KING'S BENCH FOR SASKATCHEWAN

Citation: **2025 SKKB 174**

Date: **2025 10 10**
Docket: KBG-SA-00720-2024
Judicial Centre: Saskatoon

BETWEEN:

Q GROUP RESTAURANTS CORP.

Plaintiff (Applicant)

- and -

JOSUE PINEDA

Defendant (Respondent)

Counsel:

Jared M. McRorie	for the plaintiff (applicant)
Michael R. Scharfstein and James D. Hataley	for the defendant (respondent)

DECISION WEMPE J.
October 10, 2025

INTRODUCTION

[1] The plaintiff in this matter has brought an application to strike portions of the defendant's counterclaim on the basis that:

(a) the paragraphs do not disclose a reasonable cause of action within the meaning of Rule 7-9(2)(a) of *The King's Bench Rules*;

(b) the paragraphs are scandalous, vexatious and frivolous within the meaning of Rule 7-9(2)(b); and

(c) the paragraphs are an abuse of process within the meaning of Rule 7-9(2)(e).

[2] The plaintiff is also seeking an order for production of documents pursuant to Rules 5-11, 5-12 and 5-14.

[3] The impugned paragraphs will not be struck, and production of the requested documents will not be ordered because:

(a) it is not plain and obvious that the paragraphs do not disclose a reasonable cause of action;

(b) the evidence does not establish that the paragraphs are scandalous, vexatious, frivolous or an abuse of process; and

(c) to order production of the requested documents at this early stage of the litigation is not appropriate in the circumstances of this case and is contrary to the Rules.

FACTUAL BACKGROUND

[4] The applicant/plaintiff Q Group Restaurants Corp. [Q Group] is a corporation with a number of small businesses in operation including the Sugar Shack, an ice cream shop and restaurant, and The Shoppe, a café and restaurant. The respondent/defendant Josue Pineda [Mr. Pineda] was hired by Q Group on or about April 1, 2020, as a strategic development specialist and, at some point, was promoted to executive director of operations. Mr. Pineda ceased working for Q Group in January 2024.

[5] Mr. Quattrini, the owner of Q Group, alleges that he and Mr. Pineda signed a Shareholders' Agreement setting out their respective roles, relationship and terms for sharing in ownership of the corporation.

[6] The statement of claim alleges Mr. Quattrini became aware of a number of issues with the business and problematic actions by Mr. Pineda. When Mr. Quattrini confronted Mr. Pineda, he ceased operating the business and filed a complaint with the Employment Standards Division of the Ministry of Workplace Safety and Labour Relations claiming he was owed a significant amount of money. The statement of claim alleges that Mr. Pineda misappropriated a significant amount of money from the business.

[7] Mr. Pineda, in his statement of defence and counterclaim, alleges that in his role as executive director of operations, he was expected by Mr. Quattrini and Q Group to pay for expenses out of his own pocket and was told he would be reimbursed by Q Group. Mr. Pineda alleges that Q Group failed to reimburse him for expenses he paid for and therefore claims for breach of contract and unjust enrichment. Mr. Pineda also alleges that Mr. Quattrini verbally and sexually harassed him during work and outside work hours, which continued after he left his employment with Q Group.

[8] The statement of claim was filed June 11, 2024, and was substitutionally served on December 17, 2024. The statement of defence and counterclaim were served and filed on January 14, 2025.

[9] On May 27, 2025, Q Group served Mr. Pineda with a notice to produce documents pursuant to Rule 5-11. Mr. Pineda, in response, served a notice to inspect documents on Q Group on May 29, 2025. In the notice to inspect documents, Mr. Pineda objected to production of documents numbered 1 to 4 and 7 to 11 as described in Q Group's notice to produce documents.

[10] Q Group then prepared and served its two applications in the matter at hand – an application for production of documents and an application to strike portions of the counterclaim. In response, Mr. Pineda provided notice to Q Group that he intended to amend his counterclaim. The applications came before Morrall J. in chambers on June 17, 2025, and were adjourned on the basis that Mr. Pineda would be amending his counterclaim. The amended counterclaim was served and filed on June 20, 2025. The application to strike now relates to the following paragraphs of the counterclaim:

a. Paragraph 9 in its entirety, including the additions to paragraph 9 by way of amendment;

b. Paragraph 10; and

c. Paragraph 13(d).

[11] Paragraphs 9 and 10 of the amended counterclaim contain allegations of verbal and sexual harassment by Mr. Quattrini against Mr. Pineda. Paragraph 13(d) is the request for punitive and/or exemplary damages.

ISSUES

[12] The issues in this application are:

1. Do the paragraphs in the defendant's counterclaim disclose a reasonable cause of action within the meaning of Rule 7-9(2)(a)?

    (a) Do the claims in paragraphs 9 and 10 fall under the exclusive jurisdiction of the Saskatchewan Workers' Compensation Board or the Saskatchewan Human Rights Commission?

    (b) Are punitive damages available for breach of contract?

2. Are the paragraphs in the defendant's counterclaim scandalous, vexatious and frivolous within the meaning of Rule 7-9(2)(b)?

3. Are the paragraphs in the defendant's counterclaim an abuse of process within the meaning of Rule 7-9(2)(e)?

4. Should the defendant be ordered to produce documents?

ANALYSIS

1. Do the paragraphs in the defendant's counterclaim disclose a reasonable cause of action within the meaning of Rule 7-9(2)(a)?

[13] The test on an application to strike under Rule 7-9(2)(a) is whether the claim has "no reasonable prospect of success" or whether it is "plain and obvious that the action cannot succeed". (See: *Atlantic Lottery Corp. Inc. v Babstock*, 2020 SCC 19, [2020] 2 SCR 420 [*Atlantic Lottery*], and *Hunt v Carey Canada Inc*., [1990] 2 SCR 959.) The facts as pleaded are assumed to be true "unless they are manifestly incapable of being proven". The facts, therefore, are taken as pleaded and, assuming the facts can be proven, if there is no reasonable chance of success or arguable case, then the claim should be struck.

[14] A summary of the principles to be applied on an application to strike for no reasonable cause of action was reiterated by the Saskatchewan Court of Appeal most recently in *Wilson v Saskatchewan Water Security Agency*, 2023 SKCA 16 at para 17, 478 DLR (4th) 170:

> [17] …
>
> (i) The claim should be struck where, assuming the plaintiff proves everything alleged in the claim there is no reasonable chance of success. (*Sagon v. Royal Bank of Canada et al.* (1992), 105 Sask.R. 133 at 140 (C.A.));

> (ii) The jurisdiction to strike a claim should only be exercised in plain and obvious cases where the matter is beyond doubt. (*Sagon*, at 140; *Milgaard v. Kujawa et al.* (1994), 123 Sask.R. 164 (Sask. C.A.));
>
> (iii) The court may consider only the claim, particulars furnished pursuant to a demand and any document referred to in the claim upon which the plaintiff must rely to establish its case (*Sagon*, at p. 140);
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> (iv) The court can strike all, or a portion of the claim (Rule 173);
>
> (v) The plaintiff must state sufficient facts to establish the requisite legal elements for a cause of action. (*Sandy Ridge Sawing Ltd. v. Norrish and Carson* (1996), 140 Sask.R. 146 (Q.B.)).

[15] In deciding an application to strike on the basis that the statement of claim discloses no reasonable cause of action, a judge is limited to considering only the statement of claim, any particulars from a request for particulars and any document referred to in the claim itself upon which the plaintiff relies to establish his or her case. No additional evidence is admissible. (See: *Filson v Canada (Attorney General)*, 2015 SKCA 80 at para 20, 388 DLR (4th) 66, and *Sagon v Royal Bank of Canada* (1992), 105 Sask R 133 (CA) at para 16.)

[16] Where feasible, a plaintiff should be given an opportunity to amend their pleadings to correct deficiencies before those pleadings are stuck: *Yashcheshen v Teva Canada Ltd*., 2022 SKCA 49 at para 43, [2022] 8 WWR 60.

[17] Q Group argues that paragraphs 9, 10 and 13(d) of the counterclaim ought to be struck for failing to disclose a reasonable cause of action for two reasons:

> (a) the claims in paragraphs 9 and 10 are under the exclusive jurisdiction of either the Saskatchewan Workers' Compensation Board [WCB] or the Saskatchewan Human Rights Commission

[SHRC]; and

(b) the punitive damages claimed in paragraph 13(d) are not available for breach of contract.

(a) Do the claims in paragraphs 9 and 10 fall under the exclusive jurisdiction of the Saskatchewan Workers' Compensation Board or the Saskatchewan Human Rights Commission?

[18] Q Group argues that Mr. Pineda is claiming for injuries which occurred in the workplace and therefore are under the jurisdiction of the WCB. They cite a number of cases, including: *Lindsay v Saskatchewan (Workers' Compensation Board)*, 2000 SCC 4, [2000] 1 SCR 59; *Kovach v British Columbia (Workers' Compensation Board)*, 2000 SCC 3, [2000] 1 SCR 55; *Clarke v Federated Co-operatives Limited*, 2011 SKQB 180, aff'd 2013 SKCA 37; *Hill v Saskatchewan Government Insurance*, 2008 SKQB 426, [2009] 2 WWR 124; *Pasiechnyk v Saskatchewan (Workers' Compensation Board)*, [1997] 2 SCR 890, which have held that all workplace injuries must go through the WCB and civil claims relating to the same subject matter are prohibited.

[19] Mr. Pineda argues that none of his claims relate to workplace injuries and therefore are not within the jurisdiction of the WCB. Mr. Pineda's claims are for unjust enrichment and breach of contract which are not barred by *The Workers' Compensation Act, 2013*, SS 2013, c W-17.11 [*Act*].

[20] Section 43 of the *Act* provides a statutory bar to any right of action against an employer or worker with respect to an injury to a worker arising out of and in the course of the worker's employment.

[21] While I agree with Q Group that numerous Supreme Court cases have held workplace injuries are the exclusive jurisdiction of the WCB, there are also a number of cases which held that claims for breach of contract and constructive

dismissal fall outside the WCB regime and are therefore not statute-barred.

[22] In *Rowley v Can-West Agencies Ltd.*, 2018 SKQB 224 [*Rowley*], Rothery J. considered this issue. The WCB had concluded that the plaintiff's allegations in their claim of constructive dismissal and breach of contract were not claims for a workplace injury and therefore not barred by the *Act*. The plaintiffs amended their statement of claim to reflect the WCB decision by deleting the paragraphs where there was an allegation of a tort against the employer but left the allegations of constructive dismissal and breach of contract. The defendants brought an application to strike some of the remaining paragraphs of the claim. Rothery J. struck all the paragraphs which pertained to tort claims on the basis that they were barred by the *Act*, but allowed the paragraphs involving claims for breach of the employment contract, including allegations that the contract was breached because of discrimination.

[23] The case of *Deol v Dreyer Davison LLP*, 2020 BCSC 771 [*Deol*], involved an application to dismiss a claim as disclosing no reasonable cause of action. The Court considered a similar argument relating to the exclusive jurisdiction of the British Columbia Workers' Compensation Board [BCWCB]. The Court held because the claim was for punitive damages for wrongful dismissal and breach of contract, the BCWCB did not have exclusive jurisdiction and the claim should proceed.

[24] Although tort claims for injuries in the workplace must proceed through the WCB regime, the claims in this matter are for breach of contract and unjust enrichment and, therefore, may proceed in this Court. I agree with Mr. Pineda that the amended counterclaim does not contain any tortious claims for workplace injuries. I find the allegations in paragraphs 9 and 10 do not pertain to a workplace injury, but rather are factual circumstances surrounding the allegations of breach of contract and unjust enrichment. The *Act* therefore does not apply, and the claims are not under the exclusive jurisdiction of the WCB. It is not appropriate to strike the paragraphs on the

basis that they are under the exclusive jurisdiction of the WCB.

[25] Q Group also argues that to the extent Mr. Pineda's claim is based on discrimination on the basis of sex, gender or sexual orientation, such a claim cannot succeed because there is no tort for discrimination and complaints alleging discrimination are under the exclusive jurisdiction of the SHRC.

[26] In *Yashcheshen v Law School Admission Council Inc*., 2021 SKCA 149 at paras 27-29, 75 CCEL (4th) 1, the Saskatchewan Court of Appeal confirmed there is no tort for discrimination. A claim for discrimination must follow the processes set out in *The Saskatchewan Human Rights Code, 2018,* SS 2018, c S-24.2 [*Code*]. The *Code* does not create a civil cause of action, and a person cannot file a statement of claim based solely on alleged breaches of provisions of the *Code.*

[27] It has long been held that claims for discrimination must be made in the first instance to the SHRC. In *Cadillac Fairview Corp. Ltd. v Saskatchewan (Human Rights Commission),* [1999] 7 WWR 517 (Sask CA), Vancise J.A. stated at paragraph 32:

> [32] ... It has long been established that human rights codes foreclose any cause of action at common law for a violation of the fundamental principles which are guaranteed by the *Code* [*The Saskatchewan Human Rights Code*] and that the only method of enforcement of the substantive rights based upon a breach of the provisions of the *Code* is the complaint procedure section in the *Code* itself. Any action in the courts based on public policy was also foreclosed. ...

See also: *Forsberg v Saskatchewan,* 2017 SKQB 326, 19 CPC (8th) 170, and *Lawless v Conseil scolaire Fransaskois*, 2014 SKQB 23 at paras 54-57, 436 Sask R 196.

[28] I note that in the *Rowley* case, it appears the parties agreed the paragraphs in the claim relating to complaints of discrimination under *Code* should be struck because they were under the exclusive jurisdiction of the SHRC. There were, however,

a number of allegations of discrimination and harassment which Rothery J. found should not be struck because they related to breach of the employment contract (*Rowley*, paras 11-14). To support this conclusion, Rothery J. cited a number of Ontario cases which allowed allegations for discrimination in the context of constructive dismissal claims. (See: *L'Attiboudeaire v Royal Bank of Canada* (1996), 131 DLR (4th) 445 (Ont CA), and *Gnanasegaram v Allianz Insurance Co. of Canada* (2005), 251 DLR (4th) 340 (Ont CA).

[29] Since the *Rowley* case, there have been a number of cases involving allegations of discrimination in the context of claims for wrongful and/or constructive dismissal which followed the same reasoning. In *Yee v Westjet*, 2025 ABCJ 87 [*Yee*], the Court considered whether it had jurisdiction to decide a claim for wrongful dismissal based on allegations of discrimination. The Court found the allegations of discriminatory conduct were tethered to a valid cause of action and not simply standalone allegations of discriminatory conduct contrary to the *Canadian Human Rights Act*, RSC 1985, c H-6. Citing from Ellen E. Mole, *Wrongful Dismissal Manual*, loose-leaf (Rel 61) 2d ed (Toronto: LexisNexis Canada Inc, 2006) at § 5.113, the Court noted that although it could not deal with allegations of discrimination *per se*, they may still be relevant to issues such as the wrongfulness of the dismissal, length of reasonable notice and aggravated or punitive damage claims. The Court concluded it had jurisdiction to decide the claim for wrongful dismissal even though it also engaged issues which could have been determined by the Commission. The Court held the issues of discrimination and whether the defendant had cause to dismiss the plaintiff were inextricably intertwined. (See: *Yee*, at paras 41-46.)

[30] The case of *Maule v IBM Canada Ltd.*, 2025 ONSC 3860 [*Maule*], also considered allegations of discrimination in the context of an application to strike paragraphs of the claim. Merritt J. upheld the decision of an Associate Judge not to strike the paragraphs on the basis that the pleadings were part of the factual

circumstances leading up to the plaintiff's termination and were relevant to the claims of systemic discrimination and punitive damages. (See: *Maule*, at para 86.)

[31] The previously cited *Deol* case also considered the argument that allegations in the claim should be struck on the basis that they were under the exclusive jurisdiction of the British Columbia Human Rights Tribunal [BCHRT]. The Court found that the claim was for punitive damages for wrongful dismissal and breach of contract; therefore, the BCHRT did not have exclusive jurisdiction, and the claim ought to proceed.

[32] These cases provide persuasive authority that although there is no tort for discrimination, where the allegations of discrimination form part of the factual circumstances pertaining to a valid cause of action such as breach of an employment contract, this Court has jurisdiction.

[33] I find the allegations in paragraphs 9 and 10 regarding discrimination and/or verbal and sexual harassment are the surrounding circumstances of the claims for breach of contract, unjust enrichment and punitive damages. They are not standalone claims but are tethered to a valid cause of action. The allegations are the factual basis for Mr. Pineda's claim that punitive damages are warranted as an independent actionable wrong or breach of a duty of good faith in the contract. Mr. Pineda is not making a separate claim for discrimination or sexual harassment which must proceed to the SHRC, rather the allegations are part of his claims for breach of contract and unjust enrichment. As a result, paragraphs 9 and 10 will not be struck on the basis that they fall under the exclusive jurisdiction of the SHRC.

(b) Are punitive damages available for breach of contract?

[34] Q Group argues the paragraphs of the counterclaim ought to be struck because there is no tort of harassment in Saskatchewan. They argue that Mr. Pineda is

attempting to attach the allegations of harassment to his claims for breach of contract and unjust enrichment. The claim for punitive and/or exemplary damages is not tied to any cause of action and, therefore, must be struck. Q Group argues that in the circumstances, punitive damages are not available for breach of contract or unjust enrichment.

[35] Mr. Pineda argues the punitive damages he claims relate to the alleged harassment and flow from the claims for breach of contract and unjust enrichment. Mr. Pineda argues the punitive damages are not claimed to compensate for workplace injury or to make him whole after suffering harassment. Rather, they are claimed because of how Mr. Pineda alleges he was treated in the course of Q Group's breach of contract and unjust enrichment. The claim for punitive damages is not a standalone cause of action but is tied to the claims for breach of contract and unjust enrichment, both of which are properly pleaded.

[36] I agree with counsel for Q Group that the tort of harassment has not been recognized in Saskatchewan. This was confirmed by the Saskatchewan Court of Appeal in *McLean v McLean*, 2019 SKCA 15 at paras 97-108, [2019] 5 WWR 67 [*McLean*]. At paragraph 108 of *McLean*, the Court confirmed, "[T]his can only lead to the conclusions that this Court has effectively determined that the tort of harassment is not recognized in Saskatchewan."

[37] Mr. Pineda's claim, however, is not attempting to assert the tort of harassment. Rather, as stated previously, the allegations of harassment are the factual basis upon which he claims punitive damages for breach of contract and unjust enrichment.

[38] The test for punitive damages was set out by the Supreme Court in *Hill v Church of Scientology of Toronto*, [1995] 2 SCR 1130 at para 196, as follows:

> [196] Punitive damages may be awarded in situations where the defendant's misconduct is so malicious, oppressive and high-handed that it offends the court's sense of decency. Punitive damages bear no relation to what the plaintiff should receive by way of compensation. Their aim is not to compensate the plaintiff, but rather to punish the defendant. It is the means by which the jury or judge expresses its outrage at the egregious conduct of the defendant. They are in the nature of a fine which is meant to act as a deterrent to the defendant and to others from acting in this manner. It is important to emphasize that punitive damages should only be awarded in those circumstances where the combined award of general and aggravated damages would be insufficient to achieve the goal of punishment and deterrence.

[39] In *Whiten v Pilot Insurance Co*., 2002 SCC 18, [2002] 1 SCR 595 [*Whiten*], the Supreme Court held that punitive damages are available for breach of contract in exceptional circumstances so long as the alleged breach of contract is an independent actionable wrong. This wrong is not required to be tortious; rather, a breach of the contractual obligation of good faith may be sufficient.

[40] The law in this area was recently summarized in *Atlantic Lottery*:

> [63] Punitive damage awards for breach of contract are also exceptional, but will be awarded where the alleged breach of contract is an independent actionable wrong (*Whiten v. Pilot Insurance Co*., 2002 SCC 18, [2002] 1 S.C.R. 595, at para. 78). As this Court held in *Whiten*, the actionable wrong need not be tortious: punitive damages may also be awarded where the defendant breaches a contractual obligation of good faith (para. 79).

[41] The meaning of breach of the contractual obligation of good faith was described in *Whiten* as:

> [78] … In my view, the correct approach is to assess the conduct in the context of all the circumstances and determine whether it is deserving of punishment because of its shockingly harsh, vindictive, reprehensible or malicious nature. Undoubtedly some conduct found to be deserving of punishment will constitute an actionable wrong but other conduct might not.

…

> [80] First, McIntyre J. chose to use the expression "actionable wrong" instead of "tort" even though he had just reproduced an extract from the *Restatement* which does use the word tort. It cannot be an accident that McIntyre J. chose to employ a much broader expression when formulating the Canadian test.
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> [81] Second, in *Royal Bank of Canada v. W. Got & Associates Electric Ltd.*, 1999 CanLII 714 (SCC), [1999] 3 S.C.R. 408, at para. 26, this Court, referring to McIntyre J.'s holding in *Vorvis*, said "the circumstances that would justify punitive damages for breach of contract in the absence of actions also constituting a tort are rare" (emphasis added). Rare they may be, but the clear message is that such cases do exist. The Court has thus confirmed that punitive damages can be awarded in the absence of an accompanying tort.
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> [82] … An independent actionable wrong is required, but it can be found in breach of a distinct and separate contractual provision or other duty such as a fiduciary obligation.

[42] The question therefore becomes whether the verbal and sexual harassment alleged by Mr. Pineda could constitute an independent actionable wrong as contemplated in *Whiten*.

[43] The *Deol* case involved a claim for constructive dismissal arising out of sexual harassment in the workplace. The defendants in *Deol* argued that the case of *Honda Canada Inc. v Keays,* 2008 SCC 39, [2008] 2 SCR 362 [*Honda*], precluded the availability of punitive damages as a result of conduct that may constitute a breach of human rights legislation including sexual harassment. The Court in *Deol*, however, disagreed with that interpretation of *Honda*, instead finding that *Honda* left open the possibility that discrimination or sexual harassment could be the basis for an award of punitive damages. (See: *Deol,* at paras 156-159)

[44] In reviewing the *Honda* case, I agree with the Court's interpretation in *Deol*. The Supreme Court in *Honda* overturned the factual findings made by the trial judge. The unfounded factual findings were the basis for overturning the punitive

damages award. The Supreme Court left open the list of actions and conduct that might 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 censure (*Deol*, at para 158). The *Honda* case does not go as far as finding that punitive damages will never be available for harassment or discrimination.

[45] The Court's reasoning in *Deol* as to why discriminatory conduct might warrant punitive damages is helpful:

> [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.
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> [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.
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> [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.
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> [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.

[46] Ultimately, the Court in *Deol* concluded that discriminatory behaviour or sexual harassment could constitute an independent actionable wrong as a breach of good faith or implied contractual terms:

> [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.
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> …
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> [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*.

[47] In this Court, Clackson J. recently considered whether punitive damages could be awarded for breach of contract in *Holmes v Jastek Master Builder 2004 Inc.*, 2024 SKKB 71. At paragraph 100, he cited *Bhasin v Hrynew*, 2014 SCC 71, [2014] 3 SCR 494, as authority for the proposition that there is a common law duty applicable to all contracts obligating parties to act honestly in the performance of their contractual obligations. Clackson J. awarded punitive damages on the basis that the defendant's breach of the duty of honesty was an independent actionable wrong.

[48] In light of the above case law, I am of the view that it is not plain and obvious Mr. Pineda cannot pursue a claim for punitive damages in the circumstances. The allegations of verbal and sexual harassment and discrimination, if proven, may constitute a breach of the duty of honesty or good faith and be an independent actionable wrong within the meaning of *Whiten*. The issue of punitive damages should be left open

for a trier of fact to determine at trial. Paragraphs 9, 10 and 13(b) of the amended counterclaim will not be struck for disclosing no reasonable cause of action.

2. Are the paragraphs in the defendant's counterclaim scandalous, vexatious and frivolous within the meaning of Rule 7-9(2)(b)?

[49] In *Solgi v College of Physicians and Surgeons of Saskatchewan*, 2022 SKCA 96, [2022] 12 WWR 14 [*Solgi*], the Court of Appeal explained that on an application to strike under Rule 7-9(2)(b), the Court can go beyond the pleadings and consider the merits of the claim.

> [43] Rule 7-9(2)(b) allows a pleading to be struck if it "is scandalous, frivolous or vexatious". Unlike when an application is made to strike a pleading because it does not disclose a reasonable claim or defence, an application under Rule 7-9(2)(b) engages with the merits of the claim. This was explained by Sherstobitoff J.A. in *Sagon v Royal Bank of Canada* (1992), 105 Sask R 133 [*Sagon*], as follows:
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> > [18] Striking out an entire claim on the ground that it is frivolous, vexatious or an abuse of process of the court is based on an entirely different footing [than disclosing no reasonable cause of action]. Instead of considering merely the adequacy of the pleadings to support a reasonable cause of action, it may involve an assessment of the merits of the claim, and the motives of the plaintiff in bringing it. Evidence other than the pleadings is admissible. Success on such an application will normally result in dismissal of the action, with the result that the rule of *res judicata* will likely apply to any subsequent efforts to bring new actions based on the same facts. Odgers on *Pleadings and Practice*, 20th ed. says at pp. 153-4:
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> > > If, in all the circumstances of the case, it is obvious that the claim or defence is devoid of all merit or cannot possibly succeed, an order may be made. But it is a jurisdiction which ought to be very sparingly exercised, and only in very exceptional cases. Its exercise would not be justified merely because the story told in the pleadings is highly improbable, and one which it is difficult to believe could be proved. [footnotes omitted]

[50] Numerous cases have held that an action is scandalous when it impugns the opposite party or makes degrading charges or allegations of misconduct or bad faith. (See: *Paulsen v Saskatchewan (Ministry of Environment)*, 2013 SKQB 119 at para 45, 418 Sask R 96; *Bank of Montreal v Giesbrecht*, 2005 SKQB 18 at para 14; *C & J Hauling Ltd. v Mistik Management Ltd*., 2010 SKQB 60 at para 15, 351 Sask R 199.) In *Solgi*, the Court of Appeal clarified that not every pleading that impugns a party or makes degrading charges is scandalous:

> [47] However, not every pleading that impugns a party or makes degrading charges or allegations of misconduct or bad faith is scandalous. Were it so, it would mean that a party could never plead a cause of action that depended on the existence of such conduct. The important qualification to the idea that a pleading that alleges one of these things is scandalous is that nothing is scandalous which is material. Said another way, it is only an *immaterial* allegation that can be scandalous.
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> [48] This qualification was recognized in the two cases that Ryan-Froslie J. referred to in support of her summary statement relied upon by the Chambers judge. In *Bank of Montreal v Giesbrecht*, 2005 SKQB 18 at para 14, Barclay J. referred to *Odgers on High Court Pleading and Practice*, 23d ed (London: Sweet & Maxwell, 1991) at 188, for the proposition that where an "*unnecessary* matter in a pleading contains any imputation on the opponent or makes any degrading charges or allegations of misconduct or bad faith against him or anyone else then it becomes scandalous and will be struck out" (emphasis added). Similarly, in *C & J Hauling Ltd. v Mistik Management Ltd.*, 2010 SKQB 60 at para 15, 351 Sask R 199, Popescul J. (as he then was) stated that, generally, "a pleading is scandalous if it improperly casts a party in a derogatory light" (emphasis added).
>
> [49] A party that has alleged that an action was committed in bad faith for the purposes of advancing a reasonable cause of action cannot be said to have made the statement unnecessarily or improperly solely because it casts the object of the accusation in a bad light. See also: *White Fox Alfalfa Seed Growers Co-operative Marketing Association v A. E. McKenzie Company*, [1940] 3 WWR 433 (WL) (Sask KB) at para 24; *Gabrysh v Milenkovic*, 2009 SKQB 302 at para 20, [2010] 5 WWR 112; and *Rubbert v Boxrud*, 2014 SKQB 221 at para 48, 450 Sask R 147.

[51] An action is frivolous if it is groundless and lacks substance or if it is plain and obvious the claim it advances cannot succeed: *Harpold v Saskatchewan (Corrections and Policing)*, 2020 SKCA 98 at para 63, and *Siemens v Baker*, 2019 SKQB 99 at para 25, [2019] 5 CTC 129.

[52] Finally, a pleading is vexatious if it was instituted for an ulterior motive (other than to enforce a true legal claim) or maliciously for the purpose of causing trouble or annoyance to the defendants: *Solgi*, at para 55.

[53] Unfortunately, there are no supporting affidavits which shed light on the allegations nor any questionings for discovery which could assist this Court in determining whether the allegations are scandalous, frivolous or vexatious. Instead, this Court must determine based on the bare assertions contained in the pleadings.

[54] Q Group argues that the pleadings in paragraphs 9 and 10 and the amended counterclaim are baseless and for the purposes of retaliation against the statement of claim.

[55] While I don't disagree that the allegations in paragraphs 9 and 10 are allegations of misconduct which could impugn Mr. Quattrini's and Q Group's reputation, without any evidence I cannot assess whether they are baseless, groundless or lack substance. I also cannot infer an improper purpose from the bare pleadings. If the allegations are accurate or true, then they are clearly relevant to the counterclaim. On the evidence before me, I am not prepared to strike paragraphs 9 and 10 of the counterclaim for being scandalous, vexatious and frivolous within the meaning of Rule 7-9(2)(b).

3. Are the paragraphs in the defendant's counterclaim an abuse of process within the meaning of Rule 7-9(2)(e)?

[56] Rule 7-9(2)(e) is broader than an application to strike a pleading under

Rule 7-9(2)(a). An order striking based on abuse of process is discretionary and will be granted only in clear and obvious cases. If there is an arguable issue, then a chance of success exists, and the claim should not be struck: *Nelson v Teva Canada Limited*, 2021 SKCA 171. There is some overlap between the concepts of frivolous or vexatious pleadings and an abuse of process.

[57] This is not a clear and obvious case where there is no chance of success for the claim. The allegations contained in the paragraphs of the counterclaim are serious and there is no evidence showing that it is clear and obvious they cannot succeed. Accordingly, I am not prepared to strike the paragraphs as an abuse of process under Rule 7-9(2)(e).

4. Should the defendant be ordered to produce documents?

[58] Demands for production of documents are governed by Rules 5-11, 5-12 and 5-14 of *The King's Bench Rules*. Rule 5-11(1) states that parties are entitled to provide the other with written notice to produce documents for inspection which have been referenced in the producing parties' pleadings, affidavit of documents or affidavit. The producing party then must provide a notice to inspect documents which it does not object to producing within two days.

[59] Rule 5-12(1)(d) states that if a party provides notice under Rule 5-11 and the party in receipt of that notice fails or refuses to produce any document identified therein, the party is automatically entitled to apply to the Court for an order compelling production of the identified documents.

[60] Rule 5-14 states that if a party fails or refuses to produce the documents in a notice, the Court may dismiss the action if the non-compliant party is a plaintiff or strike a defence where the non-compliant party is a defendant. Rule 5-14(3) allows the Court to award double costs against the non-compliant party.

[61] Mr. Pineda objects to producing documents numbered 1 to 4, 7, 8 and 11 on the basis that they were referenced in his pleadings, and he has not yet filed an affidavit of documents or an affidavit. Mr. Pineda takes the position that the application by Q Group for production of documents is premature and tantamount to a fishing expedition. He argues that Q Group's application is seeking to compel Mr. Pineda to provide his evidence at the pleading stage which is contrary to Rule 13-8(1)(c). That Rule states that every pleading must contain only a statement in summary form of the material facts which the party pleading relies on for the party's claim or defence, but not the evidence by which the facts are to be proved.

[62] Q Group argues that by not providing the documents Mr. Pineda relies on in his pleadings, he has prevented the plaintiff from meaningfully engaging with the litigation process, from understanding the case to meet, from being aware of documents which may defeat their own allegations, and knowing what they may actually owe Mr. Pineda, if anything. They argue that production of the documents requested could significantly narrow the issues in the litigation, simplify and reduce the costs of the litigation.

[63] Q Group cites the case of *Hill v Wiess (Estate)*, 2010 SKQB 193 [*Hill*], as supporting their argument for production of documents. The *Hill* case dealt with an application for further and better particulars and an application compelling the plaintiff to produce documents listed in their statement as to documents. In discussing the rationale for what was former Rule 164, Sandomirsky J. stated:

> [15] …. Rule 164 enables a party, after delivery of the initial pleadings of the opponent, to demand better particulars and disclosure of documents. This Rule contains at least two major purposes: first, to assess the merits of the case in greater detail then mandated by Rule 139. By more fully comprehending the details and nuances of the case, a defendant may, with the appropriate disclosure, assess the merits of settlement discussions. Second, further particulars may be required in order

> to properly prepare for examination for discovery. There may be other considerations as well.

[64] The *Hill* case has an important distinction from this case. In *Hill*, the pleadings were closed, and the plaintiff had provided a statement as to documents. The documents being sought were documents listed in the statement as to documents and were required to prepare for examinations for discovery. That is a significantly different situation than here where the pleadings are not closed, and Mr. Pineda has not yet provided his affidavit of documents.

[65] This case is more analogous to the circumstances in *Morsky v Kreuger* (1995), 136 Sask R 184 (Sask QB) [*Morsky*], where Dickson J. stated at paragraph 5:

> [5] … In this case, discovery has not yet taken place. It has not been established that the documents sought by the applicant exist. Indeed, items (a) and (b) are not described as documents but instead are calculations that accountants of the respondent have made. This application is clearly a search for information and not for production of documents that the respondent has identified. If the information is relevant to the issue between the parties it may be obtained by notice to produce at discovery or otherwise, but not by application under Rule 215 asking for production of information in the form of unidentified documents.

[66] In *Zaritsky v Zaritsky* (1998), 167 Sask R 182 (Sask QB) [*Zaritsky*], Wilkinson J. ordered production of documents, however she acknowledged the *Morsky* decision in paragraph 4 where she stated:

> [4] … It was held that Rule 215 could only be used to compel production of documents if they were clearly defined in pleadings, Affidavits or statements as to documents. Otherwise, relevant information should be obtained by notice to produce at discovery.

[67] Wilkinson J. held that *Zaritsky* was distinguishable from *Morsky* because the husband had filed an unsworn financial statement which made reference to crops

and farmland of unknown value. Had the husband completed his financial statement in accordance with the Rules there would have been the foundation to grant production of the documents referred to. In light of that and the obligation of parties to make complete disclosure of financial information in family law proceedings, the Court ordered the production of the documents.

[68] Turning to the documents that Q Group is requesting. Document No. 1 is described as all bank records and receipts of purchases in relation to expenses referred to in paragraph 15 of the statement of defence. I agree with counsel for Mr. Pineda that although paragraph 15 refers to paying for expenses from his personal account, it does not make any reference to bank records or receipts of purchase.

[69] Document No. 2 is described as all records regarding reimbursement of payments, and money transfers, received by Mr. Pineda as reference in paragraph 16 of the statement of defence. Again, paragraph 16 does not refer to any records. It only states that Mr. Pineda was reimbursed and that money was transferred to him. Presumably the records which show payments and money transfers will be referenced in the affidavit of documents and at the questioning, however, they are not referenced in the statement of defence.

[70] Document No. 3 is described as production of Mr. Pineda's paystubs showing deductions that Mr. Pineda referred to in paragraph 20 of his statement of defence. Again, I note that paragraph 20 does not state that Mr. Pineda's paystubs showed the deductions. It only states that the costs were deducted from his pay. In fact, there is no mention of paystubs at all in paragraph 20.

[71] Document No. 4 is described as records of e-transfers sent or received by Mr. Pineda as referred to in paragraph 21 of the statement of defence. I agree with Mr. Pineda's counsel that e-transfers are transactions and not documents. There is no reference to e-transfer statements, receipts or other related documents in paragraph 21.

I echo my comments above that presumably these documents will be referred to in the affidavit of documents and at the questioning.

[72] Document No. 7 is described as any records disclosing the "express term" of Mr. Pineda's employment contract which stated that he would be reimbursed by Q Group for out-of-pocket expenses he incurred. This request relates to paragraph 2 of the amended counterclaim which states that there was an implied and/or express term of Mr. Pineda's employment. Paragraph 2 does not state that the express term was in a written document.

[73] Document No. 8 is described as records of transfers made by Mr. Pineda from Q Group as described in paragraph 4 of the amended counterclaim. It appears this is the same request as Document No. 3 described above but referencing the counterclaim rather than the statement of defence. Similarly, paragraph 4 of the counterclaim does not state that there are records of the transfers.

[74] Document No. 11 is described as all records of receipts, invoices and any other document in relation to the expenses that Mr. Pineda has reference throughout the statement of defence and counterclaim. Again, the statement of defence and counterclaim do not specifically refer to receipts, invoices or documents of the expenses claimed by Mr. Pineda. These are documents which again will presumably be disclosed later in the litigation.

[75] To summarize, while I agree that many of the documents requested will likely come out later in the litigation (i.e., when pleadings are closed, after affidavits of documents are exchanged and questionings are completed), to order production of the documents at this early stage before pleadings are closed is contrary to the intentions of the Rules. The steps in litigation and the Rules are in place to ensure the orderly and efficient conduct of the litigation. It is not appropriate to order production of the documents at this early stage in the litigation in the circumstances of this case.

COSTS

[76] Both parties in this matter are seeking increased costs awards. Ultimately, Q Group was not successful in both their applications; therefore, there should be a costs award in favour of Mr. Pineda.

[77] It is my view that solicitor-client costs are not warranted in this case. In *1348623 Alberta Ltd. v Choubal*, 2016 SKQB 200, 94 CPC (7th) 210, Danyluik J. set out a list of factors to consider in deciding which column of party-and-party costs to award. These include complexity of the case, importance of the case, the duration and conduct of the proceedings, the urgency of the matter, the amount at issue, whether experts were involved, parity and expectations, access to justice, discretion and reasonable, and any other relevant matter.

[78] There are only two factors which weigh in favour of an increased costs award. I agree that this application was more complex than the usual application to strike and raised some unusual areas of the law. Therefore, the complexity of the case and the importance of the case are factors to consider.

[79] I find that a costs under Column 2 are appropriate in the circumstances and order $1,500.00 in costs payable by Q Group to Mr. Pineda.

CONCLUSION

[80] Paragraphs 9, 10 and 13(d) of the counterclaim are not struck, and the application for production of documents is dismissed.

"R.C. Wempe" J.
R.C. WEMPE