

# Complicit In The Implicit: Labour Board Finds A Termination To Be Tainted With Discrimination Due To Implicit Racial Bias In The Workplace



A recent construction industry grievance referral decision from the Ontario Labour Relations Board (the “Board”), [\*Labourers’ International Union of North America, Local 183 v CTS \(ASDE\) Inc, 2022 CanLII 14925 \(ON LRB\) \(“CTS”\)\*](#), addresses the issue of implicit racial bias in the workplace. The case is an important lesson to employers that a workplace does not have to be intentionally and maliciously biased to create a discriminatory environment for minorities.

## **Background**

The Grievor, Mr. Williams, had been with the employer, CTS (ASDE) Inc., for a period of approximately two years before his employment was terminated. There were two major incidences that lead to his dismissal.

The first event occurred when the Grievor returned from vacation to find that an employer owned tool-box, that had been assigned to him, had been cut into in order to bypass the lock and access the box. The issue of the cut toolbox lock was raised in a meeting and one of the foremen shared that the cut had been authorized because they needed to access the contents of the box. In response, the Grievor became angry and began screaming about the violation of his rights as a worker. The Grievor raised the issue to the company’s Labour Relations Manager sharing a concern that the situation may have been racially motivated. In response, the manager urged the Grievor to pursue the claim with his union but did not initiate an investigation with the Health and Safety Committee. Approximately one month later, the employer provided the Grievor with a written warning for his alleged outburst. The written warning letter indicated that the Grievor’s employment would be terminated for future inappropriate conduct.

The second series of events took place approximately six months later at a different site with a different crew. It began when the Grievor failed to respond to his radio during an assignment that involved the movement of a crane. It was unclear based on the evidence if the Grievor failed to activate his radio or if the radio was faulty. When he failed to respond, the Grievor testified that the site foreman approached him and yelled at him for not knowing how to operate the radio, which the Grievor found

to be offensive. Following the assignment, the crew convened in the office for morning briefing. There were inconsistent accounts of what took place during the meeting, but there was some sort of altercation in which a foreman accused the Grievor of failing to answer the radio and the Grievor became agitated, possibly raising his voice and slamming his fist on a desk, while defending himself. The foreman approached the Grievor the following day while he was working in an attempt to "clear the air." The Grievor became upset with the foreman's attempt to single him out, raised his voice, and was sent home. Over ten days later the Grievor was informed of his dismissal.

### **The Vice-Chairs Decision**

In his decision, Vice-Chair Kelly considered whether the Grievor's discharge was for just cause and if it was free from discrimination under the Collective Agreement and the Ontario *Human Rights Code*. Vice-Chair Kelly found that the Grievor's disciplinary record could not be sufficiently relied upon to meet the burden of a just cause termination. The past warning that the termination letter referenced was for conduct the Grievor was never disciplined for. Additionally, the termination letter claimed that the Grievor showed a continued pattern of verbally abusive behavior which made other workers fear for their safety, however, there was no documentation to support such claims. Additionally, the second event itself was not conduct that warranted discharge as the Grievor was given the impression that he had been forgiven before the foreman accosted him the following day to "clear the air." Finally, the termination letter stated that the Grievor consistently accused the employer of being inappropriately motivated causing the employer to believe that the employment relationship was irreparably damaged. However, none of the Grievor's claims of racism were investigated by the Health and Safety Committee and the company never informed the Grievor that his claims were inappropriate. For those reasons Vice-Chair Kelly found that the employer did not have just cause to terminate the Grievor.

Vice-Chair Kelly went on to consider whether the discharge was discriminatory. In doing so the Vice-Chair relied on evidence from an expert in implicit bias that explained that "implicit bias operates outside of conscious awareness and is often automatically triggered by viewing a member or the image of a member of the outgroup." The expert cited a report that found that a large majority of people (70 to 80 per cent) show an implicit anti-Black bias in which they associate negativity more with Black than White men and women. Moreover, common unconscious views of negative traits associated with Black men are that they are loud, threatening, aggressive, hostile, formidable, criminal and poor.

While the Vice-Chair found that there was not an intentional agenda by the company to target the Grievor on the basis of his race, he was still subject to a more nuanced form of discrimination. The Vice-Chair noted that the employer made virtually no response to the Grievor's claims of racism. Additionally, the other crew members were given the benefit of the doubt when they became angry, their behavior was explained by their frustration or that their voice was raised to be heard over the construction site. However, the Grievor was always assumed to be in the wrong. When he claimed the radio did not work no one examined the radio to determine if there was a problem. When he had an outburst, it was viewed as inappropriate behavior that was always investigated and fully documented with witness statements. The Vice-Chair therefore found that the Grievor was tainted by discrimination.

### **Key Takeaways**

There are two key lessons that employers can take away from the above case. Firstly, the importance of a disciplinary record to support a just cause termination. Meeting a burden of a just cause termination is an extremely high legal threshold to meet. An

employer must implement and document discipline in order to show that they went through the progressive discipline process by repeatedly warning the employee that they were not meeting standards, then given a chance to improve, and still continued to fall below expectations. In *CTS*, the Grievor had only received a warning letter so the employer did not have a disciplinary record to rely upon. It is crucial for employers to formally implement discipline through documentation in the event that they need to terminate an employee for just cause.

The second, most important lesson, for employers is the danger of implicit bias in the workplace. As noted by Vice-Chair Kelly, "racial stereotype does not usually announce itself loudly, clearly and unapologetically." It is important for employers to assess their behavior to ensure that their decisions are not influenced by any unconscious racial biases. Some steps employers can take include:

- educating themselves on implicit bias and what biases may be affecting them;
- training the workplace to identify and take action against implicit bias;
- determining where the biases are likely to affect your workplace;
- diversifying management teams and staff so that more voices and backgrounds are represented;
- have team members to speak up about biases;
- investigating claims of discrimination and holding employees accountable; and
- setting diversity and inclusion goals.

*The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.*

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