

## IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Barker v. Construction and Specialized  
Workers' Union, Local 1611,*  
2025 BCSC 1010

Date: 20250417  
Docket: S238708  
Registry: Vancouver

Between:

**Robert David Barker**

Plaintiff

And

**Construction and Specialized Workers' Union, Local 1611**

Defendant

Before: The Honourable Justice Elwood

### **Oral Reasons for Judgment**

(In Chambers)

Counsel for the Plaintiff:

N. Mitha, K.C.  
I.M. Marulanda

Counsel for the Defendant:

K.D. Blakely

Place and Date of Hearing:

Vancouver, B.C.  
April 14, 2025

Place and Date of Judgment:

Vancouver, B.C.  
April 17, 2025

[1] **THE COURT:** The plaintiff, Robert David Barker, applies for leave to further amend the notice of civil claim in this wrongful dismissal action. The proposed second amended notice of civil claim removes a claim of intentional infliction of mental suffering and builds upon an existing claim of bad faith in the manner of dismissal.

[2] Initially, the proposed amendments included an allegation of vicarious liability; however, those proposed amendments have been withdrawn by Mr. Barker.

[3] No trial date has been set and no examinations for discovery have been conducted. The defendant has not produced documents yet on the allegations of bad faith.

### **Background**

[4] The following facts are pleaded or proposed to be pleaded.

[5] Mr. Barker was employed by the defendant, Construction and Specialized Workers' Union, Local 1611 (the "Union"), from February 2015 to February 2023. He worked as a service representative.

[6] Mr. Barker's direct supervisor was Nav Malhotra. Mr. Malhotra was the Union's business manager. As an individual at or near the top of the Union's corporate hierarchy, Mr. Malhotra exercised authority over Mr. Barker's employment.

[7] In or about 2020, Mr. Barker discovered that Mr. Malhotra was having an affair with Mr. Barker's wife. Mr. Barker informed the Union president, Mark Olsen, of the affair on three occasions and asked him to investigate it as a breach of Union policy.

[8] Mr. Barker also informed Mr. Olsen that having to report to the person having an affair with his wife was causing Mr. Barker mental distress. He asked Mr. Olsen to assist with this situation. Mr. Olsen failed or refused to investigate the matter or change the requirement that Mr. Barker report to Mr. Malhotra.

[9] Mr. Barker confronted Mr. Malhotra about the affair on four separate occasions between 2020 and 2022. On all four occasions Mr. Malhotra falsely denied having an affair with Mr. Barker's wife.

[10] In or around November 2022, Mr. Barker and Mr. Malhotra had two confrontations at the Union office about the affair and the work environment between them. Mr. Malhotra suspended Mr. Barker without pay and required him

to complete certain anger management courses and other training before allowing him to return to work.

[11] On or about February 6, 2023, Mr. Barker asked Mr. Malhotra to recuse himself from making decisions relating to his employment due to Mr. Malhotra being in a conflict of interest as a result of the affair and his dishonesty about it.

[12] On or about February 7, 2023, Mr. Malhotra cancelled a scheduled meeting with Mr. Barker to discuss Mr. Barker's return to work. On or about that same day, the Union dismissed Mr. Barker, effective immediately without cause and without notice. The decision to terminate Mr. Barker was made by Mr. Malhotra alone.

[13] Mr. Barker alleges that the Union engaged in a pattern of bad faith conduct in its dealings with him, particulars of which he summarizes in para. 40 of the proposed second amended notice of civil claim.

40. The Union breached its duty of honesty and good faith, including in the manner of termination, by engaging in a pattern of conduct between approximately February 2020 and the plaintiff's termination on February 17, 2023, which included the following acts or omissions:

- a. lying to the Plaintiff about the existence of the Affair;
- b. failing or refusing to address the plaintiff's allegations of misconduct against Mr. Malhotra;
- c. failing to discipline Mr. Malhotra for his misconduct in being dishonest about the Affair and suggesting that it was the plaintiff that was mentally unstable;
- d. permitting Mr. Malhotra to continue to act as Mr. Barker's direct supervisor despite being aware as early as February 2020 of the Affair and of the mental distress Mr. Barker was experiencing as a result of having to report to Mr. Malhotra at work;
- e. bringing the plaintiff's wife to work at the Union's office as Mr. Malhotra's personal assistant in or around 2021 despite the Plaintiff already having told the Union about the Affair and the mental distress it was causing him;
- f. failing or refusing to consider an alternative working arrangement for the plaintiff, which would not require the plaintiff to report to Mr. Malhotra, the person who was having or had an affair with the plaintiff's wife and falsely denying it;
- g. failing to consider or respond to the plaintiff's request to have Mr. Malhotra recuse himself from decisions relating to the plaintiff's employment due to a conflict of interest arising from the Affair;

- h. permitting Mr. Malhotra to make the decision, alone, to terminate the plaintiff's employment despite Mr. Malhotra being in a conflict of interest due to the Affair and the acrimonious relationship between the Plaintiff and Mr. Malhotra. Due to this conflict of interest and acrimonious relationship, Mr. Malhotra was unable to exercise objective, independent judgment with respect to the plaintiff's employment and should not have been permitted by the Union to deal with Mr. Barker's employment;
- i. claiming that the plaintiff's termination was due in part to performance issues without recognizing the intolerable work environment to which the plaintiff was subjected as a result of Mr. Malhotra's misconduct and dishonesty in engaging and denying the Affair;
- j. terminating the plaintiff before conducting an investigation into the plaintiff's allegation that Mr. Malhotra had engaged in misconduct and dishonesty by engaging in the Affair and denying it;
- k. suspending the plaintiff without pay in November 2022 and requiring the plaintiff to take an anger management course after it was Mr. Malhotra that was being fundamentally dishonest and gaslighting the plaintiff by continually and falsely denying he was having an affair with the plaintiff's wife;
- l. not permitting the plaintiff to have a return to work meeting with a representative of the Union as agreed by the Union when it suspended the plaintiff without pay in November 2022;
- m. not permitting the plaintiff to make his case as to why he should not be terminated to anyone other than Mr. Malhotra, the person having an affair with his wife;
- n. terminating the plaintiff despite having represented to the plaintiff in November 2022 that he was being suspended without pay and he would be permitted to return to work upon completion of anger management training, which he completed at his own expense;
- o. terminating the plaintiff despite having already disciplined the plaintiff through a suspension without pay in November 2022.

(Collectively the "Bad Faith Conduct")

[14] Counsel for the Union has helpfully highlighted in the application response those aspects of the proposed amendments to which the defendant objects. Notably, the Union acknowledges that Mr. Barker is entitled to plead and pursue a claim based on bad faith in the manner of dismissal, and does not object to certain

amended pleadings under what the Union's counsel describes as the developing law of the duty of good faith in contractual performance.

[15] However, the Union urges caution with respect to the latter pleadings. Primarily, the Union objects to allegations concerning the affair and Mr. Malhotra's alleged dishonesty about the affair. The Union argues that these are fundamentally personal matters without a direct connection to the employment contract between the Union and Mr. Barker.

[16] Mr. Barker counters that the allegations arising from the affair are part of the factual matrix that underpinned his original bad faith claim. He says the material facts of his bad faith claim include the allegations that: Mr. Malhotra breached the Union policy; Mr. Malhotra was dishonest about the affair; Mr. Malhotra was in a conflict of interest in dealing with Mr. Barker on employment matters; and the Union failed to investigate Mr. Malhotra's misconduct or address the toxic work environment or Mr. Barker's mental distress that arose from being required to report to the man who was having an affair with his wife.

## **Analysis**

### **Amendment of Pleadings**

[17] Courts take a generous approach to applications to amend pleadings. Amendments are permitted as necessary to determine the real issues between the parties. Amendments are disallowed if they disclose no reasonable cause of action. The test for this is the same as it would be on an application to strike pleadings. Is it plain and obvious the claim has no reasonable prospect of success? See *Yenal v. Sahota*, 2023 BCSC 1022, at paras. 6–19, citing *Kwikwetlem First Nation v. British Columbia (Attorney General)*, 2021 BCCA 311, at para. 166, and *Nevsun Resources Ltd. v. Araya*, 2020 SCC 5, at para. 64.

[18] The structure for the analysis of whether a pleading properly advances a cause of action was set out by the Court of Appeal in *FORCOMP Forestry Consulting Ltd. v. British Columbia*, 2021 BCCA 465 at para. 25:

[25] For a cause of action to be properly advanced, the elements of the cause of action must be set out, the material facts that ground those various elements of the cause of action must be concisely stated, and the relief that is sought must be available for the specific cause of action advanced.

[19] In *Mercantile Office Systems Private Limited v. Worldwide Warranty Life Services Inc.*, 2021 BCCA 362, the Court of Appeal emphasized that the function of pleadings is to clearly define the issues of fact and law to be determined by the court. The objective is not to tell the story or provide a narrative; but, rather, to state the material facts, that is, the essential elements that formulate a claim or a defence, as succinctly as possible at paras. 44–48.

[20] In short, pleadings must tell the defendant who, when, where, how, and what gave rise to liability. See *Mancuso v. Canada (National Health and Welfare)*, 2015 FCA 227, at para. 19, referred to with approval in *Kindylides v. Does*, 2020 BCCA 330, at para. 34.

[21] Some of the Union's objections to the proposed pleadings raise concerns based on the limitation periods. The expiry of a limitation period is a relevant consideration only when the proposed amendments raise a new cause of action. An amendment that does not change the substance of the issues is not one that raises a new cause of action. See *Kapila v. Merit Interior Designs (Duncan) Ltd.*, 2023 BCSC 1076, at paras. 40–44.

[22] In this case, I agree with Mr. Barker that none of the proposed amendments raise a new cause of action. Therefore, the limitation defence, if there is one, must be pleaded in response to the claims.

[23] Some of the Union's objections dispute the accuracy of Mr. Barker's allegations. The court does not adjudicate disputed facts on an application to amend pleadings. Contested facts are issues for trial. On an application to amend pleadings, the court does not consider evidence bearing on the substance or the merits of the claim. See *W.O.M. Mastercraft Construction Ltd. v. TFN Meadows Development Limited Partnership*, 2020 BCSC 1345, at paras. 5–7 and 10.

[24] The Union's counsel properly recognized during oral submissions that objections based on the evidence should be withdrawn. The remaining objections concern pleadings of dishonesty and bad faith prior to Mr. Barker's dismissal.

### **Bad Faith in the Employment Context**

[25] The duty of good faith in the performance of an employment contract is distinct from an employer's duty to provide reasonable notice for a dismissal

without cause. A violation of the duty of good faith can give rise to distinct damages that are separate from the damages flowing from a failure to give reasonable notice. This was established by the Supreme Court of Canada in *Matthews v. Ocean Nutrition Canada Ltd.*, 2020 SCC 26 at paras. 39, 44, and 81.

[26] The Union argues that the duty of honest performance is also distinct from the implied term of employment contracts governing the manner of dismissal which has been a recognized aspect of Canadian employment law since *Wallace v. United Grain Growers Ltd.*, [1997] 3 SCR 701, and *Honda Canada Inc. v. Keays*, [2008] 2 SCR 362.

[27] The Union cites Justice Cromwell's decision in *Bhasin v. Hrynew*, [2014] 3 SCR 494. At para. 73, Cromwell J. said:

[73] ...I would hold that there is a general duty of honesty in contractual performance. This means simply that parties must not lie or otherwise knowingly mislead each other about matters directly linked to the performance of the contract. This does not impose a duty of loyalty or of disclosure or require a party to forego advantages flowing from the contract; it is a simple requirement not to lie or mislead the other party about one's contractual performance. ...

And in para. 74, Cromwell J. said:

[74] ...I am at this point concerned only with a new duty of honest performance and, as I see it, this should not be thought of as an implied term, but a general doctrine of contract law that imposes as a contractual duty a minimum standard of honest contractual performance. ...

[28] In my view, reading the judgment of the Court as a whole, the duty of honest performance recognized by the Supreme Court of Canada in *Bhasin*, *supra*, is best understood as an overarching organizing principle that may give rise to specific contractual rights and obligations in specific circumstances, of which the manner of dismissal is a recognized example.

[29] In *British Columbia v. Taylor*, 2024 BCCA 44, at paras. 32–37 the Court of Appeal confirmed that an allegation of bad faith in the manner of dismissal need not be confined to the moment of dismissal. The Court held that a consistent and continuing pattern of problematic behaviour that led to and culminated in an employee's termination ought not to have been struck out of a notice of civil claim. The Court held that this pre-dismissal conduct may be considered in assessing bad faith at termination, if it is a component of the manner of dismissal and,

further, that the manner of dismissal is a question of fact that may span years before the termination.

[30] The Court of Appeal in *Taylor*, also left open the possibility of damages for breach of the duty of good faith in contractual performance during the life of the employment contract, stating that the law in this area should develop in an incremental fashion. See paras. 46–49.

[31] I agree with the Union’s counsel that an essential component of the contractual duty of good faith is that the duty must be directly linked to the performance of the contract. See *Bhasin, supra* at para. 73. The requirement to directly link the duty of honesty to the employment contract was affirmed by the Supreme Court of Canada in *C.M. Callow Inc. v. Zollinger*, 2020 SCC 45. At para. 37 the Court said:

[37] ...In determining whether dishonesty is connected to a given contract, the relevant question is whether a right under that contract was exercised, or an obligation under that contract was performed, dishonestly.  
...

And the Court further stated at para. 49:

[49] ...It is not enough to say that, temporally speaking, dishonesty occurred while both parties were performing their obligations under the contract; rather, the dishonest or misleading conduct must be directly linked to performance. Otherwise, there would simply be a duty not to tell a lie, with little to limit the potentially wide scope of liability.

See also *C.M. Callow*, at paras. 51, 54, and 65.

### **Disputed Amendments**

[32] Here I am tracking the redlining provided by the Union’s counsel starting at para. 27 in the application response.

[33] The Union objects to the proposed allegation in para. 3 of the amended notice of civil claim that Mr. Malhotra was dishonest when confronted about the affair, and repeatedly and falsely denied the affair. The Union argues that the plaintiff has not pleaded how being dishonest or denying an affair is a matter within the ambit of an employment contract or is related to the performance of a contractual duty.

[34] I disagree. Mr. Barker does not allege dishonesty in the abstract or dishonesty in the context of a personal dispute with Mr. Malhotra. Rather, Mr. Barker alleges that Mr. Malhotra failed to act honestly in his exercise of the Union's authority over Mr. Barker under the contract of employment. He alleges that Mr. Malhotra created a toxic work environment by lying about the affair and continuing to require Mr. Barker to report to him on employment matters. He alleges that Mr. Malhotra used the confrontation between the two men about the affair as a pretext, first to suspend Mr. Barker, and then to terminate his employment.

[35] I am of the view that Mr. Barker has pleaded a sufficient connection between Mr. Malhotra's alleged dishonesty about the affair and the performance of obligations or exercise of rights under the employment contract for the purposes of allowing the amendment. Whether Mr. Malhotra's alleged dishonesty gives rise to liability on the part of the Union for breach of the duty of good faith in contractual performance should be decided on the evidence.

[36] Next, in para. 4 of the proposed amended notice of civil claim the Union objects to the pleading that the plaintiff repeatedly asked the Union president to investigate the affair and advised the Union president that having to report to Mr. Malhotra while Mr. Malhotra was having an affair with his wife was contrary to Union policy, and repeatedly denying it was causing him serious mental distress. The amendments allege that Union refused to investigate these concerns, and instead, authorized Mr. Malhotra to terminate Mr. Barker's employment.

[37] The Union argues that the amendments fail to identify how the Union president, an employee of a separate legal entity, had any authority or capacity to investigate an employee of the defendant. Further, the Union submits ,any investigation of Mr. Malhotra for an alleged violation or breach of Union policy would be unrelated to Mr. Barker's contract of employment.

[38] Again, I disagree. Mr. Barker does not allege a personal dispute with Mr. Malhotra. Rather, he alleges that he brought to the attention of a senior executive of the Union the complaint that Mr. Malhotra, as his supervisor, had created a toxic work environment that was causing Mr. Barker mental distress. Mr. Barker alleges that the Union failed to act honestly in the exercise of its

authority under the contract of employment to determine the conditions of Mr. Barker's employment.

[39] However, I agree with counsel for the Union that Mr. Barker must allege that the Union president, Mr. Olsen, had the authority to discipline Mr. Malhotra or reassign Mr. Barker, or otherwise remedy the situation that Mr. Barker brought to his attention.

[40] Counsel for the plaintiff argues that these facts should be implied from the allegation that Mr. Olsen was the president of the Union, which is identified in the pleading as the defendant. In my view, these are material facts that must be pleaded and not inferred by the reader.

[41] The Union objects to all of para. 13 of the proposed pleading which states that the Union was required to perform its obligations under the employment contract honestly and in good faith. Paragraph 13 alleges that this duty required the Union not to lie or knowingly mislead the plaintiff and to act in good faith in its dealings with the plaintiff, including the manner of termination. I agree with the Union counsel that this proposed amendment is legal argument and not an allegation of fact and should be placed under the legal basis of the notice of civil claim.

[42] The Union objects to the final words of para. 15 of the proposed pleadings, which states in whole:

The plaintiff performed his duties as a Service Representative/Organizer well throughout the employment, except when grappling with the symptoms of the mental illness and disability caused by the Affair and the Union's failure to address it.

[43] The Union objects to the word "caused" and everything that follows.

[44] In my view, this is a pleading of relevant fact. The Union alleges cause for Mr. Barker's dismissal. It says that the alleged cause is not based on Mr. Barker's performance. However, in my view, Mr. Barker's performance and the cause of his mental distress are relevant material facts to the manner of his dismissal.

[45] The Union objects to para. 23 which alleges that Mr. Olsen failed and/or refused to investigate the matter. As stated, my view is that this is a material fact in support of Mr. Barker's allegation of a breach of the duty of good faith in

contractual performance. However, there should be an allegation that Mr. Olsen had the authority to investigate and remedy the matter.

[46] The Union objects to para. 24 which states that in or around March 2021, Mr. Malhotra had the plaintiff's wife work for Mr. Malhotra as his assistant. In my view, this is a material fact alleged in support of the claim that Mr. Malhotra used his authority under the contract in bad faith and to subject Mr. Barker to further mental distress.

[47] The Union objects to para. 26 which alleges Mr. Malhotra always denied the affair. The pleading alleges that Mr. Malhotra denied having the affair on four separate occasions. On one of those occasions, Mr. Barker alleges that Mr. Malhotra told him he was a "psycho" for even suggesting that Mr. Malhotra was having the affair. In my view, for the reasons given, these are material facts in support of the plaintiff's allegation of a breach of the duty of honest performance of the employment contract.

[48] Further, the Union objects to para. 27(b) which alleges Mr. Malhotra made the plaintiff's wife his personal assistant. I have addressed this allegation.

[49] In para. 27(d), the Union objects to the allegation that Mr. Malhotra falsely denied having the affair. I have addressed this amendment as well.

[50] Further, the Union objects to para. 27(e) which alleges the Union president refused to investigate the matter or take any steps to address Mr. Malhotra's dishonesty in breach of Union policy. I have addressed this allegation as well.

[51] The Union objects to the opening words in para. 28 which state: "By virtue of dishonesty about the affair ...". I have held that the alleged dishonesty about the affair is a properly pleaded material fact. Likewise, with respect to the Union's objections to the pleadings in paras. 29, 32, 37(b)–(c), and 38.

#### **Paragraph 40**

[52] As set out above, para. 40 of the amended notice of civil claim provides a summary of Mr. Barker's allegations of bad faith conduct. The Union objects to a number of the subparagraphs on various grounds I have discussed above. For the reasons discussed, I would allow the substance of the amendments in para. 40.

[53] However, in my view, Mr. Barker must clarify para. 40 to plead the following necessary material facts:

- a) who on behalf of the Union, he alleges acted dishonestly or in bad faith; and
- b) how the alleged dishonesty or bad faith relates to the exercise of a right or the performance of an obligation under the contract of employment.

[54] Mr. Barker's counsel argues that the reader is able to infer these matters from the facts pleaded elsewhere in the notice of civil claim. In my view, the proper purpose of a pleading like para. 40, which can be very useful to the parties and the Court, is to provide a concise summary of the claim in which all of the essential elements of the cause of action asserted are brought together, and for that reason, I would direct that Mr. Barker amend para. 40.

[55] Lastly, I would direct that Mr. Barker is to number all of the paragraphs in the second amended notice of civil claim consecutively and not restarting at 1 at each section of the pleading, which can be confusing.

[Submissions]

### **Conclusion**

[56] For these reasons, the application to further amend the notice of civil claim is allowed with the following terms and conditions:

- a) Mr. Barker must move para. 13 of the statement of facts to the legal basis.
- b) Mr. Barker must allege that Mr. Olsen had the authority under the contract of employment to discipline Mr. Malhotra or reassign Mr. Barker, direct that Mr. Malhotra recuse himself from matters relating to Mr. Barker's employment or otherwise remedy the situation that Mr. Barker brought to Mr. Olsen's attention.
- c) Mr. Barker must revise para. 40 of the notice of civil claim as set out above.
- d) Mr. Barker must number the paragraphs of the further amended notice of civil claim consecutively.

[57] Mr. Barker was substantially successful in this application, so he is entitled to the costs of the application in the cause.

[58] And, lastly, I am grateful to counsel for their comprehensive submissions on this application.

“Elwood J.”