

CANADA / JUDGMENT

Deol v. Dreyer Davison LLP

2020 BCSC 771

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 771 Deol v. Dreyer Davison LLP

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Deol v. Dreyer Davison LLP,

2020 BCSC 771

Date: 20200522

Docket: S1911858

Registry: Vancouver

Between:

Neha Deol

Plaintiff

And

Dreyer Davison LLP and Rowan Davison

Defendants

Before: The Honourable Madam Justice Marzari

Reasons for Judgment

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Place and Date of Hearing:

Vancouver, B.C.

March 6, 2020

Place and Date of Judgment:

Vancouver, B.C.

May 22, 2020

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INTRODUCTION

- [1] The defendants Mr. Davison and his law firm, Dreyer Davison LLP, apply to strike Ms. Deol's claim in whole or in part on the basis that this Court does not have jurisdiction to consider Ms. Deol's constructive dismissal and other claims arising from allegations of sexual harassment in the workplace. Specifically, they argue that recovery for losses caused by sexual harassment falls exclusively within the jurisdiction of the Workers' Compensation Board ("WCB") for tortious or injurious conduct, or the British Columbia Human Rights Tribunal ("BCHRT") for discriminatory conduct.
- [2] In the alternative, they ask the Court to strike the entire claim against Mr. Davison personally and to strike out portions of the claim against Dreyer Davison LLP as disclosing no cause of action.
- [3] The test for striking a pleading under Rule 9-5(1)(a) of the Supreme Court Civil Rules is well settled: "[a] claim will only be struck if it is plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action": *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42 at para. 17. Furthermore, "[t]he approach must be generous and err on the side of permitting a novel but arguable claim to proceed to trial" (para. 21). In such an application, evidence is not admissible, provable facts set out in the notice of civil claim ("NOCC") are assumed to be true, and the pleadings are to be viewed in their best light: *Gichuru v. Smith*, 2010 BCCA 352 at para. 22; and *Canadian Bar Assn. v. British Columbia*, 2008 BCCA 92 at para. 37.
- [4] The defendants accept that, if proven, the allegations in Ms. Deol's particulars would amount to sexual harassment. They say, however, that this Court has no jurisdiction to consider a civil action for damages arising from allegations of sexual harassment, and the claim should therefore be struck.

THE ISSUES

- [5] The issues I must resolve are as follows:
- a. What is the nature of the plaintiff's case?
 - b. Is it plain and obvious that some or all of the plaintiff's case falls exclusively within the jurisdiction of either:
 - i. the BCHRT; or
 - ii. the WCB?
 - c. Is it plain and obvious that the NOCC discloses no cause of action against Mr. Davison personally?
 - d. Is it plain and obvious that the NOCC discloses no basis for a remedy in aggravated or punitive damages?

- e. What, if any, portions of the plaintiff's NOCC ought to be struck?

PROCEDURAL HISTORY

- [6] The plaintiff's NOCC was filed on October 21, 2019. The defendants requested particulars, and the plaintiff delivered particulars on or about November 20, 2019.
- [7] On December 13, 2019, the defendants filed a jurisdictional response. They have not filed a response to civil claim.
- [8] A 10-day jury trial scheduled for March 2021.
- [9] Counsel for the defendants has advised that the defendants have also applied to the Workers' Compensation Appeal Tribunal ("WCAT") for a determination pursuant to s. 257 of the Workers Compensation Act, R.S.B.C. 1996, c. 492.[1] That application is pending.
- [10] This matter was stayed in this Court on January 16, 2020 on the application of the defendants, pending the determination of the present application.

ASSUMED FACTS & PLEADINGS

- [11] For the purposes of this application, I must assume the truth of the facts set out in the plaintiff's pleadings.
- [12] The plaintiff, Ms. Deol, is a lawyer who was previously employed at Dreyer Davison LLP, a law firm located in Langley, BC. Mr. Davison is one of the firm's two partners.
- [13] Ms. Deol pleads that throughout her employment at Dreyer Davison LLP, she was subjected to inappropriate conduct by Mr. Davison, including sexually inappropriate verbal communications and physical contact.
- [14] In her particulars of the law firm's repudiation of the employment contract, Ms. Deol describes a number of interactions involving Mr. Davison in which she says his alleged behaviour was inappropriate, unprofessional, and disrespectful. They include Mr. Davison regularly giving unwanted kisses to female staff (including the plaintiff), propositioning the plaintiff to come to his hotel room at a legal conference, and opening her blazer and commenting on her body. The defendants concede that these allegations, if true, would constitute sexual harassment.
- [15] There are also particulars of the plaintiff's attempts to address this conduct and the inadequate and compounding responses of Mr. Davison and the firm's other partner, Ms. Dreyer. She pleads that her concerns were dismissed without any meaningful remedial steps. Specifically, she pleads that Ms. Dreyer "downplayed the seriousness of the misconduct" and advised her to "tough it out."

- [16] Ms. Deol claims that Mr. Davison's behaviour created "an objectively intolerable working environment". She says this was exacerbated by the law firm's inadequate response when dealing with Mr. Davison's misconduct.
- [17] Ms. Deol pleads that she was entitled to treat her employment contract with Dreyer Davison LLP as repudiated, and she did. The plaintiff claims that she was constructively dismissed as a result of this repudiation.
- [18] She also claims that the manner of the dismissal has had "grave personal effects on her," which were "foreseeable" at or around the time of the dismissal. She says she "has suffered and will continue to suffer" as result of "the foregoing".
- [19] Ms. Deol also asserts that Mr. Davison's misconduct, and Ms. Dreyer's response to it, were callous, malicious, reprehensible, and high-handed, amount to a marked departure from the standards to which the courts ought to hold Canadian employers, and deserve the rebuke of the court.
- [20] Ms. Deol also pleads a number of general statements at paras. 14-19 of her claim regarding the prevalence of sexual assault and harassment in Canadian workplaces, the lack of adjudication of these claims, that the common law allows defendants to ignore incidents of sexual harassment, and the social climate in Canada being such that it is time to revisit these issues "anew".
- [21] Ms. Deol pleads "damages for breach of contract (constructive dismissal)" as well as remedies in aggravated and punitive damages.
- [22] Ms. Deol also pleads at para. 22(a) that she is seeking "further meaningful development of the common law approach to harassment and assault in the workplace." In written argument, Ms. Deol says that she seeks "to change the law with respect to harassment and assault issues in the workplace across Canada," and that her case is based on the premise that "Canadian law needs to fundamentally alter how it treats workplace sexual harassment and violence".
- [23] In oral argument, counsel for Ms. Deol clarified that the change in the law Ms. Deol is seeking is not a new cause of action. Rather, the development she seeks is an increase to the amount of damages generally awarded for wrongful dismissal in cases involving sexual harassment, including substantial awards in aggravated and punitive damages.

ANALYSIS

a. The Nature of the Plaintiff's Case

- [24] The defendants say that Ms. Deol seeks damages for workplace sexual harassment and that no such cause of action is available in this Court. They say that, although Ms. Deol argues that her claim nominally falls within the jurisdiction of this Court as a constructive dismissal claim, the true nature of her claim, including her further particularization of that claim, is for damages and compensation directly for sexual harassment.
- [25] Ms. Deol agrees that she is seeking damages related to sexual harassment, but says that this is actionable in her case because the sexual harassment she experienced amounted to the repudiation of her employment contract, giving rise to a claim in constructive dismissal. In pleading constructive dismissal, Ms. Deol argues she is pleading rather than obfuscating her true cause of action. She says that the damages she seeks, including both aggravated and punitive damages, properly flow from her claim in constructive dismissal.
- [26] To understand the viability and availability of the plaintiff's claim, it is helpful to review the law of constructive dismissal.
- [27] In *Potter v. New Brunswick Legal Aid Services Commission*, 2015 SCC 10 [Potter], the Supreme Court of Canada set out the guiding principles and test for determining whether there has been a constructive dismissal. There are two approaches: In the first approach, the court identifies an express or implied term of the contract that has been breached and then determines whether the breach was sufficiently serious to constitute a constructive dismissal: Potter at para. 32
- [28] With respect to the second approach, the Court said the following:
- [33] However, an employer's conduct will also constitute constructive dismissal if it more generally shows that the employer intended not to be bound by the contract. In applying *Farber*, courts have held that an employee can be found to have been constructively dismissed without identifying a specific term that was breached if the employer's treatment of the employee made continued employment intolerable. This approach is necessarily retrospective, as it requires consideration of the cumulative effect of past acts by the employer and the determination of whether those acts evinced an intention no longer to be bound by the contract.
- [Emphasis added.]
- [29] The employer's intent, and specifically whether an employer's treatment of an employee made continued employment intolerable, is assessed objectively. The trier of fact must determine whether the employer's conduct, when viewed in light of all the circumstances, would lead a reasonable person to conclude that the employer no longer intended to be bound by the terms of the contract. A course of conduct that does evince such an intention amounts cumulatively to an actual breach: Potter at para. 42.

- [30] In *Stamos v. Annuity Research & Marketing Service Ltd.* (2002), 18 C.C.E.L. (3d) 356 (Ont. S.C.J.), the court held at para. 62 that an employer is not only "obliged not to treat an employee in a manner that renders competent work performance impossible or continued employment intolerable" but that an employer also "has a broader responsibility to ensure that the work environment does not otherwise become so hostile, embarrassing, or forbidding as to have the same effect."
- [31] There is also ample authority supporting the proposition that a fundamental implied term of any employment relationship is that the employer will treat the employee with civility, decency, respect and dignity: see, for example, *Lloyd v. Imperial Parking Ltd.*, [1997] 3 W.W.R. 697 (Alta Q.B.) at para. 41; *Morgan v. Chukal Enterprises Ltd.*, 2000 BCSC 1163 at para. 10; *Danielisz v. Hercules Forwarding Inc.*, 2012 BCSC 1155 at paras. 75-76; and, see also Janice Rubin & James Heeny, "A Remedy for the Abused Employee: The Evolution of the Law of Constructive Dismissal" in *The Law Society of Upper Canada, Special Lectures 2007: Employment Law*, e-book (Toronto: Irwin Law, 2007) 478 at 480.
- [32] The defendants correctly point out that, in general, statutory obligations are not to be treated as implied terms of a contract: *Macaraeg v. E Care Contact Centers Ltd.*, 2008 BCCA 182 [Macaraeg]. Therefore, proving a breach of a statutory obligation does not independently amount to a breach of contract.
- [33] However, this does not mean that a breach of an express or implied term of a contract cannot also amount to a breach of a statutory obligation: *Lewis v. WestJet Airlines Ltd.*, 2019 BCCA 63 at para. 47 [Lewis].
- [34] I find Ms. Deol's pleadings somewhat scattered and ambiguous. While they expressly plead a repudiation of the employment contract, they plead a number of material facts and a remedy that are not clearly related to that claim. Ms. Deol's articulation of particulars also frequently sound more in a claim in sexual harassment per se, rather than in the language generally used to describe a repudiation of an employment contract.
- [35] However, despite these deficiencies, the NOCC also expressly pleads the essential elements of a claim in constructive dismissal under the second branch of Potter, including that the conduct of the two partners of the law firm created "an objectively intolerable working environment" that amounted to a repudiation of Ms. Deol's employment contract. The test for striking pleadings does not require perfect clarity, and my inquiry is directed to whether the pleadings disclose material facts that are capable of supporting a claim known at common law: *Odhavji Estate v. Woodhouse*, 2003 SCC 69 at paras. 14-15.
- [36] Applying this test, I find that Ms. Deol's NOCC sufficiently sets out an action for constructive dismissal. Pared down to its essentials, Ms. Deol claims that her employer's treatment of her made her continued employment intolerable. Many of the particulars are described as instances of sexual harassment and a failure to address it. Whether those particularized incidents constitute harassment, sexual harassment, or something else altogether, I consider that they are relevant to the consideration of whether Ms. Deol's employer is

responsible for creating or perpetuating an intolerable working environment that amounted to a repudiation of Ms. Deol's employment contract.

- [37] Generally, damages for wrongful dismissal are awarded in lieu of notice: *Potter* at para. 31. Therefore, Ms. Deol's claim for "damages for breach of contract" are properly pled in relation to this articulated claim. In addition, while punitive damages are subject to special considerations in the employment law context, they are an established head of damage in wrongful dismissal claims, and so this pleading does not detract from the characterization of Ms. Deol's claim as one in constructive dismissal.
- [38] The relief sought for "aggravated damages" is more ambiguous. There is some authority that this is not the ideal term for the remedy available in a wrongful dismissal claim. In *Fidler v. Sun Life Assurance Co. of Canada*, 2006 SCC 30, the Supreme Court of Canada stated at para. 53 that with respect to the category of damages arising from a contractual breach "the term 'aggravated damages' becomes unnecessary and, indeed, a source of possible confusion." In *Honda Canada Inc. v. Keays*, 2008 SCC 39 [Honda], the majority stated that "there is no reason to retain the distinction between 'true aggravated damages' resulting from a separate cause of action and moral damages resulting from conduct in the manner of termination." Even before these cases, in *Warrington v. Great-West Life Assurance Co.* (1996), 139 D.L.R. (4th) 18 at paras. 37-39 (B.C.C.A.), Justice Southin was "troubled" by the use of the term "aggravated damages" as a term "which can lead, if it is not fully understood, to confusion." As a result, it has become common in some courts to refer to these additional compensatory damages for breach of contract as "mental distress damages", "moral damages" or, less descriptively, "Wallace" or "Honda" damages, rather than "aggravated" damages.
- [39] Nevertheless, the use of the term "aggravated damages" for compensatory damages beyond damages in lieu of notice, arising from the manner of dismissal for breach of contract, is still a common term in British Columbia: see, for example, *Lau v. Royal Bank of Canada*, 2017 BCCA 253 [Lau]; *Ram v. The Michael Lacombe Group Inc.*, 2017 BCSC 212 [Ram]; and *Vernon v. British Columbia (Liquor Distribution Branch)*, 2012 BCSC 133 [Vernon]. I am satisfied that the use of this term in Ms. Deol's pleadings is sufficiently related to her claim in constructive dismissal and does not signal a claim in some other novel cause of action. For consistency with the pleadings, I will also continue to use the term "aggravated damages" for this type of compensatory damages in these reasons.
- [40] I will address whether Ms. Deol has adequately pled a foundation for either punitive or aggravated damages in the constructive dismissal context below.
- b. The Exclusive Jurisdiction of the WCB and the BCHRT

- [41] The defendants say that even if Ms. Deol's claim is sufficiently or properly characterized as a claim in constructive dismissal, her claim still falls within the exclusive jurisdiction of the WCB and/or the BCHRT. The defendants say that this court's jurisdiction with respect to dealing with conduct that amounts to sexual harassment is ousted by the operation of the Workers Compensation Act and the Human Rights Code, R.S.B.C. 1996, c. 210.

The Human Rights Tribunal

- [42] It is well established that sexual harassment (whether in the workplace or elsewhere) is a form of gender-based discrimination: *Janzen v. Platy Enterprises Ltd.*, [1989] 1 S.C.R. 1252. It is also well established that in BC, the BCHRT has exclusive jurisdiction to consider claims in compensation and other remedies for discrimination, including for sexual harassment.
- [43] The defendants rely on a long line of cases starting with *Seneca College v. Bhadauria*, [1981] 2 S.C.R. 181 [Bhadauria]. In *Bhadauria*, the Supreme Court of Canada held that a claim for damages arising from discriminatory acts is not an independent cause of action. Chief Justice Laskin, writing for the Court, goes further, saying at page 195, "I would hold that not only does the [Human Rights] Code foreclose any civil action based directly upon a breach thereof but it also excludes any common law action based on an invocation of the public policy expressed in the Code."
- [44] The defendants argue that the Supreme Court of Canada applied *Bhadauria* in *Honda* and set aside the lower court's award of general and punitive damages based on an alleged breach of the Ontario Human Rights Code, R.S.O. 1990, c. H.19 at para. 63:
- [63] *Honda* argues that discrimination is precluded as an independent cause of action under *Seneca College of Applied Arts and Technology v. Bhadauria*, [1981] 2 S.C.R. 181. In that case, this Court clearly articulated that a plaintiff is precluded from pursuing a common law remedy when human rights legislation contains a comprehensive enforcement scheme for violations of its substantive terms. The reasoning behind this conclusion is that the purpose of the Ontario Human Rights Code is to remedy the effects of discrimination; if breaches to the Code were actionable in common law courts, it would encourage litigants to use the Code for a purpose the legislature did not intend -- namely, to punish employers who discriminate against their employees. Thus, a person who alleges a breach of the provisions of the Code must seek a remedy within the statutory scheme set out in the Code itself.
- [45] The defendants argue that Ms. Deol is attempting to do what Justice Bastarache for the majority in *Honda* says cannot be done: pursue a claim for damages for sexual harassment where a remedy for this conduct is already available under BC's human rights legislation. They say this is made particularly apparent by Ms. Deol's pursuit of punitive damages in this case.

- [46] The defendants point to recent cases in this Court where similar claims have been struck for this reason, including: *Hall v. Trueblue, DBA Labour Ready*, 2017 BCSC 2004 [Hall]; and *Schulz v. Beacon Roofing Supply Canada Company*, 2016 BCSC 1475 [Schulz].
- [47] These cases are of some assistance to the defendant, but of less assistance than they suggest.
- [48] In *Hall*, Justice Donegan struck the NOCC filed by Ms. Hall (who did not appear on the application) pleading that she had been "wrongfully terminated due to disability and no notice provided". That pleading was struck on five distinct grounds, including on the basis that the disability discrimination claim fell within the jurisdiction of the BCHRT, but also on the basis of inadequacy of pleadings, abuse of process, double recovery, and on its merits.
- [49] In *Schulz*, the plaintiff sought damages for alleged sexual harassment by a co-worker in her place of employment. She sought these damages using the language of both tort and contract, on the basis of a breach of her employer's "duty of care" and/or an implied term of her employment contract requiring the employer to provide a workplace "free of harassment and discrimination."
- [50] Justice Jenkins found that any damages for an alleged failure to abide by the terms of the BC Human Rights Code must be pursued at the BCHRT and was not separately actionable in this court. At para. 23 the Jenkins J. states:

Otherwise, while such conduct could serve as "repudiation of the contract of employment", arguably constituting constructive dismissal, such repudiation must be accepted and would only go ... to whether there had been a wrongful dismissal neither are pleaded in this case.

- [51] Also of note was that the defendant employer in *Schultz* conceded that the plaintiff had been terminated, that the termination was without cause, and that damages in lieu of notice were owed to the plaintiff. There was no live issue as to whether there was a constructive dismissal or an intolerable employment condition leading to a repudiation of the contract. Justice Jenkins found that the only live issue with respect to the prospective employment claim was the term of notice.
- [52] More importantly, *Honda* is not as helpful as the defendants suggest.
- [53] In that case, Mr. Keays was terminated from his employment for refusing to have his inability to attend work due to disability independently verified by a doctor chosen by the employer. He sued in wrongful dismissal.
- [54] The trial judge concluded that his termination was without cause, entitling him to 15 months notice, as well as an additional nine months in "conduct" damages, and another \$500,000 in punitive damages on the basis that the employer, in terminating him, had committed acts of discrimination, harassment, and misconduct. Notably, the trial judge refused to award damages for the acts of discrimination themselves, finding that the court did not have jurisdiction to award damages for human rights breaches, but did find that contravention of the Ontario Human Rights Code constituted an independent actionable wrong for the

purposes of an award in punitive damages.

- [55] The Ontario Court of Appeal upheld the plaintiff's entitlement to punitive damages (including the trial judge's consideration of discriminatory conduct as a basis for such damages) but reduced those damages on the basis of the principle of proportionality. The Ontario Court of Appeal expressly upheld the availability of punitive damages on the basis that a breach of the Ontario Human Rights Code could also constitute an independent actionable wrong for these purposes, relying on *McKinley v. BC Tel*, 2001 SCC 38 [McKinley] (see para. 14 of the Supreme Court of Canada decision in *Honda*).
- [56] The majority of the Supreme Court upheld the finding of wrongful dismissal (which was not contested in that Court) and maintained the general award of 15 months' notice. However, the majority overturned the awards of increased notice (or "conduct" damages) and punitive damages, rejecting the factual findings that there had been a breach of good faith or discrimination in Mr. Keays' dismissal.
- [57] I do not agree with the defendants that in doing so, the majority determined that discriminatory conduct could never be relevant to a remedy other than those provided under human rights legislation.
- [58] The portions of para. 63 set out above that the defendants rely on for this purpose is prefaced by the statement "*Honda* argues that discrimination is precluded as an independent cause of action under *Seneca College of Applied Arts and Technology v. Bhadauria*" [emphasis added]. While the majority goes on to question whether discrimination may properly be considered an "actionable wrong" at para. 64, it does not do so in relation to whether a cause of action in constructive dismissal may be pursued in such circumstances, but in the context of the availability of punitive damages.
- [59] Furthermore, at para. 62, just before the paragraphs relied upon by the defendants, the majority states:

In the case at hand, the trial judge and the Court of Appeal concluded that *Honda's* "discriminatory conduct" amounted to an independent actionable wrong for the purposes of allocating punitive damages. This being said, there is no need to discuss the concept of "actionable wrong" here; this was done in [*Whiten v. Pilot Insurance Co.*, 2002 SCC 18]. What matters here is that there was no basis for the judge's decision on the facts.

- [60] At para. 24, the majority states that "it is not necessary to reconsider whether breaches of the Ontario Human Rights Code are independent actionable wrongs for the purposes of punitive damages," and again at para. 67 the majority rejects the need to reconsider *Bhadauria* in that case because the facts do not engage the issue of discrimination.

- [61] In my view, read as a whole, the majority's decision rests on its overturning of the trial judge's factual findings that there was any discrimination at all. It is not founded on the proposition that discriminatory conduct can never be relevant to a cause of action in wrongful dismissal.
- [62] As such, I find that the discussion of Bhadauria at para. 63, and the exclusive jurisdiction of human rights tribunals to consider conduct that potentially engages human rights legislation, does not form part of the ratio of Honda.
- [63] The view that the comments of the Court at paras. 63 and 64 are obiter has also been adopted by other commentators: David Harris, *Wrongful Dismissal* (Toronto: Thomson Reuters, 1997), (loose-leaf updated 2020) at 4-256.12 to 4-256.14, 4-256.16, and 7-83 [Wrongful Dismissal]. In *Wrongful Dismissal*, the author opines that if the majority had intended to rule that Bhadauria absolutely barred damages in wrongful dismissal cases arising from discriminatory acts, then there would have been no need for the Court to overturn the trial judge's factual findings of discrimination or to discuss the egregiousness of the conduct; if Laskin C.J.'s comments in Bhadauria were determinative of the question, the whole discussion would have been unnecessary.
- [64] For the purposes of this application to strike, it is enough that our Court of Appeal in *Lewis* not only treated this question as open, but found that Bhadauria has not ousted this court's jurisdiction to consider actions in contract where the factual allegations might also ground a complaint under human rights legislation.
- [65] In *Lewis*, Ms. Lewis brought a proposed class action against her employer, WestJet, for breaching its employment contracts. Specifically, she alleged WestJet failed to fulfill an "Anti-Harassment Promise" contained in her employment contract, which provided that WestJet would create and maintain a workplace free from harassment and would properly investigate and respond to complaints of harassment. She alleged that WestJet had profited from this breach through, among other things, savings in not fulfilling the anti-harassment promise, and the favouring of a pilot accused of sexual assault over the flight attendants he assaulted. She sought restitution in the form of disgorgement of the financial benefit to WestJet of the breach, general damages, and punitive damages. WestJet brought an application to strike Ms. Lewis's pleadings on the basis that the claim was within the sole jurisdiction of the Canadian Human Rights Tribunal and/or the appropriate provincial workers' compensation board.
- [66] In this Court (*Lewis v. WestJet Airlines Ltd.*, 2017 BCSC 2327), Justice Humphries struck portions of the claim relating to damages that she found could fall within the jurisdiction of the BCHRT to award compensation for discrimination or within the jurisdiction of the WCB to award compensation for personal injury. At para. 50, she said:

Insofar as the NOCC purports to be a claim for damages for personal injury to an employee, it is misconceived and should be brought elsewhere, under the Workers Compensation Act. Insofar as it is a claim for damages for discrimination, it is also misconceived and should be brought under

the Human Rights Act. These potential claims arise, as noted, from subparas. 1(e) and (f) of the prayer for relief, which seeks general damages, or nominal damages. Put together with the paragraphs of the NOCC alleging specific incidents of assault, discrimination, and loss (paras. 35, 37 and 52), this has the potential to widen the action considerably beyond breach of contract. This should be clarified by appropriate amendments to the NOCC.

[67] However, she did not strike the claim as a whole. She determined that it was properly pled in breach of contract in relation to non-compliance with the Anti-Harassment Promise, stating at para. 53:

If WestJet were able to show that this claim was based in an employment statute, or was a claim for discrimination or harassment, this motion would have a greater chance of success, based on Seneca and Macaraeg. The plaintiffs there were attempting to enforce a statutory right through a civil action. The plaintiff in this case is not. Her claim is for breach of contract.

[68] The Court of Appeal upheld this decision, agreeing that while the plaintiff's claim related to allegations of sexual harassment, the claim as pled was for breach of contract and within the jurisdiction of the courts. Leave to appeal to the Supreme Court of Canada was denied: WestJet Airlines Ltd. v. Lewis, [2019] S.C.C.A. No. 118.

[69] WestJet contended (as do the defendants here) that the true nature of the dispute depended on its essential character and not its legal characterization. They argued that the pleading of breach of contract was merely a drafting technique that disguised the reality that the substance of the case was about alleged discrimination, sexual and other harassment, and WestJet's alleged failure as an employer to provide a workplace that complied with its statutory obligations.

[70] The Court of Appeal rejected this argument, noting that the common law courts are very familiar with the principle that the same facts may be the source of different legal rights, or legal rights sounding in different causes of action (para. 21).

[71] The Court also acknowledged that "as a general rule, if a right arises solely from statute, a claimant will have to look to the mechanisms provided for, or contemplated by, the statute to vindicate those rights": para. 22 citing Macaraeg at para. 73 [emphasis in original]. However, it found that claims in contract, including claims in contract related to sexual harassment (including constructive dismissal), are not solely statutory claims but also claims actionable at common law:

[26] a contract is a recognized source of legal rights grounding remedies for breach in the courts. It is no answer to say, as suggested by WestJet, that the common law does not recognize the tort of discrimination. This is so because the plaintiff alleges a breach of contract not a tort. Here, there is no dispute that the relationship between WestJet and its employees is governed by contracts of employment that incorporate terms and conditions relating to harassment and discrimination. Indeed, WestJet acknowledges that it relies on these contracts to enforce discipline, sanction employees, and, where necessary, justify dismissal

for cause. It is not merely a fictitious argument to contend that, although the alleged facts involve discrimination and harassment, the wrong alleged is a breach of contractual rights not breaches of statutory obligation. The underlying subject matter may be the same, but gives rise to different legal wrongs and arguably different relief.

- [27] In this respect, the plaintiff's case does not appear to me to be different from a case in which one party agrees to convey property that meets legislated building code standards, but fails to do so. ...
- [28] Perhaps more relevant are cases of constructive dismissal. WestJet accepts that the courts have jurisdiction to address alleged breaches of contract amounting to constructive dismissal even though the facts pertinent to that issue engage discrimination or harassment within the meaning of human rights legislation. It says that these cases are simply an exception to the general propositions it advances. I do not agree. In my opinion, a constructive dismissal case is a particular type of a breach of contract claim. I see no distinction in principle between this case and a constructive dismissal case over which the courts have jurisdiction.
- [29] This view of the matter finds support in decided cases. In *Alpaerts v. Obront* (1993), 46 C.C.E.L. 218 (Ont. C.J.), Spence J. refused to strike a statement of claim that alleged constructive dismissal arising from sexual harassment and resulted in the plaintiff's inability to continue with employment. The defendants contended that the claim properly should be brought under Ontario's Human Rights Code, R.S.O. 1990, c. H.19. The judge distinguished *Seneca College of Applied Arts & Technology v. Bhadauria*, [1981] 2 S.C.R. 181 [Seneca], as follows:
- [5] With respect to the Ontario Human Rights Code as a barrier to the plaintiff proceeding in Court, the defendants rely on the decision in *Seneca College of Applied Arts & Technology v. Bhadauria*, [1981] 2 S.C.R. 181, 22 C.P.C. 130 and on certain other cases. In *Seneca*, the Court determined that "the Code forecloses any civil action based directly upon a breach thereof" and "any common law action based on an invocation of the public policy expressed in the Code". In *Seneca*, the plaintiff had no cause of action apart from the Code, but, in the instant case, the plaintiff alleges facts which disclose a cause of action for constructive dismissal, which distinguishes *Seneca*.
- [30] I agree with this reasoning. The plaintiff's civil action, in this case, is not based directly on the breach of statutory rights like *Seneca* or *Macaraeg*; the plaintiff does not argue that WestJet's failure to fulfil the Anti-Harassment promise is, in and of itself, a discriminatory act.
- [31] A similar result to *Alpaerts* was reached in *White v. Bay-Shep Restaurant & Tavern Ltd.* (1995), 16 C.C.E.L. (2d) 57 (Ont. S.C.J.), in which Pitt J. concluded that it was incidental to a wrongful dismissal claim that the wrongful acts on which it depended would also breach human rights legislation: at para. 4.

[Emphasis added.]

[72] The defendants argue that Lewis is distinguishable because:

- a) WestJet conceded "that the courts have jurisdiction to address alleged breaches of contract amounting to constructive dismissal even though the facts pertinent to that issue engage discrimination or harassment within the meaning of human rights legislation." The defendants here make no such concession, and say that concession tainted the remainder of the decision;
- b) WestJet expressly incorporated their statutory obligations into the contract, which gave rise to the contractual claim. They say that in the present action, there was no such express contractual provision and therefore Ms. Deol's claim for damages for constructive dismissal is premised on the defendant's alleged breaches of the Human Rights Code and, therefore, Lewis is not applicable; and
- c) The Court of Appeal in Lewis improperly departed from the Supreme Court of Canada's reasoning in Honda, and so the Lewis case should not be followed in this Court.

[73] With respect to the first basis upon which the defendants seek to distinguish Lewis, I consider that the Court of Appeal indicated more than just an acceptance of this concession; the court endorsed this concession. While the comments of the court at para. 28 with respect to constructive dismissal are obiter dicta, I find them to be persuasive.

[74] In addition to the cases cited in Lewis, cases that have permitted actions for constructive dismissal or wrongful dismissal to proceed, even where the employer's conduct was alleged to also be discriminatory, include: *Biron v. Kashuba* (1996), 17 C.C.E.L. (2d) 279 (B.C.S.C.); *Rowley v. Can-West Agencies Ltd.*, 2018 SKQB 224; and *L'Attiboudeaire v. Royal Bank of Canada* (1996), 131 D.L.R. (4th) 445 (Ont. C.A.).[2]

[75] I also reject the distinction the defendants seek to draw between the express contractual provision not to discriminate in Lewis and the absence of a similar term in this case. Although the court takes note that the contractual provision in that case was express, the reasoning of the court does not turn on the existence of an express term with respect to the potential for a claim in contract for constructive dismissal. Paragraphs 28-31 of the decision support the proposition that discriminatory conduct under human rights legislation may also properly be the basis of a constructive dismissal claim even in the absence of an express contractual term.

[76] In any event, the availability of a contractual remedy in this case should not turn on whether that term is express or implied. As the Supreme Court of Canada explained in *Potter*, under the second branch, a claim in constructive dismissal can succeed without identifying a breach of a specific term of the contract.

- [77] The defendants argue that if Lewis is authority permitting the plaintiff to advance her claim, then I should not follow it in light of the Supreme Court of Canada's decisions in Bhadauria and Honda. The defendants say that in Lewis, the chambers judge and the Court of Appeal did not address those decisions, and they were thus wrongly decided.
- [78] It is not correct to say that the courts in Lewis did not consider Bhadauria. More importantly, it is not correct to say that they did not grapple with the fundamental question that the defendants say is determinative: whether the Supreme Court of Canada's decision in Bhadauria (alone or as referenced in Honda) ousts the jurisdiction of this court to consider causes of action that arise from allegedly discriminatory conduct that may also give rise to a common law remedy in contract.
- [79] I find that the Lewis decision both considers and rejects that proposition, finding at para. 43 that "the cases relied on by WestJet do not demonstrate that the combined effect of the CLC [Canada Labour Code, R.S.C. 1985, c. L-2] and CHRA [Canadian Human Rights Act, R.S.C. 1985, c. H-6] is to oust the jurisdiction of the court in relation to an otherwise recognized cause of action (breach of contract) either expressly or by necessary implication."
- [80] Overall, I find that Honda and Bhadauria do not go so far as to make a recognized claim at common law outside of the jurisdiction of the superior courts solely on the basis that there is an allegation of discriminatory conduct. I would not decline to follow Lewis because of the reasoning in either Honda or Bhadauria. To the contrary, I consider the Lewis decision to be consistent with those cases.
- [81] I will revisit Honda when I consider the availability of aggravated and punitive damages in a wrongful dismissal action below. For the purposes of the jurisdictional question, I find that none of the defendants' cases preclude the availability of a remedy in constructive dismissal under the second branch of Potter where the conduct complained of is also alleged to amount to sexual harassment.
- [82] I am satisfied that the BCHRT does not have exclusive jurisdiction to consider this claim. To paraphrase the Court of Appeal in Lewis at paras. 18 and 19, it is possible that what is pled to be a breach of contract is conduct that, if true, is also discriminatory conduct that may be subject to alternative remedies before the BCHRT. However, that is not sufficient to establish that this Court does not have jurisdiction to hear Ms. Deol's claim in constructive dismissal.

Workers' Compensation Board

- [83] The defendants also say that to the extent that the plaintiff's claim alleges injuries arising from workplace harassment and sexual harassment, she must seek compensation through the workers' compensation scheme in BC and is thus barred from advancing her claim in this Court.

- [84] The Workers Compensation Act sets out a comprehensive scheme through which workers must claim compensation for physical or mental injuries and illnesses that arise out of and in the course of employment.
- [85] Section 5.1(1) of the Workers Compensation Act [3] provides that a worker is entitled to compensation for a "mental disorder" if it is predominantly caused by a significant work-related stressor or series of stressors, including bullying or harassment, arising out of and in the course of the worker's employment. To be compensable, "mental disorders" must take the form of a condition described in the Diagnostic and Statistical Manual of Mental Disorders ("DSM"), and the diagnosis must have been provided by a psychiatrist or psychologist. WCAT decisions have found that compensation is payable in relation to incidents of sexual harassment where the sexual harassment was the predominant cause of a diagnosed mental disorder: see, for example, A1800800 (Re), 2018 CanLII 134647 (BC WCAT); A1700512 (Re), 2018 CanLII 75018 (BC WCAT); and WCAT-2015-00524 (Re), 2015 CanLII 42637 (BC WCAT). Compensation is not payable under the Workers Compensation Act, however, where the mental disorder is caused by a decision to terminate the worker's employment.
- [86] Not only is such compensation payable through the workers' compensation scheme in BC, in some cases compensation is only payable through that scheme. Section 10(1) of the Workers Compensation Act prohibits a worker from suing their employer for any personal injury arising out of and in the course of employment. Section 96(1) of the Workers Compensation Act grants the WCB exclusive jurisdiction to hear and determine such matters, including the determination of whether the injury arose out of and in the course of employment.[4]
- [87] The defendants correctly argue that this Court is not the proper venue for Ms. Deol to bring claims directed toward recovery for injuries arising out of and in the course of her employment. The defendants also correctly identify the possibility that the sexual harassment alleged by Ms. Deol that occurred during the course of her employment could also potentially be the basis for a claim for a mental disorder compensable under the Workers Compensation Act.
- [88] However, the defendants go even further and argue that claims for notice in constructive dismissal cases also fall within the WCB's exclusive jurisdiction. In support of this proposition, they cite a decision of the Ontario Workplace Safety and Insurance Appeals Tribunal that found a claim in constructive dismissal based on workplace harassment to fall within its jurisdiction: Decision No. 1227/19 2019 ONWSIAT 2324. However, in BC, it appears that WCAT has taken a different approach to this question based on BC's legislation.[5]
- [89] I agree with the defendants that insofar as the plaintiff seeks to claim damages for personal injury, comparable to a claim in tort, arising out of and in the course of her employment, these claims would not be within the court's jurisdiction at first instance and must either be struck or referred to WCAT for determination on its jurisdiction.

- [90] However, Ms. Deol argues that she is not seeking compensation for personal injuries in this Court; she is only seeking damages for breach of her employment contract. In argument, she takes offence to the defendant's suggestion that she is seeking compensation for a "mental disorder", though my understanding is that she may still be seeking damages for "mental distress" as that term is used in the wrongful dismissal context.
- [91] In *Lewis*, Justice Humphries struck portions of Ms. Lewis' notice of civil claim that sounded in personal injury despite Ms. Lewis' similar protestations that her claim was in contract and not for personal injury.
- [92] I have reviewed Ms. Deol's pleadings closely to consider whether there are similar pleadings that sound solely in personal injury.
- [93] General damages for breach of an employment contract stand in place of reasonable notice and are distinct from damages for personal injury. They fall within this Court's jurisdiction. They are not within the jurisdiction of the WCB. Therefore, the general damages claimed by Ms. Deol, and the basis for those damages, are not within the jurisdiction of the WCB.
- [94] Aggravated damages are more difficult in that they generally arise from proof of mental distress, which, at least in some cases will be alleged and proven as a form of mental injury as defined in *Saadati v. Moorhead*, 2017 SCC 28 (see also *Lau*).
- [95] The defendants argue that paragraphs 20 and 21 of Ms. Deol's NOCC fall into this category. At paragraph 20, Ms. Deol alleges that the manner of her dismissal has caused her "grave personal effects" which were "foreseeable at or around the time of the dismissal". At paragraph 21, she alleges that she has "suffered, and will continue to suffer, as a result of the foregoing."
- [96] The defendants argue that in a claim for constructive dismissal, where there is no moment of dismissal, cannot give rise to compensatory damages from the manner of dismissal. I will address that argument further below with respect to the availability of aggravated damages on the facts pleaded.
- [97] For now, it is sufficient to state that this pleading is consistent with a cause of action in contract rather than a duty of care in tort for personal injury arising out of and in the course of employment over which the WCB would more clearly have jurisdiction.
- [98] While it is possible that to the extent that Ms. Deol is claiming damages for mental distress, that claim may amount to a personal injury or mental disorder for the purposes of a certification by WCAT under s. 257 of the Workers Compensation Act,[6] that will be very much dependent on the nature of her loss. The question of certification is still before the Workers Compensation Appeal Tribunal and no decision has yet been made.

- [99] Although aggravated damages are generally awarded for mental distress, Canadian courts have not limited these damage awards only to the types of mental injuries and disorders that fall within the WCB's jurisdiction, and it is at least arguable that para. 20 supports such a claim.
- [100] In *Honda* (at para. 59), the majority provided a list of "examples of conduct" that might result in a recoverable loss as including: "attacking the employee's reputation by declarations made at the time of dismissal, misrepresentation regarding the reason for the decision, or dismissal meant to deprive the employee of a pension benefit or other right, permanent status for instance (see also the examples in *Wallace*, at paras. 99-100)." The losses that these damages might compensate were consolidated into a single head of damages. This head of damages includes compensation for mental distress that may amount to a personal injury, but it is not expressly so limited.
- [101] Since *Honda*, superior courts in Canada have considered a range of mental distress that includes injury to reputation and dignity, not just diagnosable mental injuries: *George v. Cowichan Tribes*, 2015 BCSC 513 at paras. 271-272; *Avelin v. Aya Lasers Inc.*, 2018 BCSC 2313 [Avelin]; and *Karmel v. Calgary Jewish Academy*, 2015 ABQB 731.
- [102] In addition, where such a claim is purely ancillary to a claim in constructive dismissal, rather than in tort, it remains an open question in BC as to whether the court retains jurisdiction over the entirety of the claim pursuant to s. 10(1) of the Workers Compensation Act:[7] See A1604839 (Re), 2019 CanLII 46686 (BC WCAT); WCAT 2014-00075 (Re), 2014 CanLII 47029 (BC WCAT) at para. 23, reference to Appeal Decision #97-0829; and *Ashraf v. SNC Lavalin ATP Inc.*, 2015 ABCA 78.
- [103] I am satisfied that para. 20 of the NOCC is a proper pleading for compensatory damages arising from the manner of dismissal (or aggravated damages) that is generally actionable in this court. In order to make out a claim for this type of damages in constructive dismissal, the plaintiff must plead and prove that the manner of dismissal caused her a loss and that this loss was foreseeable.
- [104] In this case, the pleadings at para. 20 are relevant to the pleading for aggravated damages and suggest a broad scope of potential loss arising from the manner of dismissal. The defendants are entitled to particulars of these "grave personal effects" to determine the nature and extent of the losses claimed here.
- [105] However, I find that para. 21 is worded so broadly that it pleads a claim in tort and personal injury rather than in contract. The implication of the pleading that Ms. Deol "suffered and continues to suffer" as a result of the "foregoing" is that Ms. Deol has ongoing personal injuries arising from the material facts pled, including not only the manner of dismissal but the defined "misconduct", i.e. the harassment itself. I find that this pleading strays too far into a claim for personal injuries directly arising from the conduct itself, and not the manner of dismissal. In addition, to the extent that para. 21 is intended to be limited to losses arising from the manner of dismissal, it adds nothing to para. 20 of the NOCC.

Accordingly, para. 21 must be struck from Ms. Deol's NOCC.

[106] With this clarification, I am satisfied that the claim is adequately pled in contract for constructive dismissal and that it does not fall within the exclusive jurisdiction of the WCB.

c. The Claim Against Mr. Davison Personally

[107] The defendants submit that the claim against Mr. Davison, personally, must be dismissed as it discloses no reasonable claim in contract.

[108] Ms. Deol argues that Mr. Davison is an important defendant because:

- a) Mr. Davison is primarily responsible for the conduct that she argues gives rise to a remedy in damages; and
- b) A remedy against her employer, the partnership of Dreyer Davison LLP, may be hollow if the partnership disperses all of its assets to its partners, including Mr. Davison.

[109] With respect to Ms. Deol's first argument, it is representative of the defendants concerns with the pleadings more generally. While Ms. Deol argues her claim is in contract, she frequently fails to distinguish her cause of action in contract from her remedy in damages and to constrain her remedies to ones that are available in contract alone.

[110] To the extent that Ms. Deol might have a remedy in damages directly against Mr. Davison in relation to his conduct, this remedy does not arise from her employment contract. Her employment contract was with the law firm defendant, Dreyer Davison LLP. Ms. Deol's claim in contract must be brought against a party to the contract, and Mr. Davison is not a party.

[111] Any remedy that Ms. Deol might have directly against Mr. Davison personally in relation to his conduct is precisely the type of complaint that must be brought either before the BCHRT for discrimination and/or before the WCB for physical or mental injury.

[112] With respect to her more practical concern regarding collection of damages awarded against her employer, Ms. Deol did not advance any legal basis for naming Mr. Davison personally for this purpose, acknowledging that her claim in contract is against the limited partnership (which includes Mr. Davison as a partner).

[113] Ms. Deol's claims against Mr. Davison personally are dismissed. In order to proceed with her action, Ms. Deol must amend the pleadings to remove Mr. Davison as a named defendant.

- [114] In addition, there are aspects of the NOCC and particulars that are unnecessarily confusing to the extent that they do not adequately differentiate between the conduct of individual partners of the law firm and the law firm itself as the employer and the party alleged to have repudiated the employment contract. Ms. Deol is granted leave to (and must) amend her NOCC so that, in removing Mr. Davison as a defendant, the NOCC also properly directs the allegations of breach of contract to the defendant law firm alone.
- [115] No other amendments to the NOCC, other than those I specifically direct in these reasons, are to be made without an application on behalf of Ms. Deol. A notice of trial has already been filed setting this matter down to be heard before a jury in less than a year, and any potential amendments to the NOCC speculated about, but not yet drafted, will require full articulation and authorization by this Court.
- d. The Claim for a Remedy in Aggravated and Punitive Damages
- [116] The defendants say that the Supreme Court of Canada's decision in *Honda* precludes an award for aggravated or punitive damages in this case.
- [117] General damages in wrongful dismissal are in lieu of notice. No damages are available for the actual loss of employment or the ordinary distress that an employee may suffer as a consequence of being terminated: *Honda* at para 50.
- [118] With respect to aggravated damages, the defendants say that *Honda* limits the availability of aggravated damages in the wrongful dismissal context to situations where there is an aspect of the breach of the contract that causes mental distress at the time of dismissal. They say that no such claim is possible in this case where there was no actual dismissal, only a constructive one, and where there was no single act alleged to constitute the dismissal but rather conduct over the course of Ms. Deol's employment.
- [119] With respect to punitive damages, the defendants say that the *Honda* decision precludes the availability of punitive damages as the result of conduct that may constitute a breach of human rights legislation, including sexual harassment.

Aggravated Damages

- [120] As discussed above, *Honda* provides that compensatory damages beyond damages in lieu of notice, often referred to in BC as aggravated damages, may be awarded in the context of a wrongful dismissal case, but the entitlement to these damages must arise from the manner of dismissal.

- [121] Such damages are available because employers have a duty of good faith and fair dealing in the manner of dismissal. A breach of this duty through conduct that is untruthful, misleading, or unduly insensitive can be the basis of "foreseeable, compensable damages" that are contemplated by the employment contract itself (Honda at para. 58). However, the ordinary distress and hurt feelings that are part and parcel of the loss of employment are not compensable.
- [122] The Court in Honda restated the law with respect to such damages, removing the distinction between compensatory damages for mental distress based on a separate cause of action and those based on a breach of good faith in contractual dealings. The Court united both concepts under the single original principle articulated in *Hadley v. Baxendale* (1854), 9 Ex. 341, 156 E.R. 145, finding that damages to compensate actual losses are available where an employee can prove that the "manner of dismissal caused mental distress that was in the contemplation of the parties" (para. 59 of Honda).
- [123] As a result, it is now settled that an aggravated damages award does not require an independent actionable wrong.
- [124] In *Ram* at para. 115, Justice Warren, summarized these principles in two parts, whereby the employee must establish that:
- a) the employer's conduct in effecting the termination was unfair or in bad faith because, for example, it was untruthful, misleading or unduly insensitive; and
 - b) the employee has suffered mental distress as a result of the manner of the dismissal and not just as a result of the dismissal itself.
- [125] More recently, in *Cottrill v. Utopia Day Spas and Salons Ltd.*, 2018 BCCA 383 at para. 15, our Court of Appeal stated the burden this way:

An award of aggravated damages resulting from the manner of dismissal requires: (a) a finding that an employer engaged in conduct during the course of dismissal that was unfair or in bad faith, and (b) a finding that the manner of dismissal caused the employee mental distress: *Honda* at para. 59.

[Emphasis in original.]

- [126] To these statements of principle, I would add that the Supreme Court of Canada has recognized a broader principle of good faith in the performance of all contracts in *Bhasin v. Hrynew*, 2014 SCC 71, which may yet expand the scope of the duties owed in relation to employment contracts.[8]

- [127] For now, in Ontario, and increasingly in this province, courts have characterized some pre and post-termination conduct as "a component of the manner of dismissal" in relation to claims for aggravated damages: see *Doyle v. Zochem Inc.*, 2017 ONCA 130 at paras. 12-13; *Galea v. Wal-Mart Canada Corp.*, 2017 ONSC 245 at paras. 254-256; *O.W.L. (Orphaned Wildlife) Rehabilitation Society v. Day*, 2018 BCSC 1724 at para. 286; and *Avelin* at paras. 55-56.
- [128] In this case, the defendants say that because Ms. Deol's claims of harassment are alleged to have occurred throughout her employment, aggravated damages are not available because there was no dismissal, and so no "manner of dismissal" from which such damages could arise.
- [129] The defendants also point to Ms. Deol's particulars of the terms of the contract that she alleges were breached. In addition to reliance upon the law firm's duty of good faith "at and around the time of dismissal," Ms. Deol particularizes other contractual terms that relate to her employment more generally, including the provision of a safe working environment and a workplace free of harassment. Ms. Deol's particulars refer to conduct throughout her employment, and not when the employment contract ended (which the defendants say did not occur until Ms. Deol repudiated her contract by commencing these proceedings).
- [130] Although not clearly articulated, I understand Ms. Deol to say that these particulars are relevant to the manner of her dismissal. She disagrees that she was the one that repudiated the employment contract by bringing this claim, and she says that she merely accepted the defendant partnership's repudiation of the employment contract.
- [131] For the purposes of this application, Ms. Deol's material allegations of constructive dismissal, including the manner and timing of her termination, must be assumed to be true.
- [132] However, even assuming that Ms. Deol is constrained to relying on breaches of the law firm's duty of good faith at the time of dismissal for the purposes of her claim in aggravated damages, I am satisfied that the pleadings and the particulars are sufficient to plead this claim.
- [133] The constructive dismissal in this case is alleged to have arisen from a cumulative series of acts that together are alleged to have created an intolerable workplace, evidencing an intention by the partnership to repudiate Ms. Deol's employment contract. Particulars have been provided of these incidents.
- [134] In *Potter*, the Court stated that the second branch of constructive dismissal may arise from "the cumulative effect of past acts by the employer". Ms. Deol has pled a constructive dismissal of that nature.

- [135] Notwithstanding the lesser relevance of some of these particulars and the greater relevance of others, I am satisfied that Ms. Deol has effectively pled a series of incidents within the knowledge of her employer that are capable, if proven, of being found by a trier of fact to constitute a repudiation of her employment contract.
- [136] Where the dismissal is alleged to have arisen in these circumstances, past acts may well constitute part of the "manner of dismissal." In a claim of this type, it would be wrong to limit the assessment of an employer's behaviour to the single point in time when an employee accepts the employer's repudiation of the employment contract.
- [137] Furthermore, if I were to accept the defendants' position in this respect, aggravated damages would generally not be available in constructive dismissal cases under the second branch of Potter. That is not borne out in the case law: see, for example, *Price v. 481530 B.C. Ltd.*, 2016 BCSC 1940 and *Colisto v. Tbaytel*, 2019 ONCA 197.
- [138] I make no comment as to Ms. Deol's likelihood of success in establishing aggravated damages at trial, or even in establishing a foundation for those damages to be put to a potential jury. However, I am satisfied that the pleadings sufficiently raise a claim in aggravated damages related to the manner of Ms. Deol's dismissal.
- [139] It is therefore neither plain nor obvious that Ms. Deol's claim to aggravated damages should be struck.

Punitive Damages

- [140] Unlike aggravated damages, punitive damages are not compensatory in nature. The objects of punitive damages are retribution, denunciation and deterrence, not compensation for breach or injury.
- [141] Punitive damages are an exceptional remedy and are restricted to cases where an employer's conduct is so malicious and outrageous that it is deserving of punishment: *Whiten v. Pilot Insurance Co.*, 2002 SCC 18 at paras. 36-37 [Whiten]; *Vernon* at paras. 381-384; *Ram* at para 112; and *Honda* at para. 62. They are also limited to cases where the general and aggravated damages awarded are insufficient to express the court's condemnation of the defendant's actions, including where the compensatory awards alone would be insufficient to deter the conduct of a "moneyed defendant" (*Whiten* at para.119).
- [142] Unlike aggravated damages, post-*Honda*, punitive damages require the establishment of an independent and deliberate "actionable wrong".

- [143] Since *Whiten*, the law in Canada has not required that the independent actionable wrong be a tort, as is apparently required in the United States (see *Whiten* at para 78-82). An independent actionable wrong "can be found in breach of a distinct and separate contractual provision or other duty such as a fiduciary obligation " and a breach of the contractual duty of good faith can qualify as such a wrong: *Whiten* at para. 82; see also *Honda* at para 62.
- [144] Since *Honda*, it has been accepted by Canadian courts that an actionable wrong need not amount to a tort at common law and that in wrongful dismissal cases, bad faith conduct by the employer may be an independent actionable wrong sufficient to ground punitive damages: *Boucher v. Wal-Mart Corp.*, 2014 ONCA 419 at para. 81; *Liebreich v. Farmers of North America*, 2019 BCSC 1074 at para. 131; *Bailey v. Service Corporation International (Canada) ULC*, 2018 BCSC 235 at paras. 217-220 [*Bailey*]; *Kelly v. Norsemont Mining Inc.*, 2013 BCSC 147 at para. 114; *Nishina v. Azuma Foods (Canada) Co., Ltd.*, 2010 BCSC 502 at para. 261; and *Vernon* at para. 387.
- [145] In *Whiten*, the Supreme Court of Canada canvassed the remedy of punitive damages across history and geography and concluded that:
- "the attempt to limit punitive damages by 'categories' does not work and was rightly rejected in Canada in [*Vorvis v. Insurance Corporation of British Columbia*, [1989] 1 S.C.R. 1085]" (para 67);
 - "the primary vehicle of punishment is the criminal law (and regulatory offences)" but that in Canada the existence of a punishment imposed by a criminal court or other proceeding does not oust the availability of punitive damages arising from the same facts, although it may be a "factor of potentially great importance" (para 69); and
 - "the incantation of the time-honoured pejoratives ('high-handed', 'oppressive', 'vindictive', etc.) provides insufficient guidance (or discipline) to the judge or jury setting the amount" (para 70), and that "juries can and should receive more guidance and help from the judges" in considering punitive damage awards (para 75).
- [146] The issue raised by the defendants' application is whether conduct that would also amount to a breach of human rights legislation could constitute an "independent actionable wrong" for the purposes of an award of punitive damages.
- [147] They note that discriminatory conduct is a statutorily created wrong and not a common law cause of action. Relying in particular on paras. 63-64 of *Honda*, and Chief Justice Laskin's comment at page 195 of *Bhadauria* referenced above, the defendants say that it would be contrary to the comprehensive scheme provided in human rights legislation in Canada to make discriminatory conduct the grounds for an award of punitive damages.

- [148] In fact, the defendants go further. They say that these observations in Honda and Bhadauria are binding on this court and preclude the availability of punitive damages in this case. They say that the majority's comments at paras. 63 and 64 of Honda are the basis upon which the majority overturned both the award of punitive damages and the reasoning of the Ontario Court of Appeal that discriminatory conduct could be an independent actionable wrong for the purposes of awarding punitive damages.
- [149] The strongest support for the defendants' position in this regard is the comments of the majority at para. 64 of Honda:
- [64] The Court of Appeal, relying on McKinley, concluded that Bhadauria only precludes a civil action based directly on a breach of the Code -- but does not preclude finding an independent actionable wrong for the purpose of allocating punitive damages. It is my view that the Code provides a comprehensive scheme for the treatment of claims of discrimination and Bhadauria established that a breach of the Code cannot constitute an actionable wrong; the legal requirement is not met.
- [150] The defendants say this part of the majority reasons establishes that conduct for which a remedy could be available under human rights legislation cannot constitute an independent actionable wrong required to establish a claim in punitive damages.
- [151] In response, the plaintiff refers to a number of cases in which she says punitive damages were awarded (or at least available) in cases of sexual harassment including: Badreddine v. Shapovalov, 2019 ONSC 4914; B.D. v. D.O., 2020 ONCA 29; Corfield v. Shaw, 2011 BCSC 1529; K.T. v. Vranich, 2011 ONSC 683; Silvera v. Olympia Jewellery Corporation, 2015 ONSC 3760 [Silvera]; and Zando v. Ali, 2018 ONCA 680.
- [152] None of the cases relied upon by the plaintiff address the question of whether sexual harassment is an independent actionable wrong for the purposes of an award of punitive damages. All but one of these cases are sexual assault and battery cases; these are not contract cases where the requirement for an independent actionable wrong arises.
- [153] Only Silvera is a wrongful dismissal case. That case proceeded undefended. The Ontario Superior Court awarded \$10,000 in punitive damages in relation to the claim in wrongful dismissal, along with substantial damages for sexual battery, breach of fiduciary duty, and \$30,000 for breach of the Ontario Human Rights Code in relation to sexual and racial harassment. Unfortunately, there is no discussion of whether there was an independent actionable wrong for the purposes of the punitive damages award in that case. The court also makes an award for past loss of wages in addition to damages in lieu notice, which is not a recognized head of damages for wrongful dismissal in BC. Because the case proceeded undefended and relies on Ontario law and precedent not adopted in BC, I cannot rely on this case.

- [154] In Lewis, the plaintiff's claim for punitive damages in relation to the alleged breach of the anti-harassment policy was not struck. However, it was also not the subject of a challenge in this Court or on appeal. In addition, Lewis is not a claim for wrongful dismissal; it is a claim in restitution and disgorgement for breach of contract.
- [155] Overall, a review of the plaintiff's cases does not establish that punitive damages have been awarded by this or other courts on the basis that sexual harassment is an independent actionable wrong. None of these cases provide a precedent for an award of punitive damages in wrongful dismissal (where there is a unique requirement that there be an actionable wrong) in the context of sexual harassment.
- [156] While the plaintiff's case authorities are not particularly helpful, the defendants' reliance on Honda for the proposition that conduct amounting to sexual harassment cannot constitute an independent actionable wrong for the purposes in punitive damages is equally inconclusive.
- [157] As I stated above, while the majority's comments at paras. 63 and 64 do seem to bear that meaning, paras. 24 and 62 expressly state that the majority is not making, and that it is unnecessary for it to make, a determination as to whether discriminatory conduct may be considered an independent actionable wrong for the purposes of an award of punitive damages.
- [158] After these comments, the majority goes on at length to overturn factual findings made by the trial judge in order to establish that there was no discriminatory conduct in that case. This is the basis upon which the majority overturns the punitive damages award, and it renders the discussion of punitive remedies in the face of discriminatory conduct obiter. Honda leaves open the list of actions and conduct that may constitute an independent and actionable wrong, including the possibility that this list may include discriminatory conduct where that conduct can be proven and is shocking, harsh and deserving of this censure: Wrongful Dismissal, *supra*, at 4-256.13 to 4-256.14 and 4-256.16.
- [159] Looking at the scope of bad faith conduct that has been found to warrant punitive damages in wrongful dismissal cases since Honda, it is difficult to reconcile the proposition that these various slights and wrongs could attract punitive damages but that malicious and outrageous behaviour that is also discriminatory would not. Human rights legislation is aimed at amelioration and education, but breaches of that legislation are no less likely, and are possibly more likely, to breach an employer's obligation of good faith or other express or implied contractual obligations.
- [160] Discriminatory conduct is a breach of a person's quasi-constitutional protected rights under human rights legislation. For such conduct to be excluded from the panoply of bad faith conduct that might constitute an independent actionable wrong is both artificial and unworkable.

- [161] It would mean, for example, that a pattern of demeaning behaviour could constitute an independent actionable wrong, but a pattern of demeaning behaviour directed to a person's race, sex, sexual orientation or disability could not. Those persons most likely to be the recipient of harassing conduct of this nature would be disproportionately excluded from a remedy in punitive damages.
- [162] I am also concerned that it would add unnecessary complexity to claims in contract if an amorphous cluster of conduct that is capable of being described as both in bad faith and discriminatory (or some combination thereof) must artificially be excluded from the analysis of bad faith conduct more generally.
- [163] In *Whiten*, the Supreme rejects an attempt to classify the types of wrongs capable of attracting punitive damages (para. 67). The Court also rejects a categorical exclusion of punitive damages where punishments or fines have already been imposed under other regulatory and statutory regimes, including criminal sanctions (para. 69). These principles do not support the defendants' contention that it is plain and obvious that punitive damages would not be available in relation to conduct that meets the requirements for a punitive damages award but that is also capable of a characterization giving rise to separate regulatory remedies.
- [164] A review of cases in the employment context indicate that, while the basis for the punitive damages is not generally labelled as discriminatory conduct or as a breach of human rights legislation, the court's reasoning may allude to particular vulnerabilities such as disability: see, for example, *Bailey*.
- [165] There is also precedent for punitive damages awards against employers where their failure to properly manage harassment allegations was found to be malicious, oppressive, and deserving of punishment and deterrence: *Horner v. 897469 Ontario Inc.*, 2018 ONSC 121.
- [166] In this case, it is not necessary for me to determine if sexual harassment, or other breaches of human rights legislation, is an independent actionable wrong per se. It is sufficient that I find that the conduct alleged and particularized in this case, which is pled to amount to harassment and a failure to address it (including racial and sexual harassment), is also capable of being considered a breach of the law firm's duty of good faith and fair dealing and other enumerated implied contractual terms set out in Ms. Deol's particulars.
- [167] While not in the NOCC itself, Ms. Deol's particulars set out eight alleged breaches of express or implied terms of her employment contract upon which she relies. One of these is an alleged breach of the requirement of reasonable notice of a without cause termination, which is the foundation of her claim in wrongful dismissal. Another is an alleged breach of the employer's duty of fair dealing at the time of dismissal, which is the foundation of her claim in aggravated damages. The other six set out independent alleged breaches of her employment contract, any one of which may be the basis for her claim for an independent actionable wrong, including good faith, fair dealing, and a safe working environment. Only para. 4 relies on an implied term of a working environment free from sexual harassment.

- [168] Overall, I am not satisfied that the law is settled with respect to whether conduct that is alleged to be, or that can be characterized as, discriminatory is precluded from also being treated as an independent actionable contractual wrong for the purposes of pleading punitive damage in wrongful dismissal cases. This is precisely the question left open by the majority in *Honda*.
- [169] In any event, even if *Honda* did preclude such a claim, I find that Ms. Deol has pled other conduct that may nevertheless amount to a breach of the defendant law firm's obligations of good faith and fair dealing in the performance and termination of her employment contract sufficient to make out an independent actionable wrong other than discriminatory conduct.
- [170] That does not mean the claim in punitive damages is one that will succeed, or even one that ought to go to the jury. That will be a decision for the trial judge on the evidence led at trial and subject to the other admonishments and requirements relating to punitive damages, including those laid out in *Whiten* emphasizing the exceptionality of punitive damages and the need for rationality and proportionality in any such awards (paras. 74-94). Awards of punitive damages in the employment context are generally relatively rare and modest in BC. [9]
- [171] Having found that it is not plain and obvious that Ms. Deol cannot pursue a claim in punitive damages, I turn next to whether there are portions of the NOCC that should be struck as going beyond the scope of her permitted claims.

e. Portions of the Pleadings to be Struck

Punitive Damages Pleadings

- [172] While I am satisfied that it is not appropriate to strike Ms. Deol's claim for punitive damages in this case, I am not satisfied that the entirety of her pleadings adequately fit within the constraints of her available remedies.
- [173] As stated in *Whiten* at para. 87, "the facts said to justify punitive damages should be pleaded with some particularity." Specificity and clarity of pleadings are particularly important in a jury trial. Pleadings should not include material facts that are not properly the basis of either a cause of action or a remedy in damages.
- [174] Based on both the pleadings and the submissions of counsel, I understand that the plaintiff is advancing this case, at least in part, as a vehicle to claim punitive damages, and, in particular, to use those damages to address sexual harassment in workplaces beyond the defendant law firm. This purpose is manifest at paras. 14-17 and 19 of the NOCC and the plaintiff's stated intention to call expert evidence at trial to support them. These pleadings state as follows:
14. Survivors of harassment and assault in the workplace rarely pursue justice.

15. In any event, such cases are almost never adjudicated.
 16. The social climate in Canada has developed to a point where it is time to look at sexual harassment and violence in the workplace anew.
 17. Given the nature of the Defendants' industry, the Defendants were well situated to ignore this Misconduct, assuming it would be swept under the rug like so many others. Not one facet of the pantheon of Canadian common law and/or academic resources on point would suggest that the Defendants' assumptions were errant.
 19. Sexual assault and harassment are currently a widespread plague on Canadian workplaces.
- [175] While the defendants specifically object to para. 16, they also seek that the pleadings for punitive damages be struck altogether. This includes paras. 14-19, which are only relevant to the claim in punitive damages.
- [176] Furthermore, these paragraphs relate to only one aspect of the purposes of punitive damages: deterrence. Paragraph 18 pleads the defendant law firm's financial situation and presumably relates to specific deterrence in terms of the "sting" of punitive damages.[10] However, paras. 14-17 and 19 are not related to the defendants at all and address only general and not specific deterrence goals.
- [177] Pleadings that relate solely to general deterrence raise significant issues with the requirement that punitive damages be rationally related to the nature of the claim. Although both specific and general deterrence purposes are referenced at para. 94 of Whiten, general deterrence was not the basis for the punitive damage award being upheld in that case, where the focus remained on what was required to punish and deter the defendant insurance company in particular: see, for example, paras. 118-121. I can find no authority (and none was provided) to support the relevance of these pleadings or this purpose in a purely contractual dispute in the employment context.
- [178] Although in dissent on the quantum of punitive damages in Whiten, Justice LeBel's discussion of the purposes of such damages in that case does not differ significantly from that of the majority. Justice LeBel's reasons directly address the use of private civil proceedings to solve societal problems and question general deterrence as an appropriate purpose of punitive damages:
- [150] The use of this remedy appears to be flexible. Nevertheless, if necessary, punitive damages must be granted and assessed in such a way that they serve rational purposes and represent a proportionate response to the behaviour of defendants and the harm caused. Also, as can be seen in this case, when the matter comes up before a civil jury, jurors must be instructed properly as to the nature and purposes of punitive damages and the conditions under which they may be awarded.

- [158] . An overriding objective of general deterrence remains problematic, if punitive damages are to remain a useful incident of tort law. Otherwise, their use may turn some parts of the law of tort into a sort of private criminal law, devoid of all the procedural and evidentiary constraints which have come to be associated with the criminal justice system.
- [179] When considered in the context of the majority's stated concerns in relation to punitive damages in *Honda*, the perils of using punitive damages in employment cases to address general (not specific) deterrence goals related to conduct regulated through other regulatory schemes are further heightened.[11] In my view, the comments in *Honda* with respect to the availability of comprehensive regulatory regimes designed to address wider societal goals, while constrained with respect to the availability of punitive damages at all, are compelling with respect to such damages awarded solely for general deterrence purposes.
- [180] In this case, Ms. Deol's pleadings at paras. 14-17 and 19 do not relate to the deterrence of punishment of the conduct of the defendants. Nor do they relate to Ms. Deol's compensatory claims. They are not rationally connected to the employment contract at issue, its breach, the defendants' conduct, or this contractual dispute. Nor are they necessary for Ms. Deol's claim in punitive damages. Paragraphs 16 and 17 are also argument, not pleadings of fact.
- [181] Furthermore, the presence of these pleadings opens the door to evidence being led to prove facts that are neither material to Ms. Deol's losses nor to the need to deter or punish the defendant law firm's conduct. Their presence threatens to turn this jury trial into an action for a remedy in sexual harassment per se, something that is precluded by our jurisprudence to date and that Ms. Deol says is not the basis of her claim.
- [182] Paragraphs 14-17 and 19 of Ms. Deol's NOCC should be struck.

Novel Claim Pleadings

- [183] In addition to her pleading at para. 16 of the NOCC, which I have already found must be struck for other reasons, Ms. Deol pleads at para. 22(a) in her relief sought:
- a. further meaningful development of the common law approach to harassment and assault in the workplace
- [184] I recognize that, on an application to strike pleadings, novel pleadings that seek to advance the common law ought not be struck unless it is plain and obvious that they cannot succeed.

- [185] However, this pleading does not advance a novel claim, as it does not articulate the claim to be advanced. It is also confusing, suggesting that Ms. Deol is seeking to reassert a novel claim for sexual harassment per se over which the WCB and the BCHRT have jurisdiction. Finally, it is unnecessary, as Ms. Deol clarified in argument that she is not seeking any new form of relief, but only to advance a larger than customary claim in aggravated and punitive damages.
- [186] Paragraph 22(a) serves no useful purpose, does not describe relief known to law, and is unnecessary. It shall also be struck.

CONCLUSION

- [187] I have concluded that in the Venn diagram of remedies for conduct amounting to sexual harassment, this court's jurisdiction over claims for damages in constructive dismissal is not subsumed by either the WCB's jurisdiction to award compensation for mental injuries in cases of harassment or the BCHRT's jurisdiction to provide compensation and other remedies in cases of discrimination.
- [188] A distinct pleading is available where the conduct of the employer or tolerated by the employer amounted to a repudiation of the employment contract.
- [189] I have concluded that the claim for constructive dismissal against the defendant law firm articulated in the NOCC should not be struck. However, the claim against Mr. Davison personally must be struck because the claim in constructive dismissal is not a claim against him personally.
- [190] I have also ordered that paras. 14-17, 19, and 21 be struck from the NOCC as pleading facts that are not material to Ms. Deol's action in wrongful dismissal or its remedies. Finally, I have ordered that para. 22(a) be struck as not articulating any relief sought or available in this action.
- [191] The remainder of the defendants' application is dismissed.
- [192] Ms. Deol has leave to amend the NOCC to remove those paragraphs that have been struck and to remove reference to Mr. Davison as a party. Ms. Deol also has leave and is required to amend her pleadings and particulars to clarify that Mr. Davison's alleged conduct is referenced only in relation to the remedies sought against the defendant law firm. Any further amendments contemplated by Ms. Deol, and not consented to by the defendants, will require clear articulation in an application and court authorization.
- [193] The defendants have indicated an intention to appeal if the claim in its entirety was not struck and have asked that I continue the stay of proceedings for another 30 days in that case. Given the importance and complexity of these issues, I make that order. If counsel for the defendants requires more than 30 days as a result of the COVID-19 protocols in place, he may make that request to me through the Registry, with a copy to Mr. Sheard.

COSTS

[194] Each party has had some success in this application. Although the defendants were unsuccessful in striking the claim as a whole, they were successful in striking all of the claim as against Mr. Davison personally and substantial portions of the facts pled in support of Ms. Deol's claim for punitive damages. The success of the remaining matters determined in this application will depend on the evidence at trial.

[195] I am therefore inclined to order costs in the cause of this application. However, the defendants have asked for leave to address costs of this application after the judgment has been rendered. After review of these reasons, should either party wish to address costs, I direct them to contact the Registry within 30 days of the release of these reasons to request an appearance before me for this purpose.

"Marzari J."

[1] Now s. 311 of the Workers Compensation Act, R.S.B.C. 2019, c. 1 [2019 WCA] which came into force on April 6, 2020.

[2] I note that the Ontario cases referenced pre-date 2008, when the Ontario Superior Court did not have legislated jurisdiction (as they do now) to award compensation under Ontario human rights legislation.

[3] Now s. 135 of the 2019 WCA.

[4] Now s. 127 and s. 122 of the 2019 WCA respectively.

[5] In A1604839 (Re), 2019 CanLII 46686 (BC WCAT) the Tribunal indicated that it would consider certification of a workplace injury with respect to a "mental distress" claim for aggravated damages in the context of a constructive dismissal action, but it left open whether it had exclusive jurisdiction over that aspect of the claim or what effect the certification might have on the constructive dismissal claim in this court. See also Valerie S. Dixon & Cory Sully, "Section 257 of the Workers Compensation Act and Related Employment Litigation" (Paper prepared for the Employment Law Conference 2017, May 2017) Continuing Legal Education Society of British Columbia, at 11-13.

[6] Now s. 311 of the 2019 WCA.

[7] Now s. 127 of 2019 WCA.

[8] For discussion of these possibilities see, for example: Manasvin Gaswami, "Coherence and Consistency in a System of Good Faith: Assessing and Explaining the Impact of Bhasin v Hrynew on Canadian Contract Law" (2017) 77 SCLR (2d) 309 and Carolyn Janusz, Blair W. Curtis & Kemily Ho, "Employment Damage Awards Across Canada Following Bhasin v. Hrynew" (Paper prepared for Employment Law Conference 2016, May 2016) Continuing Legal Education Society of British Columbia.

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- [9] See Ian Kennedy, "Case Law Update: Aggravated and Punitive Damages in BC from 2013-2017" (Paper prepared for the Employment Law Conference 2017, May 2017) Continuing Legal Education Society of British Columbia, at 7.5.6 and Steven Barker, Christopher Drinovz & Catherine Milne, "A Summary of Recent Employment Law Trends Developing in Ontario and How Those Trends are Being Applied in British Columbia" (Paper prepared for the Employment Law Conference 2019, May 2019) Continuing Legal Education Society of British Columbia.
- [10] The relevance of the financial "sting" of an award is also questioned in *Whiten* at para. 121, particularly in relation to disclosure obligations and trial fairness. However, I am satisfied that *Whiten* allows for consideration of the potential relevance of the financial impact of an award on a defendant.
- [11] Justice LeBel, writing for the partial dissent in *Honda*, would also have overturned the punitive damages award, despite finding that the evidence of discriminatory conduct was sufficient at trial.
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