada Limited ("GM"), as a production supervisor in the body shop at GM's Oshawa assembly plant. Johnson is a black man.

[2] In late August 2005, Johnson took a medical leave of absence from work, claiming disability due to discriminatory treatment in the workplace based on racism. He never returned to work at GM.

[3] In the litigation that followed, the trial judge found that Johnson was the victim of racism and that his workplace environment was poisoned due to racism, eventually resulting in his constructive dismissal by GM.

[4] An allegation of discriminatory treatment in the workplace due to racism is a serious claim that implicates the reputational and employment interests of the claimant, as well as those of the alleged perpetrators. It can also affect the dignity, self-worth and health of both the alleged victim and those accused of racist conduct. An allegation of this type can reverberate for many years after the incident or incidents in question, with potentially long-term consequences for all concerned.

[5] No less serious are judicial findings of racially-motivated conduct in the workplace and a poisoned work environment due to racism. Judicial consideration of an allegation of constructive dismissal based on alleged racism in the workplace requires careful scrutiny of and balanced attention to all the evidence relating to the allegation in order to determine whether it is more likely than not that the alleged racism occurred.

[6] In this appeal, this court is required to consider whether the evidence adduced at trial sustains the trial judge's findings of racism and a poisoned work environment due to racism, leading to Johnson's constructive dismissal.

[7] For the reasons that follow, I conclude that these key findings by the trial judge are unreasonable and unsupported by the evidence. As these findings are the foundation for the trial judge's holding of constructive dismissal by GM, the trial judgment cannot stand. In the circumstances of this case, the appropriate remedy is to allow the appeal and dismiss Johnson's action against GM.

II. Facts

[8] GM challenges the trial judge's central findings and inferences of fact, and their legal consequences. Accordingly, a close review of the evidence is required.

(1) Alleged 1997 Incident

[9] During his almost eight years of employment with GM, Johnson was generally happy at his job. He had never encountered any instances of racism in the workplace.

[10] In early 2005, Johnson became responsible for training group leaders in the body shop of the GM assembly plant on a new system of policies and guidelines relating to GM's Global Manufacturing System (the "GMS"). The assembly plant is a unionized workplace. The GMS training was mandatory for

body shop group leaders. It is uncontroverted that the GMS training was unpopular with union members, many of whom refused or failed to attend their scheduled GMS training sessions.

[11] On June 28, 2005, Johnson was scheduled to train Alex Markov, a group leader in the body shop. However, Markov failed, without warning, to attend his training session.

[12] Johnson promptly informed Markov's supervisor that Markov had skipped his training session. The supervisor spoke to Markov and then met with Johnson. He told Johnson that Markov refused to take the GMS training with him because of an incident several years earlier when, according to Markov, Johnson had laughed at an insensitive remark made by another GM employee about the death of Markov's brother.

[13] Later the same day, Jim Tucker, GM's shift leader in the body shop and Johnson's supervisor, met with Markov to obtain an explanation. According to Tucker, Markov said that, in about 1997, he asked for time off work to attend court proceedings involving individuals charged with his brother's murder. When the court appearance was cancelled, Markov told his superior, Ray Michaud – a white man – that he no longer required time off. Markov claimed that in response, Michaud stated, "I'll rub you out". He also said that Johnson was

present during this exchange with Michaud, and that Johnson laughed at Michaud's remark (the "1997 Incident").

[14] Markov considered Michaud's comment to be a derogatory, disparaging, and insensitive reference to his brother's murder, the negative impact of which was exacerbated by Johnson's allegedly inappropriate reaction to the comment.

[15] At trial, it emerged that at the time of the 1997 Incident, the scheduling of work hours was logged on paper and recorded in writing by pencil. The trial judge held that Michaud's comment to Markov, "if it was made at all, could have been an innocent response to removing Markov's name from the time sheet requesting time off".

[16] Tucker requested that Markov train with Johnson on the GMS. Markov refused, but did agree to train with another GM employee, Azar Choudry. Choudry is also a man of colour.

[17] Tucker informed Johnson of Markov's explanation for his absence from his GMS training. Johnson later claimed that, during his meeting with him, Tucker attempted to discourage or dissuade Johnson from pursuing Markov's absence any further. Tucker denied having done so. The trial judge accepted Johnson's evidence on this point.

(2) The Hayes and Hicks Statements

[18] The day after Markov skipped his GMS training, Johnson was scheduled to train another group leader, Ted Hayes. When Hayes arrived for his training session, he told Johnson that he had learned that if he did not want to train on the GMS, all he had to do was claim that he was "prejudiced like the last guy whose brother was killed by a black man". Johnson did not ask Hayes, then or later, about the source of this information. Nor did he ask Hayes for an explanation. Johnson later testified that he was "floored" by Hayes's statement.

[19] Johnson decided to make inquiries of another GM group leader about Hayes's statement. He spoke with Hugh Hicks, inquiring if he knew anything about the death of Markov's brother and asking him to find out as much as he could. Hicks later told Johnson that he had heard from others in the body shop that Markov's brother had been killed by a black man. Hicks did not tell Johnson the source of this information, nor did Johnson take any steps to confirm it.

(3) Johnson's Racism Complaint

[20] Based solely on Hayes's statement and the information provided by Hicks, Johnson concluded that Markov had refused to undergo GMS training with him because Markov was prejudiced against black men. Early on the morning of June 30, 2005, Johnson met with the plant area manager, Jeff Bantam, and

complained, for the first time, that Markov's refusal to train with him was based on racism.

[21] In the weeks that followed, Johnson repeated his racism allegation to various of GM's management personnel at the Oshawa facility, at various times. GM took several actions in response, including three separate investigations by GM personnel into Johnson's complaint. On each occasion, the GM investigators concluded that there was no evidence of racially-motivated conduct by Markov.

(4) GM's First Investigation

[22] Immediately after his June 30th meeting with Johnson, Bantam summoned Tucker to his office, informed him of Johnson's racism complaint, and directed him to deal with the situation. This marked the beginning of GM's first investigation into Johnson's complaint.

[23] Tucker then met with Hayes and told him that his comment to Johnson was inappropriate and that Hayes owed Johnson an apology. Hayes apologized to Johnson, who accepted the apology.

[24] Tucker, together with a GM labour relations and human rights representative, Karine Laverdière, also met separately with Johnson. Laverdière took notes of the meeting. Her notes indicate that Johnson's concerns were discussed, including Markov's explanation for his absence from the training

session. Tucker also interviewed Markov, in the presence of Markov's union representative, and two other individuals who had worked in the body shop in 1997. He did not interview Ray Michaud.

[25] By the time of the meeting with Markov, the plant manager had made a direct order that Markov take his GMS training with Johnson, failing which he was to be "walk[ed] right out of the plant". However, at the meeting, Markov's union representative proposed that the matter be resolved by Markov resigning as a group leader in the body shop, thereby relieving him of the GMS training requirement, and assuming a different role as a utility replacement representative within the body shop. At trial, Tucker testified that utility replacement personnel fill in for other plant employees, as need arises.

[26] Johnson was informed of this proposed resolution of his complaint and accepted it. The parties are divided on whether his acceptance was unconditional. Johnson later maintained that he agreed to the proposed resolution on condition that a note was entered in Markov's personnel file, indicating that Markov was stepping down as a group leader in order to avoid GMS training and to "preserve his racist views". Tucker and Laverdière disputed this claim, testifying that no condition of this kind had been raised with them by Johnson, or agreed upon. The trial judge accepted Tucker's and Laverdière's evidence on this point.

[27] At trial, Johnson acknowledged that, as far as he was concerned, the Markov-related matter was "over and done with" by June 30, 2005 as a result of the agreed-upon resolution, described above.

(5) GM's Second investigation

[28] Sometime in the third week of July 2005, after the GM assembly plant re-opened following its annual two-week summer shutdown and while Tucker was on holidays, Johnson observed Markov in the body shop, performing group leader functions. Johnson concluded that Markov's group leader position had been restored notwithstanding the complaint resolution reached several weeks earlier. He reported this to Bantam who, based on Johnson's information, promptly called a meeting to determine who had returned Markov to group leader duties.

[29] Within hours, a disciplinary hearing into Markov's failure to comply with the explicit direction that he undertake GMS training with Johnson was conducted pursuant to the governing collective agreement. In the result, Markov was suspended from work for five days. At trial, Johnson agreed that, as a result of this disciplinary action, the matter had again been fully resolved. He testified that, at that point, there were no outstanding racism-related issues insofar as he was concerned.

[30] However, Markov exercised his right under the collective agreement to appeal his suspension. His appeal was allowed, his suspension was rescinded, and GM was criticized for permitting Markov to perform group leader duties in apparent breach of the agreed resolution of Johnson's original complaint. At trial, Tucker testified that, in fact, Markov had simply been filling in as a replacement for an absent group leader in accordance with his duties as a utility replacement representative. Tucker claimed that this work did not violate the agreed complaint resolution.

[31] Johnson, upset by the appeal disposition, met with Tony Costa, GM's plant personnel director, and asked him to re-investigate his original complaint. Costa did so. He interviewed several individuals, including Johnson, Bantam and Tucker. Costa, like Tucker before him, concluded that there was no evidence of racism by Markov. To the contrary, Costa noted that, based on his investigation, Markov's version of the 1997 Incident "was plausible".

(6) GM's Third Investigation

[32] Johnson remained unsatisfied. On August 29, 2005, he took his concerns to the assistant plant manager, Gerry Meeks. After speaking with both Johnson and Costa, Meeks offered on his own initiative to have Johnson's racism complaint investigated again.

[33] Laverdière, the GM labour relations and human rights representative who had participated in some of Tucker's earlier interviews regarding Johnson's complaint, including the interview with Markov, conducted this third investigation. She interviewed Markov again, on two separate occasions. She asked him whether he was prepared to train on the GMS with Michaud, who allegedly made the "rub you out" comment in 1997. Markov replied that he would feel worse about taking training with Michaud than with Johnson. For the first time, Markov also asserted that some hours after the 1997 Incident, Michaud and Johnson went to see him, repeated the same "rub you out" comment originally uttered by Michaud, and again laughed.

[34] Laverdière interviewed various other individuals in addition to Markov, including Michaud and Tucker. Michaud denied the 1997 Incident. Laverdière took detailed notes and documented the results of her investigation in a written report. She, too, concluded that there was no evidence that Markov was racist, reporting that Markov perceived the 1997 Incident as a threat, that he was still upset by it, and that there were reasonable grounds to believe Markov's perception of events, regardless of whether the 1997 Incident had in fact occurred. At trial, she testified that, when interviewed, Markov appeared "very sincere" and "very upset" about the 1997 Incident.

[35] The trial judge found that GM did not take Johnson's complaint "sufficiently seriously" and that, notwithstanding three investigations, it failed to conduct "a

reasonably comprehensive investigation into Johnson's complaint". He held that although GM did not act maliciously, it ignored the agreed complaint resolution, reassigned Markov to the role of group leader, and failed to enforce "the voluntary demotion" by Markov, instead "carry[ing] on as if Markov's resignation did not exist". He also found that GM was "instrumental in having…Markov's 5 day period of suspension over-turned in an effort to influence contractual negotiations" with the union. He accepted Johnson's assertion that, in so doing, GM "traded away Johnson's human rights as a bargaining chip".

(7) Johnson's Leave from Work

[36] Johnson disagreed with and was distressed by the results of the first two investigations into his racism complaint. When a co-worker in the body shop allegedly told him that Markov had threatened to harm him, he also began to fear Markov. GM assured him that he would have the protection of surveillance cameras in the parking lot when he arrived at and left the plant.

[37] Johnson came to view the body shop at the assembly plant as a poisoned work environment. At the end of August 2005, after he had spoken with Meeks and before Laverdière commenced her investigation, he took an approved medical leave from work under the care of a psychiatrist, asserting disability arising from discriminatory treatment due to racism in his workplace.

[38] Johnson was absent from work for the next two years. It appears that throughout much of this period, he failed to furnish GM with current and on-going medical information substantiating his claim of continuing disability. He led no medical evidence at trial in support of his disability and damages claims.

[39] About two years later, in mid-July 2007, Johnson met with GM's plant physician, who concluded that Johnson was fit to return to work. GM wrote to Johnson's legal counsel, asking that Johnson contact GM's human resources representative, Jim Goard, to discuss his return to work. Johnson complied. He told Goard that he was disabled, that he was unable to work in any plant environment where he might come into contact with Markov or Michaud, and that he would return to work only at General Motors Acceptance Corporation ("GMAC"), in GM's training centre, or in GM's head office.

[40] Goard told Johnson that GM no longer owned GMAC and that no training positions were then available. He offered Johnson a supervisory role, similar to Johnson's previous position, in two manufacturing-related jobs, in two different GM facilities (the Truck Plant or West Paint building), both of which were located in different buildings about one kilometre away from the assembly plant body shop. He also offered to adjust Johnson's shifts and, possibly, his supervision. Johnson declined these offers, maintaining that he was disabled from working in any GM plant. He provided no current medical information to support this claim.

[41] By the end of September 2007, Johnson had still not returned to work. On September 27, Goard wrote to Johnson confirming that he had been informed of the available employment opportunities outside the assembly plant body shop and that GM had not been provided with medical support for Johnson's claim of continuing disability. Goard ended his letter by stating that, under the circumstances, he had concluded that Johnson was resigning from any further employment relationship with GM.

[42] The trial judge found that Goard's letter was "just short of an attempt to bully Johnson" into accepting an employment position "which could only resurrect the ill will that caused his grief in the first place". He further held that "GM's offer and apparent insistence" that Johnson "return to virtually the same work environment in which his problems were suffered" could not be construed as a reasonable resolution or as the provision of "a healthy, discrimination-free work environment". In the trial judge's view, GM's decision to treat Johnson's refusal of the offered employment positions as a resignation amounted to constructive dismissal.

(8) The Litigation

[43] On January 31, 2008, Johnson sued GM for damages for breach of his employment contract, special damages and damages for loss of employment–

related benefits, punitive damages and *Wallace* damages, totalling approximately $530,000.

[44] In his pleading, Johnson alleged that prior to his medical leave at the end of August 2005, he had experienced 10 weeks of "belittlement" by GM as a result of racist behaviour by GM employees, which left him "pained, humiliated, diminished, and bewildered". Johnson pleaded that, as a result of this conduct, he became "profoundly distressed", "began to experience a profound sense of worthlessness" and, by August 29, 2005, had been rendered disabled. He also pleaded that he was later diagnosed as suffering from "a phobic response to a racist workplace".

III. Trial Judge's Decision

[45] The trial judge ruled that GM was liable to Johnson for constructive dismissal. He awarded Johnson damages in the amount of $159,999.92, consisting of approximately $95,000 for wrongful dismissal damages, special damages in the sum of $40,000 and *Wallace* damages in the further amount of $40,000, less $15,000 due to Johnson's failure to mitigate his damages, plus costs and pre- and postjudgment interest.

[46] The trial judge made the following significant findings: (1) Markov's excuse for not attending his GMS training session with Johnson was "solely racially-based" and his version of the 1997 Incident was "a cover up of his discriminatory

behaviour"; (2) the conduct of GM and some of its employees created a poisoned work environment; (3) GM failed to conduct a serious or comprehensive investigation into Johnson's racism complaint; and (4) Johnson was constructively dismissed from his employment with GM.

[47] The trial judge expressed his conclusions on Johnson's claims in this fashion:

> [65] Johnson has met the objective standard of proving on a balance of probabilities that there existed conduct sufficiently severe and persistent to create a poisoned workplace, and that it started at the hand of Alex Markov who was racially biased against Yohann Johnson because he is a black man. Because of his racial bias, Markov refused to be trained by Mr. Johnson and GM failed to provide Mr. Johnson the support needed to eradicate the existence of the discrimination or to improve working conditions such as would provide for him a healthy, discrimination-free work environment.
>
> [66] GM breached the implied term of Mr. Johnson's employment that he would not be subjected to discrimination because of the colour of his skin. As a victim of racism in the workplace, Mr. Johnson was adversely affected not only by the initial expression of racist behaviour but also by the failure of GM to follow up and live by the agreements and resolutions entered into.
>
> …
>
> [68] I am satisfied that Yohann Johnson has satisfied the burden of proof placed on him of proving that he was constructively dismissed from his employment with GM; that he suffered a foreseeable financial loss as a result of racism and/or the follow-up events in the workplace; and that he suffered a foreseeable loss to

> his mental health and dignity as a result of racism and/or the follow-up events in the workplace.

[48] On appeal, GM argues that the trial judge's findings of racism and a poisoned work environment due to racism are unreasonable and unsupported by the evidence and that the trial judge's resulting finding of constructive dismissal therefore cannot stand. In addition, and essentially in the alternative, it challenges the trial judge's awards of special and *Wallace* damages.

IV. Issues

[49] I would frame the issues on appeal as follows:

> (1) Is the trial judge's finding of racism tainted by palpable and overriding error or otherwise clearly wrong, unreasonable, or unsupported by the evidence?
>
> (2) Are the trial judge's findings of a poisoned work environment due to racism and resulting constructive dismissal also tainted by palpable and overriding error or otherwise clearly wrong, unreasonable, or unsupported by the evidence?
>
> (3) Did the trial judge err in law by awarding special and *Wallace* damages in the circumstances?

V. Analysis

(1) Standards of Review

[50] It is well established that a trial judge's findings and inferences of fact attract great deference from a reviewing court. They cannot be disturbed on appeal unless they are infected by palpable and overriding error or are otherwise

clearly wrong, unreasonable, or unsupported by the evidence: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at paras. 1-3 and 10-25; *H.L. v. Canada (Attorney General)*, 2005 SCC 25, [2005] 1 S.C.R. 401, at paras. 4, 52-55 and 64-65; *F.H. v. McDougall*, 2008 SCC 53, [2008] 3 S.C.R. 41, at paras. 55 and 73.

[51] That said, while the principle of deference applies, a trial judge's factual findings and inferences are not immune from appellate scrutiny. In *H.L.*, at paras. 55-56, the Supreme Court, citing *Housen*, explained that a trial judge's findings or inferences of fact may be set aside on appeal if they are "clearly wrong". With respect to a trial judge's findings of fact, the palpable and overriding test is met where the findings can be properly characterized as "unreasonable" or "unsupported by the evidence" and they are likely to have affected the result at trial: *H.L.* at para. 56. With respect to a trial judge's inferences of fact, Fish J., writing for a majority of the Supreme Court in *H.L.*, stated, at paras. 74-75:

> Not infrequently, *different* inferences may reasonably be drawn from facts found by the trial judge to have been directly proven. Appellate scrutiny determines whether inferences drawn by the judge are "reasonably supported by the evidence". If they are, the reviewing court cannot *reweigh the evidence* by substituting, for the reasonable inference preferred by the trial judge, an equally – or even more – persuasive inference of its own. This fundamental rule is, once again, entirely consistent with both the majority and the minority reasons in *Housen*.

> In short, appellate courts not only may – but must – set aside all palpable and overriding errors of fact shown to have been made at trial. This applies no less to inferences than to findings of "primary" facts, or facts proved by direct evidence. [Emphasis in original.]

[52] The Supreme Court's jurisprudence is equally unequivocal concerning the governing standard of review on questions of law. There is no room for error by a trial judge on a pure question of law – the applicable standard is that of correctness. Thus, on matters of law, an appellate court enjoys a broad scope of review and is free to replace the opinion of the trial judge with its own: *Housen* at paras. 8-9.

(2) Trial Judge's Finding of Racism

[53] The trial judge found, at para. 16:

> I am satisfied that Markov's excuse for not attending the training session by Johnson was solely racially based and his story about his interpretation of the alleged [1997 Incident] was simp[ly] a cover up of his discriminatory behaviour which was inexcusable. I am satisfied that Markov refused to take training from Johnson because Johnson is a black man.

[54] The trial judge's finding of racially-motivated conduct by Markov lies at the core of his decision. Without the existence of underlying racism and the discriminatory treatment that the trial judge held flowed from it, there is no basis in law for the trial judge's additional finding of a poisoned work environment, leading to constructive dismissal. There is no suggestion that, apart from the

issues of racism and a racism-infected workplace, Johnson was otherwise constructively dismissed.

[55] I am satisfied that GM has met the high hurdle for appellate reversal of the trial judge's impugned finding of racism. I respectfully conclude that, on this evidentiary record, this foundational finding is unreasonable and unsupported by the evidence. I say this for the following reasons.

[56] At trial, there was no direct evidence of racism towards Johnson by anyone at the GM assembly plant, including Markov. Moreover, the trial judge's finding of racism did not turn on an evaluation of Markov's credibility, to which heightened deference would be owed, because Markov died before trial. Further, Johnson never spoke to Markov about his explanation for missing his GMS training session. As a result, the information gathered by Tucker and Laverdière in their investigations of Johnson's racism complaint was the only evidence at trial regarding Markov's motivation for skipping the GMS training with Johnson.

[57] Both Tucker and Laverdière testified that they had personally sought an explanation for Markov's failure to attend his training session. Both investigators independently viewed his explanation as "very sincere", assessed that his account of the 1997 Incident reflected his genuine and strongly-held beliefs, and

concluded that there was no evidence of racism. Their evidence concerning Markov's explanation was uncontradicted.

[58] As GM properly acknowledges, the trial judge was not obliged to accept the GM investigators' conclusions regarding Markov's motivation for skipping his GMS training. The trial judge was nevertheless obliged to assess the available evidence concerning Markov's avowed excuse for his absence from his GMS training session. This evidence included Markov's consistent denials that his failure to attend the training session was racially motivated; instead, Markov offered an entirely different explanation for his absence, namely, his personal dislike of Johnson as a result of the 1997 Incident.

[59] The trial judge's sole basis for concluding that Markov lied about his reason for refusing to train with Johnson was what the trial judge perceived as a significant discrepancy between what Markov first told Tucker about the 1997 Incident and what he later relayed to Laverdière when she conducted GM's final investigation of Johnson's complaint. As I have said, during his interview with Laverdière, Markov alleged for the first time that Michaud and Johnson had approached him some hours after the 1997 Incident, repeated Michaud's initial comment about "rubbing [Markov] out", and again laughed.

[60] The trial judge regarded the timing of this disclosure as highly suspect. Based on Markov's late disclosure of this alleged second encounter, and without

the opportunity to observe Markov directly or assess his credibility first-hand, the trial judge concluded that Markov had fabricated his account of the second encounter "with the intent to bolster his claim and to mislead Ms. Laverdière in her efforts to ascertain the existence of racial discrimination" by Markov.

[61] I accept that the apparent inconsistency between what Markov told Tucker and what he said to Laverdière about the circumstances surrounding the 1997 Incident provided some basis for the trial judge's rejection of Markov's reported reason for skipping his GMS training with Johnson. That is quite different, however, from finding that there was affirmative evidence of a racially-based animus by Markov towards Johnson.

[62] Even if Markov had fabricated his account of a second encounter with Michaud and Johnson, the trial judge drew an unreasonable inference when he concluded on that basis alone that Markov had lied throughout the GM investigations about his reason for skipping the GMS training to hide his racist conduct and beliefs. The trial judge's reasons suggest that he ignored the following considerations, which bore directly on Markov's explanation for skipping his GMS training:

- the GMS training session was mandatory for group leaders at the assembly plant, Markov had been told to attend and he did not do so. When he skipped his training session, he was confronted by his superiors, who demanded an explanation. In these circumstances, a false

explanation that had nothing to do with racism was eminently possible;

- Markov told Tucker that he was willing to take the GMS training with another person of colour – Azar Choudry – who also worked at the GM Oshawa facility;

- Markov said that he would find it more difficult to train with Michaud than with Johnson because of Markov's perception of Michaud's conduct during the 1997 Incident. Michaud, as I have mentioned, is a white man;

- Johnson acknowledged at trial that Markov never said anything racist to him or in his presence; and

- when pressed why he believed Markov was racist, Johnson could point only to Hayes's statement, described above, and Hicks's subsequent hearsay information that Markov's brother was killed by a black man.

[63] I note, in particular, that Hayes's statement to Johnson – that he had learned that he could avoid GMS training by claiming that he was "prejudiced like the last guy whose brother was killed by a black man" – was the only evidence of any racially-related comment by a GM employee to Johnson. However, this statement had no evidentiary value at all concerning Markov's alleged state of mind regarding Johnson.

[64] I therefore conclude, on this evidentiary record, that it was unreasonable for the trial judge to hold that Markov's absence from his GMS training was "solely racially based". With respect, there was simply no evidence to support

this finding. Given the centrality of this flawed finding to the trial judge's ruling on liability, this error is sufficient to decide the appeal.

[65] However, there is more. I reach a similar conclusion regarding the trial judge's findings that the body shop at the GM assembly plant was a poisoned work environment due to racism, consisting of "an underlying but persistent aura of harassment", which eventually led to Johnson's constructive dismissal. I turn now to these critical findings.

(3) Trial Judge's Findings of a Poisoned Work Environment and Constructive Dismissal

[66] Workplaces become poisoned for the purpose of constructive dismissal only where serious wrongful behaviour is demonstrated. The plaintiff bears the onus of establishing a claim of a poisoned workplace. As the trial judge recognized, the test is an objective one. A plaintiff's subjective feelings or even genuinely-held beliefs are insufficient to discharge this onus. There must be evidence that, to the objective reasonable bystander, would support the conclusion that a poisoned workplace environment had been created. See for example, *Ata-Ayi v. Pepsi Bottling Group (Canada) Co.* (2006), 54 C.C.E.L. (3d) 148 (Ont. S.C.), at paras. 23 and 40; *Bobb v. Alberta (Human Rights and Citizenship Commission)*, 2004 ABQB 733, 370 A.R. 389, at para. 85; *Houtz v. 772910 Ontario Inc. (c.o.b. McFee's Tavern)*, [2002] O.J. No. 475 (S.C.), at para.

45; *Canada (Canadian Human Rights Commission) v. Canada (Canadian Armed Forces) (re Franke)*, [1999] 3 F.C. 653 (T.D.), at paras. 43-46.

[67] Moreover, except for particularly egregious, stand-alone incidents, a poisoned workplace is not created, as a matter of law, unless serious wrongful behaviour sufficient to create a hostile or intolerable work environment is persistent or repeated: *Bobb* at paras. 85-87; *Canada (Canadian Armed Forces) (re Franke)* at paras. 43-46.

[68] The test for establishing constructive dismissal is no less stringent. In *Farber v. Royal Trust Co.*, [1997] 1 S.C.R. 846, Gonthier J. explained, at para. 26, that an objective test governs; the issue is whether "a reasonable person in the same situation as the employee would have felt that the essential terms of the employment contract were being substantially changed". Justice Gonthier elaborated, at para. 33:

> In cases of constructive dismissal, the courts in the common law provinces have applied the general principle that where one party to a contract demonstrates an intention no longer to be bound by it, that party is committing a fundamental breach of the contract that results in its termination.

See also *Shah v. Xerox Canada Ltd.* (2000), 131 O.A.C. 44 (C.A.), at paras. 6 and 8.

[69] The trial judge recognized, correctly, that an objective standard applied to determine Johnson's claim of constructive dismissal due to a poisoned workplace arising from racism. He went on to hold, at para. 63:

> When one objectively considers the events which comprise the progression of the status of Johnson's complaint through the system that existed in GM for handling such complaints, *there can be no doubt that a reasonable person would conclude that circumstances were such as would justify Mr. Johnson to consider he had been constructively dismissed from his employment*. [Emphasis added.]

[70] With respect, I disagree. First, even if Markov's absence from his GMS training session were racially-motivated – a conclusion that I regard as unreasonable and unsupported by the evidence – this alone would not support a finding that the assembly plant body shop was poisoned by racism, warranting a finding of constructive dismissal. As a matter of law, the offending conduct must be persistent and repeated unless the incident in question is sufficient, standing alone, to taint the entire workplace. That is not this case. The trial judge made no finding that Markov's refusal to train with Johnson on the GMS was sufficient to establish a poisoned workplace due to racism.

[71] Nor, in my view, was such a finding available here. Johnson's racism complaint arose from a single employee's failure to attend a single training session. Such conduct falls short of the type of egregious behaviour manifested in those cases involving poisoned work environments. Johnson did not establish

systemic or institutional racist behaviour. I agree with GM's submission that a single incident of this kind, with a single employee, over the course of an eight-year working relationship cannot objectively ground a finding of a work environment poisoned by racism.

[72] Second, Johnson acknowledged at trial that he was satisfied, and there were no outstanding racism issues, when Markov agreed on June 30, 2005 to step down as a group leader and, again, in August 2005 when Markov was disciplined. Only when Markov's suspension was rescinded on appeal under the collective agreement did Johnson again allege racism in the workplace. Dissatisfaction with the results of a legitimate grievance process cannot anchor a claim for constructive dismissal.

[73] Third, the trial judge committed several additional errors in finding constructive dismissal based on a poisoned work environment due to racism. The trial judge identified the following factors as supporting his conclusion that "circumstances were such as would justify Mr. Johnson to consider he had been constructively dismissed from his employment":

> (a) Markov's behaviour in failing to attend his GMS training session, coupled with his reason for that failure – the 1997 Incident – and his subsequent embellishment of the circumstances surrounding the 1997 Incident during his interview with Laverdière;

(b) the "underlying import and impact of Markov's unexpected resignation from his group leader position";

(c) Hayes's statement to Johnson;

(d) Tucker's opposition to and reluctance to accept Markov's resignation as a group leader in the body shop;

(e) GM's return of Markov to the position of group leader;

(f) the "overturning" of Markov's disciplinary suspension "because of ongoing contractual negotiations between GM and its employees";

(g) Markov's "threats against Johnson"; and

(h) GM's "insistence" that Johnson "return to the work environment in which his difficulties first arose under pain of being considered to have resigned his employment".

[74] The first factor, in my view, affords no support for the finding that Johnson was constructively dismissed by reason of a poisoned work environment due to racism. I have already concluded that the trial judge's finding of racially-motivated conduct by Markov is unreasonable and unsupported by the evidence.

[75] It is difficult to understand how the second factor cited by the trial judge contributes to a finding of constructive dismissal based on a poisoned work environment due to racism. Markov's resignation as a group leader was proposed by his union representative. On the trial judge's findings, Johnson unconditionally accepted this proposed resolution of his racism complaint. There

is no evidence that Johnson viewed the proposed resolution as itself inspired by racism.

[76] As I have said, there is no doubt that the third factor – Hayes's statement that he could avoid GMS training by claiming prejudice, as Markov allegedly had done – was an inappropriate, race-related comment. Tucker concluded as much. He promptly instructed Hayes to apologize to Johnson. Hayes did so, and Johnson accepted Hayes's apology. These facts do not support the conclusion that the GM body shop was a poisoned workplace due to racism. Accepting the offensive nature of Hayes's statement, Tucker's actions signify GM's intolerance, rather than acceptance, of inappropriate, race-related comments in the workplace.

[77] Nor does the fourth factor relied on by the trial judge support a finding of constructive dismissal based on a poisoned workplace due to racism. Tucker testified that he was opposed to the union proposal that Markov step down as a group leader because it would permit Markov to unilaterally determine whether he would comply with a mandatory training requirement imposed by his employer. Tucker regarded the resignation proposal as a "poor precedent" that, in effect, would allow Markov to "work the system". Nonetheless, on the advice of labour relations representatives, Tucker accepted the proposal. And, on the trial judge's findings, Johnson also unconditionally agreed to the proposed resolution.

[78] Thus, on the evidence accepted by the trial judge, Markov's resignation as a group leader was a negotiated compromise in the grievance disciplinary process. Tucker's personal reaction to it is irrelevant. Johnson accepted the proposed resolution. I did not understand Johnson to claim that the proposal, or Tucker's reaction to it, were motivated by racism.

[79] The trial judge next identified GM's return of Markov to a group leader role and the "overturning" of Markov's suspension as indicia of a poisoned work environment that led to Johnson's constructive dismissal. The trial judge was critical of the grievance process that led to Markov's suspension and its revocation on appeal in part on the basis that Johnson did not participate in either hearing. He also held that GM ignored Markov's voluntary demotion, carried on as if his resignation as a group leader had not occurred, and "traded away" Johnson's human rights as a bargaining chip in its contractual negotiations with the union.

[80] With respect, these holdings reflect a fundamental misapprehension of the evidence. The evidence at trial established that Markov was in fact removed from his role as a group leader. Tucker testified that when Johnson observed Markov at work in the body shop after the plant summer shutdown, Markov was performing group leader functions on a temporary basis in his assigned role as a utility replacement representative. Johnson has pointed to no evidence admitted at trial that contradicts this explanation for Markov's activities on the day in

question. Johnson had simply assumed, as Bantam had based on Johnson's reported observations of Markov, that Markov continued in the role of a group leader in violation of the agreed complaint resolution.

[81] However, Markov was reinstated as a group leader and his suspension was rescinded only after his successful appeal under the plant grievance procedures. GM did not control these contractual procedures, including the appeal process and its outcome. Johnson was not a party to the grievance process, which involved only GM and Markov in accordance with the procedures outlined under the applicable collective agreement. There is no evidence that the grievance process permitted or contemplated Johnson's participation or that his involvement in the discipline and appeal hearings was within GM's control.

[82] Moreover, the grievance process had nothing to do with Johnson's human rights. Both the discipline and appeal hearings were concerned with whether GM had acted properly, in accordance with the collective agreement, in suspending Markov for failing to obey a direct order that he take GMS training with Johnson. Johnson's human rights were not engaged at either hearing.

[83] I also note that there was no evidence at trial (1) concerning the position taken by GM at the grievance appeal hearing or (2) establishing that GM stood to benefit in its contractual relations with the union if Markov were to be returned to a group leader position. Although Johnson maintained that his human rights

were somehow compromised during the grievance process, no GM witness was cross-examined on this issue.

[84] In a related finding, the trial judge also held that Johnson was adversely affected not only by Markov's initial expression of racist behaviour but, as well, by GM's failure "to follow up and live by the agreements and resolutions entered into". The trial judge directed several criticisms at GM in this regard. In many instances, these criticisms were unfounded or simply inaccurate.

[85] For example, the trial judge criticized Tucker for not being outraged on June 28, 2005 at Markov's conduct when Johnson "reported racism" and, on the evidence accepted by the trial judge, for attempting to persuade Johnson not to pursue Markov's behaviour any further. Johnson, however, did not allege or complain of racism until June 30, in his meeting with Bantam. As a result, anything Tucker said to Johnson on June 28 about continuing to press the matter of Markov's failure to attend his GMS training session could not have been referable to racism, at least insofar as Tucker was concerned.

[86] In addition, the trial judge stated in respect of GM's investigations of Johnson's complaint, "It is not without note that no one in the GM organization charged with the responsibility of investigating [Johnson's] allegations of racist behaviour…ever interviewed Michaud." This assertion, too, is incorrect. Laverdière interviewed Michaud as part of her investigation.

[87] The seventh marker of a poisoned work environment identified by the trial judge was Markov's "threats against Johnson". This factor, if properly established by admissible evidence at trial, may well have been significant. However, during oral argument before this court, Johnson's counsel fairly conceded that, at best, the evidence of a threat of harm by Markov was unproven hearsay. Johnson claimed that he had been told by a co-worker that Markov had threatened to harm him, presumably in retaliation for Johnson's racism complaint. But Johnson led no evidence at trial of an actual threat, nor any evidence from the person or persons who allegedly told him of the purported threat.

[88] Finally, there is the matter of GM's position concerning Johnson's return to work. The trial judge held that GM "insisted" and attempted to "bully" Johnson into returning to work in "the environment in which his difficulties first arose", failing which he would be considered to have resigned his employment with GM. He held, in effect, that GM acted unreasonably and failed to accommodate Johnson's disability by failing to provide him with "a healthy, discrimination–free work environment".

[89] I make several observations regarding these findings. First, contrary to the trial judge's findings, GM did not "insist" that Johnson "return to a paint shop as a production supervisor". Nor did it suggest that Johnson return to work in "virtually the same work environment … in which there was the potential of encountering

the same individual who had caused him grief in the beginning". The evidence at trial established that Goard offered Johnson two alternate manufacturing positions, located in facilities outside the assembly plant body shop where he had experienced his difficulties with Markov, in buildings situate some distance away from the body shop. Only one of these facilities was the plant paint shop. Markov did not work in either facility.

[90] Second, as the trial judge himself recognized, Johnson did not have the right to dictate where he would work or the employment role he would assume on his return to work.

[91] Third, and importantly, an objective standard governs the determination whether a workplace is poisoned, by reason of racism or harassment: *Houtz* at para. 45. Further, in order to establish a claim of constructive dismissal, an employee must prove that the employer's conduct constituted a repudiation of the contract of employment, such that the employer no longer intended to be bound by the contract: *Farber* at para. 24. As Finlayson J.A. of this court stated in *Smith v. Viking Helicopters Ltd.* (1989), 68 O.R. (2d) 228, at p. 231, "The employer must be responsible for some objective conduct which constitutes a fundamental change in employment or unilateral change of a significant term of that employment." See also *Ata-Ayi*, at para. 45; *Shah*, at paras. 6-8. Moreover, where it is alleged that an employee has been constructively dismissed by reason of a poisoned work environment due to racism, the employee must also

establish that the employer's persistent conduct has rendered his continued employment intolerable: *Shah* at para. 6; *Bobb* at paras. 85 and 87.

[92] In this case, given the trial judge's finding that GM's repeated investigations of Johnson's racism complaint were deficient, the critical issues were, first, whether GM repudiated its employment contract with Johnson and, second, whether, evaluated objectively, its decision to treat Johnson's refusal to return to work as a voluntary resignation was reasonable.

[93] It is here, in my opinion, that the trial judge's constructive dismissal analysis fatally founders. The trial judge was obliged to consider all the evidence of the circumstances surrounding Johnson's termination of employment and the entire context in which the termination occurred. In my opinion, viewed in that fashion, the evidence does not support the conclusion that GM repudiated its employment contract with Johnson or that it acted unreasonably in treating Johnson's decision not to return to work as a voluntary resignation of his employment with GM.

[94] Even if GM's investigations of Johnson's racism complaint were imperfect, the investigations did not reveal any intention by GM to repudiate its employment contract with Johnson. I did not understand Johnson to argue to the contrary.

[95] Nor, as a matter of law, did Goard's position concerning Johnson's potential return to work constitute a repudiation of the employment contract. GM,

through Goard, offered Johnson two employment opportunities outside the assembly plant body shop. These offers of continuing employment are inconsistent with the notion that GM was resiling from its employment relationship with Johnson. In fact, GM concluded that Johnson himself had effectively elected to terminate his employment relationship with GM only after Johnson declined to accept the employment positions offered by GM, failed for another two months to return to work, and failed to provide GM with current medical evidence to support his claim of continuing disability.

[96] The trial judge appears to have concluded that GM repudiated Johnson's employment contract by failing to provide him with a discrimination-free employment environment. With respect, this misconceives GM's obligations in the circumstances.

[97] During oral argument, Johnson acknowledged that he did not lead any medical evidence at trial supporting his claim of continuing disability or indicating that he required workplace accommodation outside of any GM plant due to disability. Nor did he furnish such evidence to GM when discussing his return to work with Goard in the summer of 2007. In the absence of contrary evidence from Johnson, GM was entitled to rely on the advice of its plant physician that Johnson was fit to return to work without accommodation measures.

[98] Nevertheless, GM did seek to accommodate Johnson by offering him employment as a production supervisor, a position similar to the one he had previously occupied, in two different plants located in separate buildings about one kilometre away from the body shop. GM also offered "flexibility in terms of shift and perhaps, supervision". Johnson declined these offers. At trial, he explained this decision by asserting that if he accepted a position in the paint shop, he might encounter Markov (or other body shop personnel) if they were required to attend at the paint shop to deal with a product defect.

[99] GM, however, was not obliged to immunize Johnson from any future contact with Markov or other body shop employees. The information available to GM did not establish racism by Markov or other body shop employees. In any event, the mere possibility of contact with body shop employees, including Markov, does not alone establish that such exposure would result in future discriminatory treatment of Johnson. I also note that GM offered Johnson employment in the truck plant, as well as the paint shop.

[100] In all these circumstances, GM's decision to treat Johnson's refusal to return to work as a voluntary resignation cannot be said to be objectively unreasonable.

[101] I therefore conclude that the trial judge's key findings of a poisoned work environment due to racism, resulting in Johnson's constructive dismissal, cannot

withstand close scrutiny when assessed in the context of the entire evidentiary record. On this record, these findings are unreasonable. It follows that, on this ground as well, the trial judge's liability finding against GM cannot stand.

(4) Trial Judge's Awards of Special and *Wallace* Damages

[102] Johnson does not claim and the trial judge made no finding of constructive dismissal independent of racism in the workplace. Since I have concluded that the liability finding against GM must be set aside, it is unnecessary to consider GM's alternative argument that the trial judge erred in law by awarding Johnson special and *Wallace* damages.

VI. Conclusion and Disposition

[103] There is no reason to question that Johnson genuinely believed that he had been the victim of racism in his workplace. I accept that his perception of events unfortunately led to stress and mental anguish. However, I also conclude that the evidentiary record in this case does not support the trial judge's findings of racism, a work environment poisoned by racism and, hence, Johnson's constructive dismissal.

[104] For the reasons given, I would allow the appeal, set aside the trial judgment and the trial judge's costs award in Johnson's favour, and dismiss

Johnson's action against GM. GM does not seek its costs of the trial or this appeal. Accordingly, I would make no order as to costs.

Released:

"DD"
"JUL 31 2013"

"E.A. Cronk J.A."
"I agree Doherty J.A."
"I agree David Watt J.A."