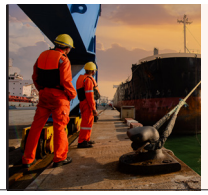
Lack of mitigation reduces B.C. worker's notice entitlement PG.3
Sending out resumés without cover letters and starting woodworking business wasn't reasonable effort at mitigating losses from termination



B.C. worker gets $500,000 for family status discrimination PG.4
Employer spent three years providing inadequate accommodation options to single father and then stopped trying when agreement fell through

Ask an Expert PG. 2
Harassment complaint followed by bad behaviour
with **Brian Johnston**

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Ontario employer's bad faith invalidates termination clause

Bad-faith conduct can be considered repudiation of contract

BY RISHI BANDHU

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LAST YEAR, the Supreme Court of Canada's significant decision in *Matthews v. Ocean Nutrition Canada Ltd.* made news because, in part, it reaffirmed employer obligations to act honestly and in good faith towards employees, particularly at the time of dismissal. It was anticipated that, following *Matthews*, courts would continue to address employer conduct that was dishonest, insensitive, misleading or unduly harsh, with potentially increasing damage awards.

The recent Ontario Superior Court of Justice decision in *Humphrey v. Menē Inc.* represents an expansion of the available arsenal to address employer bad faith. In addition to awarding aggravated and punitive damages totaling $75,000, the court invalidated a restrictive termination clause in response to the employer's bad faith, increasing the employer's liability for pay in lieu of notice from $3,500 to over $80,000.

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Exaggeration of role, qualifications doesn't increase notice entitlement

B.C. worker claimed 13 months' reasonable notice entitlement for 5 years of service, but his role wasn't as significant as he claimed

BY JEFFREY R. SMITH

A BRITISH Columbia worker is entitled to five months' reasonable notice, not the 13 months he claimed by exaggerating his role with his former employer, the B.C. Supreme Court has ruled.

Kartners Bathroom Accessories is a supplier of bathroom products to individuals, builders, and hotels. It's a small company that started in 2010. In October 2013, Jose Adriano, 54, applied for a part-time bookkeeper position, highlighting his experience as a finance and administration officer in his native Philippines as well as his commerce degree earned there. He also worked in bookkeeping and office administration after he moved to Canada in 2010.

Kartners hired Adriano as an independent contractor on Oct. 23, 2013, for an inside sales support role. Kartners saw him as an "integral part of the team," but as the company grew it hired a controller who had a Chartered Professional Accountant (CPA) designation and operational training in accounting — qualifications that Adriano didn't have.

Adriano identified his job duties as including that of controller managing the overall financial activities of the company, logistics manager, purchasing and

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Employer's conduct egregious enough to invalidate clause

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Jacquelyn Humphrey's employment history with Menē — a designer, manufacturer and retailer of jewelry — started in 2016 in the capacity of director of global communications. She progressed to vice president, then COO some time between May and July 2018. In December 2018, Humphrey signed an employment agreement that purported to limit her entitlements to the employment standards minimums.

In January 2019, on the heels of some performance issues, Humphrey asked for a salary increase. The CEO questioned her dedication to the company, removed her from her COO position and suspended her for two weeks. At the end of that period, the company would decide whether or not to terminate or demote her. Humphrey responded through her lawyer, prompting the company to terminate the relationship on a with-cause basis and allege serious performance failures, despite having never previously engaged in formal performance management with Humphrey.

Humphrey sued for wrongful dismissal. Menē abandoned its cause allegations, almost one year after asserting them, claiming that evidence of the employee's alleged misconduct had been destroyed.

The issue of repudiation

Wrongful dismissal cases should settle quickly after an employer abandons an allegation of just cause. In this case, though, Menē believed it had an enforceable employment contract, which limited Humphrey's entitlement to the statutory minimums. Her position was that the contract was invalid because it was not supported by valid consideration, and because Menē engaged in conduct that repudiated the relationship.

The court agreed that there was no consideration for the agreement, but its treatment of the repudiation issue represents the most noteworthy aspect of the decision.

Precluding an employer from relying on a contract of employment that limits an employee's entitlement to notice of termination because the employer engaged in acts of repudiation is an unusual and extraordinary remedy. In the 1995 B.C. decision, *Dixon v. British Columbia Transit*, the court held that the employer had repudiated the employment agreement by taking a deceitful position of cause for dismissal. The employer was precluded from relying on its termination clause.

The decision in *Dixon* seemed to be an outlier, until 2021.

Court invalidates termination provision

The court, finding *Dixon* persuasive, held that the employer's conduct was sufficiently egregious to invalidate the termination clause.

The court found that, prior to termination, Menē repudiated the relationship by removing Humphrey's responsibilities, suspending her, and threatening to demote her.

The following also constituted repudiation:

- The employer informed a vendor that Humphrey had been dismissed, prior to her receiving the suspension letter. It also sent a message to all employees advising that she was not a fit for the COO role.
- The employer set up Humphrey to fail by promoting her with limited experience and failing to provide any performance feedback.
- The employer subjected her to a toxic workplace. Relying on email and text communications that predated Humphrey's promotion, the court held that the CEO's behaviour towards Humphrey violated "a fundamental and implied term of any employment relationship… to treat the employee with civility, decency, respect and dignity."
- The employer exaggerated performance issues and alleged cause when it knew or ought to have known it had none. Further, it refused to abandon its position of cause for almost a year after initially asserting it.
- The employer delayed paying Humphrey her statutory entitlements, despite abandoning its position of cause.

The court grounded its findings of repudiation in the duty of good faith, which it named as an implied minimum expectation in the negotiation of all employment agreements.

"An employee's agreement to accept terms which significantly impact on the employee's common law rights must be taken to be made in the expectation that the employer will comply with these minimum implied expectations," said the court in *Humphrey*. "Where the employer significantly departs from such expectations, in my view, the employee should not be held to extremely disadvantageous provisions which he, she or they agreed to. This is not rewriting the contract but giving effect to what the parties much reasonably have intended."

The court noted that not every instance of wrongful conduct by an employer will constitute repudiation. An unsuccessful or withdrawn position of cause, asserted in good faith, does not invalidate a termination clause. A technical mistake or error by the employer would also not preclude it from relying on a termination provision. In the case of *Humphrey*, the court was satisfied that Menē did not commit "mere technical breaches made in good faith." Rather, its conduct went "to the heart of the employment relationship."

Humphrey was awarded 11 months' wages at her salary of $90,000, aggravated damages of $50,000 due to the mental distress she suffered and $25,000 in punitive damages. The court relied on Menē's litigation conduct, trumped-up allegations of cause, dishonesty, failures to comply with court orders and irrelevant references to Humphrey's personal life for the award of punitive damages.

Takeaways for employers

As the court noted, Menē could have chosen to part ways with Humphrey in a professional manner. A sensible approach may have been to provide her with a reasonable severance package in exchange for a release, using its termination clause as potential leverage. Its aggressive, no-holds-barred approach out of the gate cost it, at the very least, tens of thousands of dollars in legal fees and more than $150,000 in damages.

Employer counsel frequently say "bad facts make bad law" and the *Humphrey* case is a prime example. In addition to aggravated and punitive damages, employees can argue that an employer's bad faith represents repudiatory conduct sufficient to invalidate a bargained termination provision.

We are likely to see such claims with increasing frequency.

Significantly, in the Ontario decision of *Perretta v. Rand A Technology Corporation*, released shortly before *Humphrey*, the court invalidated the employer's restrictive termination provision because it demanded that the employee provide a release in exchange for contractually agreed-to severance compensation. Despite the absence of bad faith, the court found that the employer's "mistake" represented a sufficiently serious act of repudiation to invalidate the termination clause. *Perretta* suggests that invalidation of termination clauses for bad faith conduct may be the norm, not the exception, going forward.

Ultimately, the best antidote for liability for bad faith conduct is to not engage in it. Take the high road. Be empathetic. Understand the vulnerability of employees at termination and be vigilant not to exploit it. As one senior employment lawyer often said to clients, terminate like you're letting your best friend go. Employees will always trade respect and courtesy for the remote prospect of a windfall.

For more information, see:

- *Humphrey v. Menē Inc.*, 2021 ONSC 2539 (Ont. S.C.J.).
- *Matthews v. Ocean Nutrition Ltd.*, 2020 SCC 26 (S.C.C.).
- *Dixon v. British Columbia Transit*, [1995] B.C.J. No. 2465 (B.C. Arb.).
- *Perretta v. Rand A Technology Corporation*, 2021 ONSC 2111 (Ont. S.C.J.).

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