CITATION: Maule v. IBM Canada Ltd., 2025 ONSC 3860
COURT FILE NO.: CV-22-00683435-0000
DATE: 20250630

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: BRUCE MAULE, Plaintiff

AND:

IBM CANADA LTD., Defendant

BEFORE: Merritt J.

COUNSEL: *Margaret Waddell* and *Karine Bedard* Counsel, for the Plaintiff

Aislinn Reid and *Simone Livshits*, Counsel, for the Defendant

HEARD: **May 26, 2024**

ENDORSEMENT

OVERVIEW

[1] This is an appeal of a pleadings motion in an action for wrongful dismissal.

[2] The Defendant, IBM Canada Limited ("IBM Canada"), appeals from the endorsement of Associate Justice Frank dated April 16, 2024 (the "Endorsement"). IBM Canada asks this court to strike certain paragraphs from the Plaintiff Bruce Maule's Fourth Amended Statement of Claim (the "Fourth Amended Claim") and grant Mr. Maule leave to amend.

DECISION

[3] For the reasons that follow, the Appeal is dismissed.

BACKGROUND FACTS

[4] Mr. Maule was employed by IBM Canada from September 1985 till the date he was terminated without cause, October 22, 2021. IBM Canada is a wholly owned subsidiary of International Business Machines Incorporated ("IBM US") headquartered in New York.

[5] Mr. Maule commenced this action on June 30, 2022 seeking, *inter alia*, damages for wrongful dismissal and a declaration that IBM Canada breached the *Human Rights Code,* R.S.O. 1990, c. H 19. (the "*HRC*"). Alternatively, he sought damages for IBM Canada's violation of the HRC and his employment contract. Mr. Maule claims punitive damages.

[6] IBM Canada says that Mr. Maule's termination occurred because of a restructuring and changing business needs. Mr. Maule states that IBM US has a policy of culling older executives from its corporate ranks, IBM Canada adopted and carried out this policy, and he was therefore terminated at the direction of IBM US.

[7] Following service of the Statement of Claim, IBM Canada raised various concerns about certain pleadings in the Statement of Claim. In response, Mr. Maule amended the Statement of Claim on December 21, 2022, and again on March 10, 2023 (the "Second Amended Claim").

[8] In the Second Amended Claim, the Plaintiff alleges that the decisions about his hiring, promotions, bonuses, scope of work, and termination were made by IBM US, and that the reason for his termination arose from policies and directives originating from IBM US.

[9] IBM Canada continued to take issue with certain pleadings in the Second Amended Claim. These issues included the fact that certain pleadings (a) related to the employment and termination of employment of other employees of IBM US (the "IBM US Employee Pleadings"); and (b) made broad allegations of systemic discrimination by IBM US dating back to 2013 (the "Systemic Age Discrimination Pleadings"). IBM Canada moved to strike the IBM US Employee Pleadings and the Systemic Age Discrimination Pleadings (the "Impugned Pleadings") without leave to amend (the "Motion to Strike").

[10] The Motion to Strike was heard by the Associate Judge on January 16, 2024.

[11] At the Motion to Strike, IBM Canada submitted that the Impugned Pleadings are irrelevant, overly broad, scandalous, or an abuse of the process of the court. IBM Canada submitted that the Impugned Pleadings should be struck because the complexity they add to the action outweighs any potential marginal probative value.

[12] Following the submissions of IBM Canada's counsel at the hearing of the Motion to Strike, Plaintiff's counsel advised that the Plaintiff would make the following further amendments to the Second Amended Claim (the "Proposed Further Amendments"):

> (a) The Systemic Age Discrimination Pleadings would be narrowed to allegations of age discrimination as against **executive** level employees of IBM US; and
>
> (b) The IBM US Employee Pleadings would be amended to remove allegations related to other employees who had been terminated for cause or underperformance (the Plaintiff had alleged that others who were promoted instead of him were less qualified and subsequently terminated for cause or underperformance.)

[13] On February 15, 2024, counsel for the Plaintiff served a Third Amended Statement of Claim that incorporated certain of the Proposed Further Amendments.

[14] In his Endorsement dated April 16, 2024 (the "*Decision*"), the Associate Judge dismissed the Motion to Strike, in part, on the basis that the Second Amended Claim would be amended to incorporate the Proposed Further Amendments.

[15] The Associate Judge held that there was no basis to find that the Systemic Age Discrimination Pleadings are irrelevant, or, that they are bare and unprovable allegations that should be struck as scandalous pleadings. The Associate Judge found that the Impugned Pleadings are not overly broad or an abuse of process.

[16] On May 15, 2024, Mr. Maule served the Fourth Amended Statement of Claim (the "Fourth Amended Claim"). The Fourth Amended Claim incorporated additional changes relating to the Proposed Further Amendments. It removed allegations regarding the terminations of other employees for just cause or underperformance, and restricts the allegations of systemic age discrimination by specifically referring to executive level employees:

> (a) The addition of the term "executive level" in paragraphs, 31, 34 and 36; and
>
> (b) The addition of the defined term "Age Discrimination Policy" which included executive level employees in paragraphs 55, 59, and 65.

[17] With respect to the Fourth Amended Claim, IBM Canada now seeks to:

> (a) In effect, amend the definition of "Age Discrimination Policy" in paragraph 31 to include only **marketing executive** employees by striking the words "executive employees" from paras. 31, 34 and 36 and granting leave to amend to the Plaintiff to include "marketing executive employees";[1]
>
> (b) Strike the words "Since 2013" from para. 36 and grant leave to Mr. Maule to amend para. 36 to include the words "Since 2015"; and,
>
> (c) Strike the pleadings of the alleged circumstances of other employees of IBM US from paras. 39 and 43.

The chart below is from IBM Canada's factum and compares the Impugned Pleadings as amended and IBM Canada's requested amendment.

Para	Impugned pleading as amended	Requested amendment
31	On September 23, 2021, Mr. Maule was advised that his position was being terminated without cause by IBM Canada, effective October 22, 2021. The true reason for Mr. Maule's termination was age discrimination. The decision to terminate Mr. Maule was made by	On September 23, 2021, Mr. Maule was advised that his position was being terminated without cause by IBM Canada, effective October 22, 2021. The true reason for Mr. Maule's termination was age discrimination. The decision to terminate Mr. Maule was made by his superiors at IBM U.S., and

[1] IBM Canada seems to have omitted para. 34 from its factum and the chart below. I am proceeding on the assumption that the objection to paras. 31 and 35 concerning "executive level employees" vs. "marketing executive level employees" also applies with respect to para. 34.

	his superiors at IBM US, and was consistent with IBM US's age discrimination practices applied against executive level employees (the "Age Discrimination Policy"), and acceded to by IBM Canada, which was complicit in the IBM US systemic Age Discrimination Policy as applied against Mr. Maule.	was consistent with IBM U.S.'s age discrimination practices applied against *executive level marketing employees* (the "Age Discrimination Policy"), and acceded to by IBM Canada, which was complicit in the IBM U.S. systemic Age Discrimination Policy as applied against Mr. Maule. Mr. Maule was 59 years old at the time.
36	*Since 2013*, IBM U.S. has systemically terminated *executive level employees* without cause on the sole and prohibited basis of their age, in keeping with the Age Discrimination Policy.	*Since 2015*, IBM U.S. has systemically terminated *executive level marketing employees* without cause on the sole and prohibited basis of their age, in keeping with the Age Discrimination Policy.
39	Mr. Maule first became aware that IBM U.S. and IBM Canada might be targeting older executive employees for termination in 2015, *when his superior, Mike Gerentine, was terminated without cause after over thirty years of service to IBM U.S. Mr. Maule competed for Mr. Gerentine's position, but another, younger executive was chosen to replace Mr. Gerentine. Unlike Mr. Maule, this younger executive had no experience at all in Channel marketing.*	Mr. Maule first became aware that IBM U.S. and IBM Canada might be targeting older executive employees for termination in 2015, ~~when his superior, Mike Gerentine, was terminated without cause after over thirty years of service to IBM U.S. Mr. Maule competed for Mr. Gerentine's position, but another, younger executive was chosen to replace Mr. Gerentine. Unlike Mr. Maule, this younger executive had no experience at all in Channel marketing.~~
43	In July 2021, IBM U.S. also terminated Chris MacLaughlin. Mr. Maule was denied the opportunity to compete for the worldwide Channel Marketing leader role previously occupied by Ms. MacLaughlin. Instead, the role was given to another younger executive with no Channel marketing experience, Ed Hatch.	~~In July 2021, IBM U.S. also terminated Chris MacLaughlin~~. Mr. Maule was denied the opportunity to compete for the worldwide Channel Marketing leader role previously occupied by Ms. MacLaughlin. Instead, the role was given to another young executive with no Channel marketing experience, Ed. Hatch "see also paras. 12 and 57.

[18] IBM Canada submits that the impugned pleadings fall into two categories:

(i) The Impugned Systemic Age Discrimination Pleadings which are overly broad and prejudicial to IBM Canada and will unnecessarily delay and add complexity to the Action, and should be struck out under r. 25.11(a) of the *Rules of Civil Procedure*; and

(ii) The Impugned IBM US Employee Pleadings which are irrelevant and scandalous in their references to the employment circumstances of employees of IBM US and should be struck out under r. 25.11(a) and (b).

POSITIONS OF THE PARTIES

[19] IBM Canada submits that the Associate Judge erred in finding that the Impugned Systemic Age Discrimination Pleading is relevant, not overly broad or an abuse of process, and is proportionate and not prejudicial. IBM Canada says that the Associate Judge also erred in finding that this claim is provable.

[20] IBM Canada also submits that the Associate Judge erred in refusing to strike the Impugned IBM US Employee Pleadings.

[21] IBM Canada's position is that the real issues in this action are 1) whether it wrongfully dismissed Mr. Maule, and if so, what are his damages, and 2) whether IBM Canada terminated Mr. Maule's employment because of his age in violation of the *HRC.*

[22] Mr. Maule submits that the Associate Judge did not make any errors of law or palpable and overriding errors in his findings of fact, or in the exercise of his discretion with respect to granting Mr. Maule leave to amend his Claim.

[23] Mr. Maule produced evidence on the Motion to Strike to support his claim for age discrimination contrary to the *HRC* and that he was the victim of a concerted policy of IBM US to cull older executives from its corporate ranks (i.e., to make "dinobabies extinct"). He says that this policy was carried out by IBM Canada at the direction of IBM US. IBM US was his *de facto* employer because it made decisions about his hiring, promotions, bonuses, scope of work, and termination. The reason for his termination also arose from directives from IBM US.

[24] Mr. Maule submits that the systemic nature of the discrimination is relevant to the issue of human rights damages, his employer's failure to act in good faith in respect of the employment contract, as well as punitive damages where deterrence is an important consideration for the court.

[25] Therefore, Mr. Maule submits that his pleading is proper and this case will inevitably require exploration of the decisions made by his US superiors – including what IBM US directives and policies they followed in making the decision to terminate him. This does not make the case overly broad; it is simply the nature of his hiring arrangement.

THE ISSUES

[26] The two issues on this appeal are as follows:

(1) Whether the Associate Judge erred in refusing to strike the Impugned Systemic Age Discrimination Pleading in paras. 31, 34 and 36; and,

(2) Whether the Associate Judge erred in refusing to strike the Impugned IBM US Employee Pleadings in paras. 39 and 43.

ANALYSIS

[27] Section 17 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 provides:

> An appeal lies to the Superior Court of Justice from,
>
> (a) an interlocutory order of a master, case management master or associate judge.

[28] The parties agree on the applicable standards of review. Errors of law are governed by the correctness standard, the standard for findings of fact or mixed fact is palpable and overriding error, unless there is an extricable legal error, in which case the standard of review is correctness: *Fazli v. Advantageous Mortgage Inc.*, 2023 ONSC 4295, at para. 9; *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 23, at paras. 8,10 and 37.

[29] There is considerable discretion on a pleadings motion under rule 25.11. An appeal court should only intervene if the motion judge errs in principle, misapprehends or fails to take account of material evidence, or reaches an unreasonable conclusion: *Resolute Forest Products Inc. v. Greenpeace*, 2016 ONSC 5398, 133 O.R. (3d) 167, at para. 13, citing *Young v. Tyco International of Canada Ltd.*, 2008 ONCA 709, 92 O.R. (3d) 161 (C.A.), at para. 27.

[30] The Associate Judge identified the correct legal test at paras. 9-10 of the *Decision*:

> Pursuant to Rule 25.11, the court may strike out or expunge all or part of a pleading with or without leave to amend, on the ground that the pleading, (a) may prejudice or delay the fair trial of the action; (b) is scandalous, frivolous or vexatious; or (c) is an abuse of the process of the court.
>
> The applicable principles with respect to a motion to strike under Rule 25.11 include the following:
>
> - Every pleading must contain a concise statement of the material facts on which the party relies for the claim or defence, but not the evidence by which those facts are to be proved. A pleading should be brief, clear, focused and contain the skeletal or core facts and not the evidence that details those facts unless particulars are required by the rules. (citing *Stedfasts Inc v Dynacare Gamma Laboratory Partnership*, 2020 ONSC 8008 at para 29).
>
> - A challenge to a pleading under Rule 25.11(b) focuses on the relevance of the pleading to a cause of action or defence (citing *Abbasbayli v. Fiera Foods Company*, 2021 ONCA 95 at para 49).
>
> - Requiring a party to respond to irrelevant facts, inquire into those facts on discovery and respond to evidence of those facts at trial, leads to inquiries into facts that have no connection to the real issues before the court (citing *Canadian National Railway Company v. Brant et al*, [2009] OJ No 2661, 96 OR (3d) 734 (Sup. Ct.) ("*Brant*") at para 29).

- Pleadings that raise irrelevant allegations that cannot affect the outcome of an action are scandalous, frivolous or vexatious, and should be struck out. A fact that is relevant to a cause of action cannot be scandalous, frivolous or vexatious. (citing *Huachangda Canada Holdings Inc. v. Solcz Group Inc.*, 2019 ONCA 649 at para 15).

- Motions under Rule 25.11 should only be granted in the "clearest of cases"(citing *Abdi Jama (Litigation Guardian of) v. McDonald's Restaurants of Canada Ltd.*, 2001 CarswellOnt 939 ("*Abdi Jama*") at para 21).

[31] The Associate Judge found that the Impugned Pleadings are relevant and not overly broad, prejudicial, nor an abuse of process and that they are provable.

Systemic Age Discrimination Pleadings (Paragraph 31, 34 and 36)

2013 vs 2015

[32] At the hearing of the Motion to Strike, IBM Canada argued that the allegations that IBM US has discriminated against US employees since 2013 are irrelevant to his termination by IBM Canada in 2021, are overly broad, and prejudicial because they are not sufficiently temporally limited.

[33] The Associate Judge identified the correct legal principle that historical facts that have no relevance should be struck: *Decision,* at para. 14, citing *Canadian National Railway Company v. Brant et al*, 2009 CanLII 32911, 96 O.R. (3d) 734 (S.C.), at para. 28.

[34] The Associate Judge found that the allegation of systemic age discrimination in the US going back to 2013 was not overly broad. The Associate Judge found that the allegation of systemic age discrimination in the US is relevant because the Plaintiff expressly pleads a connection between IBM US and his employment and termination; namely, that IBM US's age discrimination policy and practices were adopted or implemented by IBM Canada. He found that the Systemic Age Discrimination Pleadings are relevant to the allegation that IBM US has a scheme or pattern of targeting older employees for termination. These pleadings also particularize the systemic discrimination that the Plaintiff says led to his termination. The Associate Judge found that the allegation of systemic discrimination is relevant to the Plaintiff's claims for human rights violations, failure to act in good faith, and punitive damages: *Decision,* at paras. 13-15.

[35] IBM Canada does not challenge the Plaintiff's pleading of systemic age discrimination by IBM US, but says it is too broad in two respects. IBM Canada says that paras. 31, 34 and 36 of the Fourth Amended Claim should be limited to an allegation of systemic termination of **marketing** executive level employees since **2015**, as opposed to an allegation of systemic termination of **all** executive level employees since **2013**. The challenge to "marketing executives" vs. "executives" is discussed below.

[36] At the hearing of the Motion to Strike, IBM Canada did not propose that the Plaintiff should be allowed to amend his pleading to allege systemic discrimination going back to 2015. Therefore, the Associate Judge did not consider the 2015 timeframe, as opposed to 2013 timeframe.

[37] The significance of the year 2015 is that this is when the Plaintiff asserts that he first became aware that IBM US and Canada might be targeting older executive employees for termination. The significance of 2013 is that this year is mentioned in documents which the Plaintiff or his lawyers found on the internet. One exhibit the Plaintiff attaches to his affidavit is a New York Times article about IBM US discriminating against its employees on the basis of age and filings from American age discrimination lawsuits against IBM US. In one of the cases there is mention of an investigation by the Equal Employment Opportunity Commission (the "EEOC") which resulted in a finding that there was reasonable cause to believe that IBM US discriminated against older employees from 2013 to 2018.

[38] At para. 17 of the *Decision,* the Associate Judge said:

> IBM Canada also submits that some of the evidence filed by the plaintiff regarding the Systemic Age Discrimination Pleadings – an online article and certain court documents relating to proceedings regarding systemic age discrimination involving IBM US – is not relevant to this motion or the action. In my view, this is not a basis for striking the Systemic Age Discrimination Pleadings. First, this is a pleadings motion and not a determination of the merits of the allegations of systemic age discrimination. On a pleadings motion, one of the issues is an assessment as to whether the allegations are provable. A fact that is not provable at the trial or that is incapable of affecting the outcome is immaterial and ought not to be pleaded. In this case, I am satisfied that the Systemic Age Discrimination Pleadings are provable based on the material facts alleged in the Second Amended Claim. This is distinguishable from the situation in *McKee*, a case in which the court found that certain similar fact pleadings should be struck because they were overly broad, bald allegations with no supporting facts. The result was that the unsupported pleading would capture "anyone and anything"(footnotes omitted).

[39] The Associate Judge said that, for the purposes of the Motion to Strike, he placed no weight on the Plaintiff's evidence concerning the cases in the US. The issue of whether the Plaintiff's allegations concerning systemic age discrimination should be limited to 2015, as opposed to 2013, was not before the motions court. Therefore, the Associate Judge did not need to consider the evidence relating to US cases of discrimination dating back to 2013 in determining whether the Plaintiff's systemic age discrimination allegations were too broad.

[40] Generally parties cannot raise a new issue on appeal. Whether to grant leave or not is a matter of discretion based on balancing the impact on the parties and the interests of justice: *R. v. Salifu*, 2023 ONCA 590, 429 C.C.C. (3d) 492, at para. 14. In this case, the relevant evidence was in the record and it was sufficient. The impact on the parties of allowing IBM Canada to raise this issue now, as opposed to at the motion, is minimal.

[41] At paras. 27-30 of the *Decision*, the Associate Judge considered the other systemic discrimination cases IBM Canada relied upon and distinguished them on their facts, namely: *Abdi Jama (Litigation Guardian of) v. McDonald's Restaurants of Canada Ltd.*, [2001] O.T.C. 203; *Kalamaris v. IBM Canada Limited*, 2021 ONSC 5704; and *McKee v. Rowshani-Zafaranloo*, 2021 ONSC 2452.

[42] IBM Canada now argues that the relevant time frame is 2015, when the Plaintiff first learned about the systemic discrimination. In support of this argument, IBM Canada relies on *Kamateros v. Women's Collage Hospital*, 2023 ONSC 2865. At para. 9 of *Kamateros*, I stated that "[i]f a plaintiff does not have knowledge of the facts necessary to support the cause of action, it should not be pled." The pleading was struck in *Kamateros* because the material facts were insufficient to establish the probative value of allegations of prior negligent acts.

[43] IBM Canada's reliance on this case is misplaced. As the Associate Judge correctly pointed out, a pleadings motion is not a determination on the merits: *Decision*, at paras. 17, 36-37. A plaintiff need not demonstrate that they have admissible evidence sufficient to prove the allegations in the statement of claim. In this case, it may well be that admissible evidence to prove the systemic age discrimination is within IBM US possession. I am not saying that a plaintiff can make a bald allegation with no supporting material facts, but that is not what the Plaintiff here has done.

[44] Surely both the dates IBM US is alleged to have engaged in systemic age discrimination and the date when the Plaintiff first realized this was impacting his employment are both relevant. It does not matter that it was only after the Plaintiff was terminated that he became aware that IBM US was allegedly engaging in systemic discrimination since 2013. The point made in *Kamateros* is that a bald allegation without any material facts or basis is improper.

[45] It is sufficient at this stage that the Plaintiff has some knowledge that the systemic discrimination dates back to 2013 based on the EEOC investigation and has otherwise pled sufficient material facts relating to the allegations of systemic discrimination.

[46] Had IBM Canada argued that 2015 rather than 2013 was the appropriate time frame, it would have been open to the Associate Judge to reply upon the EEOC investigation to conclude the Plaintiff had sufficient knowledge to plead that IBM's systemic age discrimination went back to 2013. The Associate Judge did not err in refusing to strike the pleading that since 2013, IBM US has systematically terminated employees without cause on the sole and prohibited basis of their age.

Executive level employees vs Marketing executive level employees

[47] The Fourth Amended Claim provides:

> 31. On September 23, 2021 Mr. Maule was advised that his position was being terminated without cause by IBM Canada, effective October 22, 2021. The true reason for Mr. Maule's termination was age discrimination. The decision to terminate Mr. Maule was made by his superiors at IBM US, and was consistent with IBM US's age discrimination practices

> applied against **executive** level employees (the "Age Discrimination Policy"), and acceded to by IBM Canada, which was complicit in the IBM US systemic Age Discrimination Policy as applied against Mr. Maule. Mr. Maule was 59 years old at the time(emphasis added).

[48] Paras. 34 and 36 also contain references to executive level employees.

[49] Paras. 31, 34 and 36 in their current form in the Fourth Amended Claim were not before the Associate Judge. As set out above, counsel for the Plaintiff advised the court that Mr. Maule would amend the pleading to limit the allegations of systemic discrimination to allegations of age discrimination practices against **executive** level employees of IBM US, and this formed part of the reasons the Associate Judge dismissed the Motion to Strike.

[50] IBM Canada seeks an order striking from para. 31 of the Fourth Amended Claim "applied against executive level employees (the "Age Discrimination Policy")" and granting leave to amend para. 31 of the Fourth Amended Claim to state "applied against **marketing executive** level employees (the "Age Discrimination Policy")". IBM Canada seeks similar orders with respect to paras. 34, 36.

[51] Mr. Maule alleges that his termination arose from systemic age discrimination. He pleads that:

1) He was denied promotions several times, and on one occasion despite successfully holding the position in an interim capacity, in favour of a younger executive with fewer qualifications;

2) He saw hiring and firing practices consistent with age-related discrimination within the IBM US executive and within his business unit;

3) He was excluded from opportunities because of his age; and,

4) His termination was the result of these systemic practices.

[52] At the hearing of the Motion to Strike, IBM Canada submitted evidence that IBM US has 49,077 employees, including 9,042 employees in New York state. It argued that pleadings of:

> systemic discrimination" and "discriminatory scheme" would expose it to a disproportionate scope of discovery about the employment practices of IBM US which are irrelevant to the termination of the plaintiff's employment by IBM Canada. IBM Canada submits that the absence of specificity as to location, business unit or time (dating back to 2013), would lead to extremely onerous discovery obligations for IBM Canada and would add significant time, complexity and cost to this action.
>
> *Decision,* at para. 24.

[53] The Associate Judge correctly identified the legal test for pleading similar facts, i.e. whether the added complexity of pleading similar facts outweighs the potential probative value and he correctly set out the factors to consider: *Decision,* at paras. 32-33.

[54] The Associate Judge considered and rejected IBM Canada's submission that the "Impugned Pleadings demonstrate that the plaintiff intends to broadly explore the allegations of the systemic practice of age discrimination by engaging in a fishing expedition". He considered the cases IBM Canada relied upon and correctly distinguished them: *Decision*, at paras. 27-28, 30 and 34-35.

[55] The Associate Judge relied on the principles outlined in *Gnanasegaram v. Allianz Insurance Co of Canada* (2005), 251 D.L.R. (4th) 340, 195 O.A.C. 319 (C.A.), where the Court of Appeal allowed disputed allegations of systemic discrimination to stand. At para. 29 of the *Decision*, the Associate Judge stated:

> As the Court of Appeal explained, for the purposes of pleading discriminatory conduct as a basis for a wrongful dismissal claim, there is no principled basis for distinguishing between allegations of direct discrimination aimed at a plaintiff and allegations of systemic discrimination (in that case race discrimination) which target a class or group of which the plaintiff is a member. The Court of Appeal also recognized the difficulty in proving allegations of discrimination (in that case race discrimination) by way of direct evidence. Importantly for present purposes, the Court of Appeal noted that "the *Rules of Civil Procedure* and specifically those which relate to the ability of the Defendant to require particulars, and which govern the scope of both documentary and oral discovery are adequate to meet any concerns about the breadth of these pleadings.

[56] IBM Canada submits that the Associate Judge made a palpable and overriding error of fact in rejecting IBM's evidence of the number of employees IBM has and their concerns about the overbreadth of the discovery process. The problem with this submission is that the total number of employees became irrelevant once the Plaintiff agreed to limit his claim to executive level employees. The Associate Judge did not err in failing to consider the total number of employees.

[57] IBM Canada submits that the Associate Judge made an error of law by failing to examine the correct comparator group and accepting that "executive level employees" was sufficient. There is no dispute that the Plaintiff was part of the "Channel" or "Ecosystem" marketing group led by IBM US employees and based in New York State.

[58] Once the Plaintiff agreed to limit his claim of systemic discrimination to executive level employees, IBM Canada did not seek an adjournment of the Motion to Strike, nor leave to adduce further evidence of how many employees would be included in the Plaintiff's proposed amended group (i.e., only "executive level employees"). On the motion before me, IBM Canada proposed granting the Plaintiff leave to amend his claim to include only "**marketing** executive level employees". Again, IBM Canada did not seek leave to introduce evidence of how many employees this proposed definition would include.

[59] It is not clear that the scope of discovery will be impacted by the number of employees included in the group in respect of whom the Plaintiff alleges there was systemic discrimination. The Plaintiff does not suggest that a pleading of systemic discrimination opens the door to a discovery on the specific details of the hiring, promotion, and termination of each and every employee in the group.

[60] In *Gnanasegaram*, the court did not find that the plaintiff's claims of racial discrimination against Allianz Insurance Company were too broad. The plaintiff in *Gnanasegaram* alleged that the company discriminated against employees of colour and did not limit her comparator group to a specific department or level of employee: at paras. 5, 10-13.

[61] If, as alleged, IBM US had a policy directly aimed at reducing the number of older employees in its workforce, then it is difficult to see how the Associate Judge erred in accepting that the pleadings of systemic age discrimination aimed at executive employees was appropriate. This is not a case where the Plaintiff needs to establish that a neutral policy has a disproportionate impact on a disadvantaged group as compared to others; rather, he is claiming he is in a group and he and the other members were all direct targets of a discriminatory policy.

[62] There is no basis to interfere with the Associate Judge's conclusion that Mr. Maule's pleading does not "raise the same concerns about the need to curtail mischief that arises from overly broad and irrelevant pleadings as was the case in *Abdi Jama, Kalamaris,* and *McKee.*": *Decision,* at para. 30.

[63] IBM Canada submits that the Associate Judge made an error of law in failing to weigh the probative value and prejudicial effect of the Systemic Age Discrimination Pleadings as set out in *J.S. v K.O.*, 2024 ONSC 2120, at para. 11. Although he did not cite *J.S.*, the Associate Judge clearly identified the need to weigh the probative value of similar fact allegations against the added complexity they might bring to the case: *Decision,* at para. 32

[64] The Associate Judge correctly concluded that "the Impugned Pleadings are probative allegations, and any concerns about admissibility should be addressed by the trial judge": *Decision,* at para. 37. There is no basis to interfere with his conclusion that it was inappropriate to strike the Impugned Pleadings on the basis that their prejudicial effect outweighs their probative value.

Provable

[65] IBM Canada submits that the Associate Judge erred in dismissing its submissions regarding the Plaintiff's evidence related to the Impugned Systemic Age Discrimination Pleading and in finding it is provable based on this evidence.

[66] There is no onus on the Plaintiff to prove his case on a pleadings motion. The Associate Judge correctly identified that if the Plaintiff had plead facts that were not provable at the trial or were incapable of affecting the outcome, they should be struck. When discussing this issue, he held:

> In this case, I am satisfied that the Systemic Age Discrimination Pleadings are provable based on the material facts alleged in the Second Amended Claim. This is distinguishable from the situation in *McKee*, a case in which the court found that certain similar fact pleadings should be struck because they were overly broad, bald allegations with no supporting facts. The result was that the unsupported pleading would capture "anyone and anything".

[67] As set out above, the exhibits attached to the Plaintiff's affidavit included hearsay documents from American lawsuits. Amongst the exhibits was a document detailing the EEOC finding that there was reasonable cause to believe that IBM US discriminated against older employees from 2013 to 2018. This is not the only evidence the Plaintiff relied upon. As set out above, in his affidavit, Mr. Maule set out details of his experience. As the Associate Judge pointed out, "it is difficult to get direct evidence of the type of discrimination alleged by the plaintiff": *Decision*, at para. 18, citing *Gnanasegaram*, at para. 11.

[68] IBM Canada submits that the Associate Judge erred by failing to consider *Glover v. IBM Canada Ltd*., 2020 ONSC 544 even though it was before him. In *Glover v. IBM Canada Ltd*., the plaintiff moved for production of certain documents from IBM Canada. The affidavit evidence filed by the plaintiff on the motion included an Order of a United States District Court against IBM US and an online article commenting on allegations of age discrimination by IBM US. Master Abrams (as she then was) denied the plaintiff's motion, noting that the plaintiff's purported evidence related to a separate/unrelated case against the defendant's US parent company.

[69] The facts of the case are not set out in the *Glover* decision and the court merely held that the plaintiff had not established a foundation for the requested documents. It appears that in *Glover* the plaintiff had not set out the required connection between his claim against IBM Canada and the documents requested from IBM US. The case is distinguishable on this basis. The Associate Judge here did not err in not referring to *Glover*.

[70] IBM Canada submits that the Associate Judge erred by not applying *Kalamaris v. IBM Canada Limited*, 2021 ONSC 5704. In *Kalamaris*, IBM Canada moved to strike out the phrase "IBM regularly hired younger employees" from the plaintiff's claim. The allegation was not limited temporally, geographically, or departmentally. IBM Canada argued that its hiring practices in the plaintiff's business for her team during her period of employment and perhaps immediately after might be relevant and the court agreed that the plea was overly broad. The court accepted that all employees, in any business unit, at any time, was too broad for a comparator group and struck the pleading. In finding the plaintiff's evidence of article and court documents from IBM U.S irrelevant, the court said that IBM Canada not IBM US was the employer.

[71] *Kalamaris* is distinguishable. In the present case, Mr. Maule has limited his claim temporally and by employment category (i.e. executives). I note, however, that I am not convinced it was necessary for the Plaintiff to limit his claim to executives for the reasons set out at para. 63. *Kalamaris* is also distinguishable because Mr. Maule has pled a connection between his employment and IBM US. The Associate Judge correctly distinguished *Kalamaris*: *Decision*, at paras. 30, 32 and 35.

[72] IBM Canada also relies on *George v. Harris*, 2000 CarswellOnt 1714, [2000] O.J. No. 1762, at para. 20. It is not clear whether IMB Canada argued the applicability of this case before the Associate Judge; however, he did refer to it in footnote 13 as follows: *Taylor v. Canada Cartage Systems Diversified GP Inc*, 2018 ONSC 617, at para. 24, citing *George v. Harris*, [2000] O.J. No. 1762, at para. 20. The Associate Judge correctly cited these cases for the proposition that pleadings that are bare allegations should be struck out as scandalous. However, the Associate Judge found that the Plaintiff has pleaded the necessary and sufficient material facts to support a claim of systemic age discrimination; the facts included his own observations, what he was told, his own experience in being passed over for a promotion, and being terminated because of his age: *Decision*, at paras. 16-17. These facts are capable of proof at trial and the Associate Judge did not err in so finding.

[73] As noted above, IBM Canada is not disputing that the Plaintiff's claim of systemic age discrimination by IBM US is entirely improper; instead, IBM Canada seeks to limit the claim to 2015 rather than 2013 and narrow "executive level employees" to "marketing executive level employees." For the reasons set out above, I do not find that the Associate Judge erred in not striking allegations of age discrimination against executives going back to 2013.

IBM US Employee Pleadings (Paragraphs 39 and 43)

[74] IBM Canada seeks an order striking the following pleadings from the Fourth Amended Claim:

a. Para. 39 after "when his superior". Para. 39 provides:

> Mr. Maule became aware that IBM US and IBM Canada might be targeting older executive employees for termination in 2015, **when his superior, Mike Gerentine, was terminated without cause after over thirty years of service to IBM US. Mr. Maule competed for Mr. Geretine's position, but another, younger executive was chosen to replace Mr. Gerentine. Unlike Mr. Maule, this younger executive had no experience at all in Channel marketing** (emphasis added).

b. Para. 43 "IBM US also terminated Chris MacLaughlin." Para. 43 provides:

> In July 2021, **IBM US also terminated Chris MacLaughlin.** Mr. Maule was denied the opportunity to compete for the worldwide Channel Marketing leader role previously occupied by Ms. MacLaughlin. Instead, the role was given to another younger executive with no Channel marketing experience, Ed Hatch (emphasis added).

[75] IBM Canada submits in its factum that:

> 30. The Motion Judge did not consider whether the Impugned IBM US Employee Pleadings relating to "allegations of termination for cause or underperformance with respect to IBM US Employees" should be struck because the plaintiff agreed to remove them at the hearing of the Motion to Strike.

> 31. However, the plaintiff did not remove all such allegations. As noted above, in paragraph 39, the Fourth Amended Claim still states that M.G. "was terminated without cause after over thirty years of service to IBM US", and states that the younger executive who replaced M.G. "had no experience at all in Channel marketing". Paragraph 43 provides that "in July 2021, IBM US also terminated Chris MacLaughlin". As such, the Fourth Amended Claim contains Impugned Pleadings which were not even considered by the Motion Judge.

[76] It is difficult to understand how IBM Canada can base its appeal on matters upon which it says the Associate Judge made no findings. This is particularly so, where the Associate Judge invited the parties to request a case conference before him if any issues arose concerning the Proposed Amendments: *Decision,* at para. 39.

[77] I do not agree that the Plaintiff has failed to remove the allegations that other employees promoted instead of him were subsequently terminated for cause or underperformance. The Plaintiff has removed the allegations regarding termination of other employees for just cause or underperformance. These are the allegations which raise the most significant privacy concerns.

[78] The remaining allegations relate to promotions that the Plaintiff sought unsuccessfully. There is an allegation that Mike Gerentine was terminated **without** cause after a long period of service, Mr. Maule competed for his position, and another younger executive with no experience in Channel marketing was chosen. Similarly, there is an allegation that when Chris MacLaughlin was terminated, Mr. Maule was denied the opportunity to compete for the position and it was given to another younger executive with no Channel marketing experience. There is no reference to the reason for Chris MacLaughlin's termination. There are no references to employees being terminated for just cause or underperformance.

[79] I do not agree that the Associate Judge failed to rule on these allegations.

[80] The Associate Judge found, at para. 22, that the allegations concerning US Employees are relevant (other than the allegations with respect to termination for cause or underperformance with respect to IBM US employees, which the Plaintiff agreed to remove):

> On the basis that the Second Amended Claim will be amended in accordance with the Proposed Further Amendments, I find that the balance of the IBM US Employee Pleadings are relevant to the claim of systemic discrimination and the claim for punitive damages. As with the Systemic Age Discrimination Pleadings, I find that the IBM US Employee Pleadings form part of the relevant factual background leading to the Plaintiff's termination. Again, while the court will strike pleadings of historical fact that have no relevance, this does not apply to the IBM US Employee Pleadings which (other than the pleadings regarding their performance or termination) are relevant material facts.

[81] In its factum, IBM Canada submits that it was Mr. Maule's employer rather than IBM US, that allegations regarding job performance and departure of IBM US employees in 2015 and 2021 are not relevant to his termination in 2021, and do nothing to advance his claim. IBM Canada also submits that the Plaintiff has no knowledge of the circumstances of Mike Gerentine's or Chris MacLaughlin's employment with IBM US, or the younger executives who replaced them.

[82] IBM Canada is not challenging Mr. Maule's pleading of systemic discrimination in the US. These allegations are two examples of older employees being replaced with younger employees which directly impacted Mr. Maule's employment. In his affidavit, Mr. Maule set out his experience with respect to age discrimination at IBM US and being passed over for promotions. He included evidence about the employees who were selected and provided a comparison of their experience to his. Mr. Maule was not cross examined on this evidence.

[83] The Associate Judge correctly identified the test for pleading similar facts and that pleadings should be struck where any marginal probative value is outweighed by the prejudicial effect: *Decision,* at paras. 31-33.

[84] As set out above, the Associate Judge distinguished the cases IMB Canada relied on and he did not err in this regard.

[85] The Associate Judge also referred to *Bansal v. 2343467 Ontario Inc*, 2015 ONSC 1016, at paras. 60-61, citing *Gnanasegaram,* and *Covelli v. Sears Canada Inc.*, 2011 ONSC 1850, when considering IBM Canada's submission that the IBM US Employee Pleadings would lead to discovery of non-probative, prejudicial information and would add significant cost, time, and complexity to the proceeding: *Decision,* at para. 25.

[86] In *Bansal,* the court allowed allegations about other terminated employees to stand because they were relevant to punitive damages for systemic wrongdoing in an employment context. Mr. Maule similarly seeks punitive damages for systemic wrongdoing. The Associate Judge did not err in finding that the IBM US Employee Pleadings are part of the factual circumstances leading up to Mr. Maule's termination, and relevant to Mr. Maule's claim of systemic discrimination and claim for punitive damages.

COSTS

[87] I encourage the parties to agree on costs. If they cannot agree, I will consider brief written submissions. These costs submissions shall not exceed three pages in length, (not including any bill of costs or offers to settle). The Plaintiff shall file his written submissions within ten days of the date of these reasons. The Defendant's responding submissions shall be delivered within five days of receipt of the Plaintiff's costs submissions. Any reply submissions by the Plaintiff shall be delivered within three days of receipt of responding submissions and shall be no more than three pages long. Costs submissions shall be uploaded to CaseCenter and delivered to me by emailing them to my Judicial Assistant.

Merritt J.

Date: June 30, 2025