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Indexed as: Francis v. Victoria Shipyards (No. 3), 2012 BCHRT 233

IN THE MATTER OF THE *HUMAN RIGHTS CODE*
R.S.B.C. 1996, c. 210 (as amended)

AND IN THE MATTER of a complaint before
the British Columbia Human Rights Tribunal

B E T W E E N:

Austin Francis

COMPLAINANT

A N D:

Victoria Shipyards Co. Ltd.

RESPONDENT

REASONS FOR DECISION

Tribunal Member:	Marlene Tyshynski
Counsel for the Complainant:	Roger Batchelor
Counsel for the Respondent:	Chris Leenheer
Hearing Date:	April 30, 2012

I INTRODUCTION

1. Summary of the Complaint and Application

[1] Austin Francis filed a complaint alleging that Victoria Shipyards Co. Ltd. (“Victoria Shipyards”) discriminated against him with respect to his employment on the basis of his race, colour, ancestry, and place of origin, contrary to s. 13 of the *Human Rights Code*.

[2] In its final submissions, Victoria Shipyards made an application for costs against Mr. Francis.

2. Decision

[3] I find that Mr. Francis’ complaint of discrimination is justified in part. I order Victoria Shipyards to cease and desist its contravention of the *Code*. For the reasons set out below, I did not make an order for injury to Mr. Francis’ dignity, feelings or self-respect. I dismiss the part of the complaint that I found is not justified.

[4] Victoria Shipyards’ application for costs is denied.

3. Organization of the Decision

[5] First, I set out the procedural history to this complaint. Following this, I introduce the witnesses and provide my determination of the credibility of their evidence. Next, I set out the relevant evidence and make findings of fact. Then I provide the applicable law and my analysis and conclusion respecting the complaint. Finally, I consider and determine Victoria Shipyards’ application for costs.

[6] I have considered all of the parties’ evidence and their submissions. However, I have set out only that which is relevant and necessary to my determination of this complaint.

II PROCEDURAL HISTORY

[7] Mr. Francis and a black co-worker, Anthony Stevenson, jointly filed a complaint on June 22, 2009, wherein they alleged, among other things, that Victoria Shipyards and several employees discriminated against them with respect to their employment on the basis of race, colour, ancestry, place of origin, and family status, contrary to s. 13 of the *Human Rights Code*.

[8] The respondents brought an application to dismiss the complaint, decided by the Tribunal in *Stevenson and Francis v. Victoria Shipyards and others*, 2010 BCHRT 270 (*Francis No. 1*). The Tribunal dismissed Mr. Stevenson's complaint in its entirety pursuant to s. 27(1)(g) as untimely. Mr. Francis' complaint included allegations occurring in June and July 2007 and others occurring in April 2009. The Tribunal dismissed Mr. Francis' allegations pre-dating his April 2009 period of employment under s. 27(1)(g) as untimely.

[9] Victoria Shipyards brought a further application to dismiss which the Tribunal declined to consider in *Francis v. Victoria Shipyards (No. 2)*, 2011 BCHRT 16. In *Francis No. 2* the Tribunal articulated the scope of the complaint. I quoted the following portion of *Francis No. 2* at the commencement of the hearing in order to once again clarify the scope of the complaint before me at the hearing.

...the only part of the complaint that remains before the Tribunal relates to Mr. Francis' April 2009 period of employment. With respect to this period, Mr. Francis alleges discrimination on the basis of race, colour, ancestry and place of origin, contrary to s. 13 of the *Code: Francis No. 1*, at para. 101. The Tribunal outlined the allegations relating to that period of employment in the following manner:

The remaining allegations made by Mr. Francis, as against Victoria Shipyards, are as follows:

- a) From April 21 to 26, 2009, he worked at Victoria Shipyards. During this time, various employees made racial slurs, including statements such as:
 - i) "we can't see you if you're not smiling"; and
 - ii) referring to Black persons as "niggers, spooks, and jigaboos".

- b) During his April 2009 period of employment, someone left a white hood designed to look like a KKK hood on his bag while he was at work. (para. 89) (paras. 1 and 2)

[10] And at paragraph 17 of *Francis (No. 2)* the Tribunal held that:

...I accept that no formal amendment form has been filed but, in all of the circumstances, the Tribunal has waived that requirement. The respondent has now been provided with appropriate notice of the allegation, and the KKK hood allegation is properly part of the complaint before the Tribunal.

[11] For the purpose of this decision, I will refer to the KKK hood as the rag and the KKK hood allegation as the rag incident.

III CREDIBILITY

1. Legal Principles

[12] In determining the facts, I have adopted and applied the test set out in *Bradshaw v. Stenner*, 2010 BCSC 1398, para. 186 (“*Bradshaw*”):

Credibility involves an assessment of the trustworthiness of a witness’ testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet (Township)* (1919), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness’ evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness’ testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (*Wallace v. Davis*, [1926] 31 O.W.N. 202 (Ont. H.C.); *Faryna v. Chorny*, [1952] 2 D.L.R. 152 (B.C.C.A.) [*Faryna*]; *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484 at para. 128 (S.C.C.)). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (*Faryna* at para. 356).

[13] In assessing the evidence, I note that I am entitled to accept some, none or all of any witness’ testimony, and have done so as I consider appropriate on the evidence before me.

2. The Complainant's Witnesses

[14] Mr. Francis called two witnesses, himself and Trevor Graham, a co-worker.

Mr. Francis

[15] Mr. Francis was very nervous. He seemed confused about dates and events and what was expected of him. He gave vague unresponsive answers in cross-examination. It is my view that Mr. Francis had information that he wished to express about his complaint; however, the questions put to him in direct did not provide him with an opportunity to do so. He seemed to be guessing about what his counsel was trying to ask him. As explained below, Mr. Francis' direct examination did not cover necessary ground and I have found his evidence unreliable.

Mr. Graham

[16] Mr. Graham started working at Victoria Shipyards in 2001. He went to welding school and has been hired off and on by Victoria Shipyards as a welder since 2006. Mr. Graham stated that he worked at Victoria Shipyards in 2009 at the same time Mr. Francis worked there. He described Mr. Francis as his friend. Mr. Graham is not currently employed by Victoria Shipyards.

[17] Mr. Graham was straight forward in his testimony. He quickly acknowledged when he could not recall something. It was obvious that Mr. Graham had not been prepared to testify. When originally asked whether he recalled anything occurring in the workplace in 2009 he responded no, that was a long time ago. When asked whether he recalled a "rag" in the workplace, he said, "yes, there are lots of rags". Finally, when asked to focus on whether he recalled anything related to Mr. Francis, he thought for a moment and then recalled the rag incident. His testimony about the rag was straightforward. I found his evidence credible and reliable.

3. The Respondent's Witnesses

[18] The Shipyard called one witness, Fred Goddard, the Manager of Paint and Labour. He testified about the workplace and its harassment policy and what he knew about the rag incident. I found his testimony about who he questioned about the rag

incident carefully put; otherwise he testified in a straightforward manner. I found his testimony credible.

IV THE FACTS

1. Victoria Shipyards

[19] Mr. Goddard has been employed at Victoria Shipyards since 1995. He came up through the ranks and joined management in 2008. He testified about the work and the organization of Victoria Shipyards.

[20] Victoria Shipyards is in the business of ship repair and construction. The vessels include small motor life-boats, harbour ferries, cruise ships and navy vessels. The amount of work is ever-changing. When a job comes in, workers are hired, and as the job moves to completion, workers are laid off. There is a constant ebb and flow to the work. Mr. Goddard stated that Victoria Shipyards was particularly slow in 2009, whereas now it has a great volume of work.

[21] Relevant contextual information was provided in *Francis No. 1*. The Tribunal stated:

Victoria Shipyards is certified by the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Lodge 191 (the “Boilermakers”), for a bargaining unit of all employees except those excluded by the B.C. *Labour Relations Code*. Victoria Shipyards and the Boilermakers are party to a Collective Agreement. The Boilermakers represent several other unions which are also covered by the Collective Agreement. The Boilermakers negotiate the Collective Agreement and the other unions are bound by the terms and conditions, although certain provisions may have different application to separate unions.

....Austin Francis [is a] member of the Dock and Shipyard Workers’ Union Local 1204 LIUNA (the “Union”). The Union is bound by the terms and conditions of the Collective Agreement. The Union supplies Victoria Shipyards with labourers needed for its operation. Victoria Shipyards obtains the labourers through the Union hiring hall as needed on a project basis. (paras. 5 and 6)

[22] Mr. Goddard explained that Victoria Shipyards is organized by trade group. He manages both painters and labourers (the “Paint and Labour Group”), whereas other

trades have their own managers. Generally there are two shifts, the morning shift from 7:30 am to 4:00 pm (the “Morning Shift”), and the afternoon shift from 4:00 pm to 12:30 am (the “Afternoon Shift”).

[23] The reporting scheme for the Paint and Labour Group is as follows: charge-hand(s) report to senior charge-hands, who report to a supervisor, who report to the manager, Mr. Goddard. There are three senior charge-hands on the Morning Shift and one on the Afternoon Shift. In cross-examination, Mr. Goddard agreed that a charge-hand was in a supervisory position.

[24] Mr. Goddard testified extensively about the “Respect in the Workplace Policy” (the “Policy”). He testified that it was put in place in August 2007 in response to the issues raised in the summer of 2007. After 2007, the Human Resources department put on a number of respect in the workplace sessions. He testified that Victoria Shipyards takes its responsibilities very seriously. He said they have workers of many different races and cultures as well as female employees. He pointed out that Victoria Shipyards has three “lady supervisors”. Mr. Goddard testified that he regularly raises the issue of respect in the workplace in his Wednesday meetings with the workers of both shifts. He testified that the charge-hands are trained in the application of the Policy and the employees are made aware of the Policy through constant referral. He said that the Policy is on his Bulletin Board outside his office. His office is located on the same floor as the workers’ lunchroom and locker room. Every office has a copy of the Policy.

[25] Mr. Goddard explained that “if a worker had a problem, he is to talk to the charge-hand. If the charge-hand cannot solve the problem, the matter goes to the senior charge-hand. If the senior charge-hand cannot solve the problem, it is left for [Mr. Goddard] to deal with when he comes in for the Morning Shift”. Mr. Goddard testified that anyone who has a problem can come to him anonymously, can talk to a charge-hand, or can write out the problem and put it in the suggestion box. Mr. Goddard testified that Victoria Shipyards has whistle-blower protection in place.

2. Mr. Francis

[26] Mr. Francis is 39 years of age. He is black. Mr. Francis did not state his ancestry or place of origin. He testified that he completed high school and attended two and one-half years studying at a State College. He stated that he played football for the NCAA (National College Athletic Association). He testified that he has lived in Victoria B.C. for the last ten years. He currently coaches football at Mount St. Douglas High School as a volunteer.

[27] Mr. Francis testified that he was employed as a labourer about three or four times at Victoria Shipyards commencing in 2006. On each occasion, his Union dispatched him in response to the Shipyards' request for labourers. Mr. Francis explained that he was hired for specific jobs and then laid off. He said he worked on a cruise ship in 2006, was laid off, returned the summer of 2006 to work on a rocket launcher, was laid off for about three to four months, and then returned in 2007 to work on another cruise ship and a fishing vessel. Mr. Francis testified that he was dispatched to work at the Victoria Shipyards again in April 2009.

[28] Mr. Goddard testified, and Victoria Shipyards adduced documentary evidence, that showed that Mr. Francis was employed as a labourer on three occasions. May 10 to 25, 2007, June 11 to July 30, 2007, and April 21 to 26, 2009. I prefer the evidence of Victoria Shipyards respecting Mr. Francis' employment dates.

[29] Mr. Francis' duties included removing old paint from ships, "hole-watch" and "fire-watch" which involved passing tools and attending to the safety of workers. For instance, on fire-watch he guarded against fires that might result from welding. He also built scaffoldings for a welder.

[30] Mr. Goddard testified about the general duties of labourers. He noted that there were entry-level unskilled labourers and highly-skilled labourers. He testified that Mr. Francis belonged to the former group. He also noted that in the normal course, less-skilled labourers were the first to be laid off as they approached the end of a job, as the skilled labourers were able to perform a greater range of tasks.

[31] Mr. Francis testified about how he generally experienced working at the Victoria Shipyards. He stated that the challenge he faced was that he had to go to work every day and “not be a part of their clique”. He testified that he felt like an outsider.

[32] Mr. Francis testified that in 2009 he was dispatched by his Union to go back to work. He testified that he felt a bit of tension due to earlier workplace issues. I understand that the “earlier workplace issues” refers to Mr. Francis’ allegations of discrimination against Victoria Shipyard that were dismissed in *Francis No. 1*.

[33] Mr. Francis explained that in April 2009 he worked the Afternoon Shift. He stated that every two hours workers got a break. First, there would be a short break at 6:00 pm, then a longer lunch break. I presume there was a further short break.

[34] Mr. Francis testified that he carried a bag containing work-related articles around with him in the normal course of his work. He would “throw the bag down” where he was working.

The Rag Incident

[35] Mr. Francis’ initial testimony about the rag incident was brief. He testified that, when he arrived at work, he first reported to charge-hand X who assigned him to fire-watch on a cruise ship. He went to where the welders were working. He went off the cruise ship to an employee area for 15 minutes. He said that there was ongoing animosity between him and A. He testified that A was “chit chatting”. He then came upon “a rag sitting on his lunch bag”.

[36] I asked Mr. Francis to tell me in detail what happened. In order to understand his testimony, it is necessary to add that, later in his testimony, Mr. Francis said that at some point on this shift, charge-hand X told him to report to Y. Mr. Francis testified that, in his view, a charge-hand was “sort of the boss” as he instructed workers regarding “what they should do and where they should go for the day”. The charge-hand was the “guy you report to”.

[37] Mr. Francis’ testimony was rushed and disjointed. At times he spoke in partial sentences. What follows is my understanding of the substance of his testimony: It was Mr. Francis’ lunch break. He left the ship. He had forgotten his bag and went to get it.

There was a rag on his bag. He said to his buddy B that he didn't know "how to take the rag". Mr. Francis grabbed the bag and the rag and talked to Trevor Graham. Mr. Francis said, "Man things are getting weird." Mr. Graham said Mr. Francis could put "stuff" in Mr. Graham's locker. Mr. Francis went back to work and talked to Y, referring to a former incident with A. Y told him to get tough skin, made a reference to Mr. Francis reporting it, and said that this is "just the way it is around here" and that some people are set in their ways. Mr. Francis went back to work. He testified, "[It is] too intense. This all started over a little incident I had with a co-worker." (I believe Mr. Francis is possibly referring to something in relation to A that happened in the past.) The next day, Mr. Francis arrived at 3:30 for the Afternoon Shift. He also said that at about 11 to 11:30, he was told he was laid off by another charge-hand. When Mr. Francis asked why, the charge-hand said it was just his time, and that a lot of guys were getting laid off. Mr. Francis testified, "Maybe because I talked to Y." Mr. Francis phoned the Union and had a conversation. He waited and waited. Then he phoned another guy who worked at another company I gather to find work.

[38] Mr. Francis gave inconsistent evidence about when the Incident happened. In some instances, saying it happened at his lunch break and, at other times, at this first break.

[39] Mr. Francis testified that he spoke to Y at around 8:15 to 8:30 pm. In cross-examination he admitted that he did not mention the rag to Y. He testified that he explained to Y that he got into an argument with A and the things A said to him. Mr. Francis testified that Y responded "chill out" and that if Mr. Francis wanted to keep his job, then he should not make trouble for himself.

[40] Mr. Francis explained that he did not report the rag incident to upper management because it was 11:30 at night, it was dark and he didn't see anyone. He thought that maybe if he talked to Y, "maybe he would move on it". Mr. Francis testified that Y was the boss of all the welders and so he thought that Y would move him to where there wasn't so much animosity.

[41] In cross-examination, Mr. Francis admitted that the animosity between him and A was due to matters that occurred in the summer of 2007. The animosity was ongoing

because of all the gossip that resulted. Much of the gossip occurred after work. Mr. Francis stated his theory was that “A and all his little friends” were making it hard for him to go to work. Mr. Francis admitted that he believed that A worked the Day Shift.

[42] When Mr. Francis was advised that Victoria Shipyards’ records showed that A was not working for them in April of 2009, Mr. Francis insisted that he saw A leaving when he was coming to his April Afternoon Shift. Mr. Francis admitted that he did not know whether A was actually working but he insisted that he saw A in the secure area talking to some of his friends.

[43] In his testimony, Mr. Francis identified the person I have called Y by name. He testified that he understood Y to be the charge-hand he was to report to at the time.

[44] Mr. Goddard testified that he first heard about the rag incident after Victoria Shipyards received Mr. Francis’ complaint. He stated that, upon learning of Mr. Francis’ allegation, he talked to Y who is the welding supervisor on the Afternoon Shift. Mr. Goddard said that Y has no responsibility for Paint and Labour. Mr. Goddard testified that Y never raised any issues with him. Mr. Goddard said that he spoke to the three Paint and Labour supervisors including charge-hand X. All three said that they had heard nothing about the rag incident.

[45] In cross-examination, Mr. Goddard admitted that he did not talk to the supervisors in the welding division. He added, “nor did they approach [him]”.

[46] Mr. Goddard was adamant that his charge-hands know what happens on shift. He stated “[The rag incident] never happened. It never happened in my group. No one [came] to me.”

[47] Mr. Francis identified a picture of the rag. It is a black and white picture. The picture shows what appears to be a white cloth lying on a dark carpet. The cloth has two triangular “eye holes” cut in it. It also appears to be cut in such a way that there are long thin pieces of the cloth which are positioned so that they form a long narrow triangle or peak above the “eye holes”. Mr. Francis stated that the picture was taken at his lawyer’s office. He testified that “it was almost in the same position as when it was on his bag”.

[48] Mr. Francis identified a rag as the rag that was left on his bag. It was entered as an exhibit. The rag entered as an exhibit looks the same as the rag in the picture. It is a white rag. It is cut so that it looks like there are two “eye holes”. It is also cut in a manner that creates two long thin pieces of rag at one end and above the “eye holes”.

[49] In cross-examination, Mr. Francis said he did not “pose the rag”. He agreed that the position of the rag in the picture and the way it was positioned on his bag was “pretty close”. In the picture, the rag was on the floor rather than on the bag. In cross-examination, Mr. Francis agreed that finding the rag was very disturbing. He was asked why he did not include the rag allegation in his original complaint filed June 22, 2009. Mr. Francis said “[he] just explained the whole ordeal to Mr. Batchelor”.

[50] Mr. Graham testified that he recalled that, at the beginning of an Afternoon Shift, Mr. Francis told him that someone had put a rag cut out to be a KKK mask on his tool bag. Mr. Graham testified that he saw the rag. He first described it from memory as a white rag with two eye holes cut out. He said “seeing that, I don’t even know”. I understand Mr. Graham to be expressing his disbelief; that he didn’t know what to make of the situation. He testified that he was shocked when he saw the rag. He went on to say, “The workplace is a war zone, everyone hates everyone, everyone is out to get each other”. When the rag, which was entered as an exhibit, was shown to Mr. Graham, he immediately stated that it “looked similar, but no legs. It was white with two eye holes cut in it.” I understand Mr. Graham’s comment of “but no legs” to be referring to the cut area I have described as the long thin pieces of cloth above the eye holes.

[51] Mr. Graham testified that Mr. Francis asked him if he could put his gear in his locker. Mr. Graham agreed to let him do so.

[52] In cross-examination, Mr. Graham took a moment to carefully reflect on when Mr. Francis showed him the rag. He stated that he believed that it was the day following the rag incident.

[53] In cross-examination, Mr. Francis admitted that he did not tell the Union about the rag. He responded that “violence was not the way to go”.

[54] Mr. Francis testified that he did not return to work at Victoria Shipyards because he talked to his Union representative who advised him to wait until the decision was rendered in his “court case”. When it was complete and the Union received a “call out”, they would send Mr. Francis. Mr. Francis contacted the Nanaimo shipyard and was hired there.

[55] Mr. Goddard testified that he was shown the picture of the rag provided by Mr. Francis’ counsel in the response to Victoria Shipyard’s application to dismiss the complaint. He stated that had he known about the rag incident he would have done everything possible to look into it. It was completely unacceptable conduct by anyone’s standard.

[56] In cross-examination, Mr. Goddard was asked to give his view about the rag incident. He stated, that [if it happened] “it appeared to be a prank that someone has done”.

3. Determination of Facts Where There is Inconsistent Evidence

[57] The evidence about when the rag incident occurred is inconsistent. I found Mr. Francis’ testimony scattered. His testimony about the incident was peppered with obscure, rushed references to the allegations that were dismissed in *Francis No. 1*. Victoria Shipyard successfully objected to the relevance of these references.

[58] Mr. Francis did not state the date of the rag incident. I can extrapolate from the evidence of Victoria Shipyards that Mr. Francis was in their employ from April 21 to 26, 2009. If I relied on Mr. Francis’ evidence, the incident would have occurred on April 25, 2009, the day before he was laid off. Mr. Francis’ evidence varied about the time the rag incident occurred as either at his first break or at the beginning of his lunch break when he returned to the worksite having forgotten his bag. Mr. Francis testified that, upon finding the rag, he commented to his buddy B. He did not call B to testify. His evidence suggested that he then spoke to Mr. Graham. Mr. Graham hesitated before stating when the incident occurred. He testified that “he believed” the incident occurred the day before Mr. Francis showed him the rag. I take it Mr. Graham was not absolutely sure when the rag incident occurred.

[59] Mr. Francis admitted that he did not mention the rag to Y. His evidence was that he complained about former antagonism between him and A. I find this evidence required an explanation about why Mr. Francis did not mention the rag. None was given.

[60] I find the explanation given by Mr. Francis that he did not complain to upper management about the incident because it was 11:30 at night, it was dark and he didn't see anyone very weak and hard to believe, or not the real reason, or an indication that Mr. Francis did not take the matter that seriously at the time.

[61] Mr. Francis testified that both the rag and the picture of the rag entered as an exhibit was the rag he found on his bag. Mr. Graham described the rag from memory. Upon being presented with the rag exhibit, he immediately identified it as not being identical. He stated that it "looked similar, but no legs. It was white with two eye holes cut in it." I found Mr. Graham's testimony consistently frank, responsive and credible. I prefer the evidence of Mr. Graham to that of Mr. Francis respecting the rag and thus must conclude that the rag and the picture of the rag entered as exhibits was not the original rag, or it was the original rag altered to look as though it had two long thin strands or, in the picture, a peak.

[62] Ultimately, I have determined the following facts respecting the rag incident on a balance of probabilities. I make these findings based on the evidence of Mr. Graham, which I found to be entirely credible. A white rag with two eye holes cut out was placed on Mr. Francis' bag, either at the commencement of his first break or his lunch break, while he was on the Afternoon Shift on April 25 or 26, 2009. Mr. Francis told Mr. Graham that someone had put a rag cut out to be a KKK mask on his tool bag. Mr. Graham saw this rag. Mr. Graham felt shocked. Mr. Francis asked Mr. Graham if he could put his bag in Mr. Graham's locker, I will infer, for safety's sake, and Mr. Graham agreed.

[63] I note that Victoria Shipyards' evidence respecting whether Y or any other Paint and Labour charge-hand or supervisor had knowledge of the rag incident is hearsay. I give it little weight as it was not tested.

V ANALYSIS

[64] Mr. Francis' complaint is filed under s. 13 of the *Code* which provides, in part:

- (1) A person must not
 - (a) refuse to employ or refuse to continue to employ a person, or
 - (b) discriminate against a person regarding employment or any term or condition of employment because of the because of the race, colour, ancestry, place of origin, ... of that person

[65] Mr. Francis bears the evidentiary burden of establishing a *prima facie* case of discrimination, that is, he must prove, on a balance of probabilities, that Victoria Shipyards discriminated against him on the basis of his race, colour, ancestry, and place of origin contrary to s. 13. In *O'Malley v. Simpson-Sears Ltd.*, [1985] 2 S.C.R. 536, the Supreme Court of Canada stated: "A *prima facie* case of discrimination...is one which covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the complainant's favour in the absence of an answer from the respondent employer". (para. 28)

[66] In order to prove his complaint, Mr. Francis must establish that he is a member of a group protected under one or more of the enumerated grounds in s. 13 of the *Code*, that he suffered adverse treatment in his employment, and that it is reasonable to infer from the evidence that the grounds were a factor in the adverse treatment.

[67] In his submissions, counsel for Mr. Francis acknowledges that no evidence was tendered respecting the allegations of racial slurs. (I return to this point when addressing the application for costs.) I note that no submissions were made on behalf of Mr. Francis on the *prima facie* case of discrimination. The submissions are a five-paragraph summary of the evidence, a brief reference to injury to dignity case law, and the comment that Mr. Francis was in a vulnerable position and is a member of a visible minority. The submissions do not expressly seek the remedy of damages for injury to dignity. The only specific comment made respecting remedy is that Mr. Francis is not seeking wage loss.

[68] I have read and considered Victoria Shipyards' submissions. In summary, Victoria Shipyards argues that Mr. Francis has failed to establish a *prima facie* case of discrimination due to conflicts in the evidence, and the lack of credibility of Mr. Francis'

evidence. In the alternative, Victoria Shipyards asks that I dismiss the complaint on the basis that a single incident may not constitute a violation of the *Code: Pardo v. School District No. 43*, 2003 BCHRT 71.

[69] My analysis is as follows.

[70] In determining whether Mr. Francis has established a *prima facie* case of discrimination, I find that Mr. Francis is a member of a protected group based on race and colour.

[71] I have considered the weaknesses of Mr. Francis' evidence. I have concluded that the rag entered into evidence was created or altered to bolster Mr. Francis' case. Mr. Francis could not consistently state when the rag incident happened. Mr. Francis gave no explanation about why the relevant testimony of B was not called at the hearing. Mr. Francis did not provide reasonable explanations for why he did not expressly complain about the rag to the Paint and Labour charge-hand or anyone in management at any time while or after he was employed by Victoria Shipyards or to his Union.

[72] However, on a balance of probabilities, I find that the following happened based on Mr. Graham's evidence. A white rag with two eye holes cut in it was placed on Mr. Francis' bag when it was left on the ship worksite at some time on April 25 or 26, 2009. Mr. Francis told Mr. Graham that someone had put a rag cut out to be a KKK mask on his tool bag and asked if he could put his gear in Mr. Graham's locker.

[73] In cross-examination, Mr. Francis agreed that he found the matter disturbing.

[74] Having determined that the rag incident occurred, as I have described, I find that I am also led to conclude that the placement of a white rag with two eye holes on the bag of a black man who expresses to his co-worker that someone had put a rag cut out to be a KKK mask on his tool bag constitutes adverse treatment. Thus, I find that on a balance of probabilities, the evidence before me establishes that Mr. Francis suffered adverse treatment in his employment with Victoria Shipyards and that his race and/or colour was a factor in the treatment.

[75] I reject Victoria Shipyards' argument that the circumstances of this complaint are appropriately considered as a single incident that does not, by its nature, constitute a breach of the *Code*. In *Pardo* the Tribunal wrote:

... The Respondents have requested that the Complaint be dismissed because it does not disclose a violation of the *Code* and because the *Code* was not intended to apply to this type of situation. I will consider this application under s. 27(1)(b) of the *Code*.

The Respondents have cited three human rights decisions which concluded that one isolated comment does not amount to a contravention of the relevant legislation: *Québec v. Bombardier* (1983), 4 C.H.R.R. D/1447 (the supervisor subsequently apologized for his remark); *Nimako v. Canadian National Hotels* (1987), 8 C.H.R.R. D/3985 (one racial slur does not amount to harassment); and *Parsonage v. Canadian Tire Corp.* (1991), 28 C.H.R.R. D/42 (a single insulting joke with racial overtones does not amount to a violation of the legislation).

In my view, all the circumstances must be taken into account when considering whether a single comment could constitute a contravention of the *Code*. Without suggesting that this is an exhaustive list, some of the relevant factors would be the egregiousness or virulence of the comment, the nature of the relationship between the involved parties, the context in which the comment was made, whether an apology was offered, and whether or not the recipient of the comment was a member of a group historically discriminated against. (paras. 10-12)

[76] Here, Mr. Francis described the rag to Mr. Graham as something cut out to look like a KKK mask. Mr. Graham saw the rag with the eye holes cut out and reacted with shock. Mr. Goddard said (albeit in relation to the somewhat altered rag) that putting the rag on Mr. Francis' bag was completely unacceptable conduct by anyone's standard. Considering the rag with eye holes placed on a black worker's bag, I also view the conduct as totally unacceptable, harkening back to a long history of extreme acts of discrimination against black persons in North America. As a single incident, it is an egregious act of discrimination, not a joke with racial overtones, and not an inappropriate comment made in anger or a single racial slur later apologized for.

[77] I find that the portion of Mr. Francis' complaint respecting the rag incident on the facts found by me in this decision constitutes discrimination and that this portion of the complaint is justified.

[78] The remainder of Mr. Francis' complaint is dismissed pursuant to s. 37(1) as no evidence was led.

VI REMEDY

[79] Having found a breach of the *Code*, I make the mandatory order pursuant to s. 37(2)(a) that Victoria Shipyards cease contravening the *Code* and refrain from committing the same or similar contravention.

[80] Mr. Francis did not expressly seek any remedy in his submissions. He stated that he was not seeking wage loss. I have considered whether to make an order pursuant to s. 37(2)(d)(iii) for injury to dignity, feelings and self-respect.

[81] Mr. Francis provided little evidence about how the Incident affected him. In direct examination he testified that he said to B that he didn't know how to take the rag and to Mr. Graham that things were getting weird. Only in cross-examination did he say he found the Incident disturbing. By his own account, he did not mention the rag to any other employee of Victoria Shipyards or to his Union, although he did complain about an interaction with A that occurred in the past. In these circumstances, and considering the general vagueness of Mr. Francis' testimony I am not inclined to order an award for injury to Mr. Francis' dignity, feelings or self-respect.

VII APPLICATION FOR COSTS

[82] Victoria Shipyards applies for an order for costs against Mr. Francis for improper conduct pursuant to s. 37(4) of the *Code*. Mr. Francis' counsel did not file a response to this application.

[83] Victoria Shipyards states that Mr. Francis maintained, throughout the complaint process, that he had evidence of the alleged racial slurs. At the hearing, he called no evidence of racial slurs and, in his submissions, he acknowledged the same. Victoria Shipyards argues that I should find improper conduct because Mr. Francis knowingly made unfounded allegations in his complaint, and in his responses to two applications to dismiss, including his affidavit. If I do not find that Mr. Francis knowingly made unfounded allegations, Victoria Shipyards urges me to find that Mr. Francis' allegations

and failure to produce any evidence wasted the Tribunal's resources, as the complaint should have been dismissed on a preliminary basis, is an abuse of the Tribunal's process and had a prejudicial impact on Victoria Shipyards.

[84] The reason no evidence about the racial slur allegations was adduced at the hearing is because counsel for Mr. Francis forgot to lead evidence. After the examination of Mr. Francis was complete, including cross-examination and re-examination, the hearing was adjourned for the lunch break. Upon re-convening the hearing, counsel for Mr. Francis made an application to re-open as there was further evidence about the other allegations that was not before the Tribunal. This application was vigorously and successfully opposed by Victoria Shipyards based on prejudice to it. In my view, this is not an appropriate circumstance in which to order costs.

[85] I accept that no evidence was led regarding the alleged racial slurs. Counsel for Mr. Francis applied to re-open Mr. Francis' case to lead the evidence, an application that may have been allowed but for Victoria Shipyards' objection. I do not find that Mr. Francis engaged in improper conduct.

[86] Victoria Shipyards' application for costs is denied.

VIII CONCLUSION

[87] The portion of Mr. Francis' complaint respecting the rag incident is justified. Pursuant to s. 37(2)(a), I order that Victoria Shipyards cease contravening the *Code* and refrain from committing the same or similar contravention.

[88] The remainder of Mr. Francis' complaint is dismissed pursuant to s. 37(1) of the *Code*.

[89] Victoria Shipyards' application for costs is denied.

Marlene Tyshynski, Tribunal Member