



No. S238708  
Vancouver Registry

**IN THE SUPREME COURT OF BRITISH COLUMBIA**

BETWEEN:

ROBERT DAVID BARKER

PLAINTIFF

AND:

CONSTRUCTION AND SPECIALIZED WORKERS' UNION, LOCAL 1611  
also known as LiUNA LOCAL 1611

DEFENDANT

**Notice of Application**

NAME(S) OF APPLICANT(S): The Plaintiff, Robert David Barker (the "Applicant")

TO: The Defendant



AND TO: Their Solicitor

TAKE NOTICE that an application will be made by the Applicant to the Honourable Justice Elwood who is seized of the application at the courthouse at 800 Smithe Street, Vancouver, British Columbia on April 14, 2025 at 10:00 am for the orders set out in Part 1 below.

The Applicant estimates that the application will take 1 day.

☐ This matter is within the jurisdiction of an associate judge.

☒ This matter is not within the jurisdiction of an associate judge.

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## Part 1: ORDERS SOUGHT

1. An order pursuant to Rule 6-1(1)(b)(i) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 (the “*Rules*”) granting leave to the Plaintiff to file a Second Amended Notice of Civil Claim in the form attached hereto as Schedule A;
2. Costs of this application; and
3. Such further and other relief as this Court deems just.

## Part 2: FACTUAL BASIS

### Overview

1. The proposed Second Amended Notice of Civil Claim (the “*SAN OCC*”) removes a cause of action (intentional infliction of mental suffering) and clarifies the pleading of bad faith, which is already alleged in the current pleading before the court. As such, the *SAN OCC* narrows the issues in dispute and does not prejudice the defendant Construction and Specialized Workers’ Union, Local 1611 also known as LiUNA Local 1611 (the “*Union*”). No trial date has been set and no examinations for discovery have been conducted.
2. While the law with regards to bad faith in the employment context is developing, it is now established that an employee can allege bad faith in the manner of termination with respect to events that took place long before the actual termination, if they were connected to or were a component of the dismissal. Therefore, the *SAN OCC* discloses a cause of action with respect to breach of the duty of good faith and the Plaintiff should be permitted to file it.

### Facts Giving Rise to Underlying Litigation

3. The plaintiff is a former employee of the Union. Between approximately February 2015 and February 2023, he worked as a Service Representative.

4. In or around early 2020, the plaintiff discovered that his direct supervisor, Mr. Nav Malhotra (the Union's Business Manager), was having an affair with the plaintiff's then wife, Jennifer Farish (the "Affair").
5. The plaintiff informed the Union President, Mr. Mark Olsen, of the Affair and on three occasions asked him to investigate it as a breach of the Union Policy.
6. The plaintiff also informed Mr. Olsen that having to report to the person having an affair with his wife was causing him mental distress and asked Mr. Olsen to assist to address this situation.
7. Mr. Olsen failed and/or refused to investigate the matter.
8. The plaintiff confronted Mr. Malhotra about the Affair on four separate occasions:
  - a. In or around August or September 2020;
  - b. In or around March 2021;
  - c. In or around May 2021; and
  - d. In or around November 2022.
9. On all four occasions, Mr. Malhotra falsely denied having the Affair.
10. In or around November 2022, at the Union's office, the plaintiff had two confrontations with Mr. Malhotra caused by Mr. Malhotra's continued refusal to acknowledge the Affair and deal with the reporting relationship requiring the plaintiff to report to Mr. Malhotra.
11. As a result of the November 2022 workplace incidents, Mr. Malhotra suspended the plaintiff without pay and required him to complete certain anger management courses and other training before being allowed to return to work. The plaintiff was not paid his salary in December 2022 or January 2023.

12. On or around February 6, 2023, the plaintiff asked Mr. Malhotra to recuse himself from making decisions relating to the plaintiff's employment due to Mr. Malhotra being in a conflict of interest as a result of the Affair and his dishonesty about it.
13. On or around February 7, 2023, Mr. Malhotra and the plaintiff were scheduled to meet to discuss the plaintiff's return to work. Mr. Malhotra unreasonably refused to meet with the plaintiff.
14. On February 17, 2023, the defendant dismissed the plaintiff effective immediately without cause and without notice. The decision to terminate the plaintiff was made by Mr. Malhotra alone, despite the plaintiff's request that Mr. Malhotra recuse himself from decisions regarding the plaintiff's employment due to Mr. Malhotra being in a conflict of interest as a result of the Affair.
15. The plaintiff alleges that the Union engaged in a pattern of bad faith conduct in its dealings with him, particularized in the SAN OCC.
16. The alleged bad faith conduct includes the following acts or omissions by the Union:
  - a. lying to the plaintiff about the existence of the Affair;
  - b. failing or refusing to address the plaintiff's allegations of misconduct against Mr. Malhotra;
  - c. failing to discipline Mr. Malhotra for his misconduct in being dishonest about the Affair and suggesting that it was the plaintiff that was crazy and a psycho;
  - d. permitting Mr. Malhotra to continue to act as the plaintiff's direct supervisor despite being aware as early as February 2020 of the Affair and of the mental distress the plaintiff was experiencing as a result of having to report to Mr. Malhotra at work;

- e. bringing the plaintiff's wife to work at the Union's office as Mr. Malhotra's personal assistant in or around 2021 despite the plaintiff already having told the Union about the Affair and the mental distress it was causing him;
- f. failing or refusing to consider an alternative working arrangement for the plaintiff, which would not require the plaintiff to report to Mr. Malhotra, the person who was having or had an affair with the plaintiff's wife and falsely denying it;
- g. failing to consider or respond to the plaintiff's request to have Mr. Malhotra recuse himself from decisions relating to the plaintiff's employment due to a conflict of interest arising from the Affair;
- h. permitting Mr. Malhotra to make the decision, alone, to terminate the plaintiff's employment despite Mr. Malhotra being in a conflict of interest due to the Affair and the acrimonious relationship between the plaintiff and Mr. Malhotra. [...];
- i. claiming that the plaintiff's termination was due in part to performance issues without recognizing the intolerable work environment to which the plaintiff was subjected as a result of Mr. Malhotra's misconduct and dishonesty in engaging and denying the Affair;
- j. terminating the plaintiff before conducting an investigation into the plaintiff's allegation that Mr. Malhotra had engaged in misconduct and dishonesty by engaging in the Affair and denying it;
- k. suspending the plaintiff without pay in November 2022 and requiring the plaintiff to take an anger management course after it was Mr. Malhotra that was being fundamentally dishonest and gaslighting the plaintiff by continually denying he was having an affair with the plaintiff's wife;

- l. not permitting the plaintiff to have a return to work meeting with a representative of the Union as agreed by the Union when it suspended the plaintiff without pay in November 2022;
  - m. not permitting the plaintiff to make his case as to why he should not be terminated to anyone other than Mr. Malhotra, the person having an affair with his wife;
  - n. terminating the plaintiff despite having represented to the plaintiff in November 2022 that he was being suspended without pay and would return to work upon completion of anger management training, which he completed;
  - o. terminating the plaintiff despite having already disciplined the plaintiff through a suspension without pay in November 2022.
17. The bad faith conduct, even though it began with the discovery of the Affair in 2020, continued up until the plaintiff's termination in February 2023, and was a component of the termination.

## **Underlying Litigation and Procedural History**

18. On December 22, 2023, the plaintiff commenced this action, alleging wrongful dismissal.
19. On May 7, 2024, the plaintiff filed an Amended Notice of Civil Claim, which is the claim currently before the court.
20. In the Amended Notice of Civil Claim, the plaintiff, among other things:
- a. claimed aggravated damages for bad faith in the manner of dismissal; and

- b. added a claim for intentional infliction of mental suffering. The plaintiff no longer wishes to pursue this cause of action, as seen in the SAN OCC.

## **Parties' Appearance before Justice Elwood**

- 21. On February 11 and 12, 2025, the parties appeared before Justice Elwood for two applications brought by the Union: one, a summary trial application regarding the validity of the severance provisions in the Union's Policy Manual; and an application to strike portions of the Amended Notice of Civil Claim, in particular those relating to the affair.
- 22. Justice Elwood dismissed the Union's application for summary trial regarding the validity of the severance provisions. He found that the severance provisions were not valid and did not displace the plaintiff's entitlement to reasonable notice at common law.
- 23. At the hearing, Justice Elwood also raised certain concerns regarding the viability of the claim for intentional infliction of mental suffering as currently pleaded.
- 24. By consent, the Union's application to strike was converted to an application to amend pleadings to be brought by the plaintiff. Justice Elwood seized himself of the application.

## **Part 3: LEGAL BASIS**

### **Legal Principles**

#### **Amendment of Pleadings**

- 25. Courts should take a generous approach to applications to amend pleadings. Amendments should be permitted as are necessary to determine the real issues between the parties. Amendments should not be allowed only if they disclose no reasonable cause of action.

*Yenal v. Sahota*, 2023 BCSC 1022 at paras. 6 and 19.

## Bad Faith in Employment Context

26. A violation of a duty of good faith is distinct from an employer's duty to provide reasonable notice to a dismissed employee. A violation of the duty of good faith can give rise to distinct damages (separate from damages flowing from the failure to give reasonable notice). Bad faith in the manner of dismissal need not be confined to the moment of dismissal.

*Matthews v. Ocean Nutrition Canada Ltd.*,  
2020 SCC 26 at paras. 4, 39, 44, 45, 81 and 82.

27. A pleading that discloses "a consistent and continuing pattern of problematic behaviour that led to and culminated in [an employee's] termination" should not be struck. Pre-dismissal conduct may be considered in assessing bad faith at termination if it is a component of the manner of dismissal. The "manner of dismissal" is a question of fact that may span years before the termination.

*British Columbia v. Taylor*, 2024 BCCA 44 at paras. 32-37.

## Argument

28. The proposed SAN OCC, instead of expanding the scope of the litigation, narrows it. It clarifies the plaintiff's pleading of bad faith, an allegation that is already before the court under the current pleading. The proposed SAN OCC meets the test of an amendment that should be permitted; namely, one that is necessary to determine the real issues between the parties.
29. The plaintiff has pled sufficient material facts regarding his allegation of breach of the duty of good faith. He alleges that the Union engaged in a pattern of bad faith conduct that began in 2020 and continued into the date he was terminated, on February 17, 2023. This pattern of bad faith was a component in the manner of termination, and included the following acts or omissions by the Union:



- a. failing or refusing to address the plaintiff's allegations of misconduct against Mr. Malhotra;
  - b. failing to discipline Mr. Malhotra for his misconduct in being dishonest about the Affair and suggesting that it was the plaintiff that was crazy and a psycho;
  - c. permitting Mr. Malhotra to continue to act as the plaintiff's direct supervisor despite being aware as early as February 2020 of the Affair and of the mental distress the plaintiff was experiencing as a result of having to report to Mr. Malhotra at work;
  - d. failing or refusing to consider an alternative working arrangement for the plaintiff, which would not require the plaintiff to report to Mr. Malhotra, the person who was having or had an affair with the plaintiff's wife;
  - e. failing to consider or respond to the plaintiff's request to have Mr. Malhotra recuse himself from decisions relating to the plaintiff's employment due to a conflict of interest arising from the Affair;
  - f. permitting Mr. Malhotra to make the decision, alone, to terminate the plaintiff's employment despite Mr. Malhotra being in a conflict of interest due to the Affair and the acrimonious relationship between the plaintiff and Mr. Malhotra. Other acts or omissions in the Union's pattern of bad faith conduct are listed at paragraph 40 of the proposed SANOCC.
30. As noted by the Court of Appeal in *Taylor*, courts should be cautious in striking pleadings of bad faith in the employment context, "given the recognized potential for development of the law surrounding the duty of good faith in an employment context." (at para. 50).

31. Therefore, the plaintiff's claim of breach of the duty of good faith, which sets out sufficient material facts and deals with a developing area of the law, should be properly decided at trial on a full record, not at the pleadings stage.

**Part 4: MATERIAL TO BE RELIED ON**

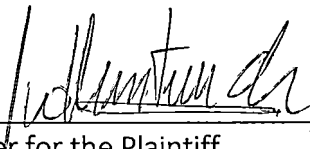
1. The pleadings in this action; and
2. Such further and other material as counsel may advise.

TO THE PERSONS RECEIVING THIS NOTICE OF APPLICATION: If you wish to respond to the application, you must, within 5 business days after service of this notice of application or, if this application is brought under Rule 9-7, within 8 business days after service of this notice of application,

- (a) file an application response in Form 33;
- (b) file the original of every affidavit and of every other document, that
  - (i) you intend to refer at the hearing of this application, and
  - (ii) has not already been filed in the proceeding, and
- (c) serve on the applicant 2 copies of the following, and on every other party of record one copy of the following:
  - (i) a copy of the filed application response;
  - (ii) a copy of each of the filed affidavits and other documents that you intend to refer to at the hearing of this application and that has not already been served on that person;
  - (iii) if this application is brought under Rule 9-7, any notice that you are required to give under Rule 9-7(9).

Dated: 1 April 2025

Ivo Martinich for:

  
 Signature of lawyer for the Plaintiff  
 Nazeer T. Mitha, K.C.

To be completed by the court only:

Order made

☐ in the terms requested in paragraphs \_\_\_\_\_ of Part 1 of this Petition

☐ with the following variations and additional terms:

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Date: \_\_\_\_\_

Signature of ☐ Judge ☐ Associate Judge

## Appendix

### THIS APPLICATION INVOLVES THE FOLLOWING:

- ☐ discovery: comply with demand for documents
- ☐ discovery: production of additional documents
- ☐ other matters concerning document discovery
- ☐ extend oral discovery
- ☐ other matter concerning oral discovery
- ☒ amend pleadings
- ☐ add/change parties
- ☐ summary judgment
- ☐ summary trial
- ☐ service
- ☐ mediation
- ☐ adjournments
- ☐ proceedings at trial
- ☐ case plan orders: amend
- ☐ case plan orders: other
- ☐ experts
- ☐ other

# Schedule A

No. S238708  
Vancouver Registry

## IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

ROBERT DAVID BARKER

PLAINTIFF

AND:

CONSTRUCTION AND SPECIALIZED WORKERS' UNION, LOCAL 1611  
also known as LiUNA LOCAL 1611

DEFENDANT

### Second Amended Notice of Civil Claim

This action has been started by the Plaintiff(s) for the relief set out in Part 2 below.

If you intend to respond to this action, you or your lawyer must

- (a) file a Response to Civil Claim in Form 2 in the above-named registry of this court within the time for Response to Civil Claim described below, and
- (b) serve a copy of the filed Response to Civil Claim on the Plaintiff(s).

If you intend to make a Counterclaim, you or your lawyer must

- (a) file a Response to Civil Claim in Form 2 and a Counterclaim in Form 3 in the above-named registry of this court within the time for Response to Civil Claim described below, and
- (b) serve a copy of the filed Response to Civil Claim and Counterclaim on the Plaintiff(s) and on any new parties named in the Counterclaim.

JUDGMENT MAY BE PRONOUNCED AGAINST YOU IF YOU FAIL to file the Response to Civil Claim within the time for Response to Civil Claim described below.

## Time for Response to Civil Claim

A Response to Civil Claim must be filed and served on the Plaintiff(s),

- (a) if you were served with the Notice of Civil Claim anywhere in Canada, within 21 days after that service,
- (b) if you were served with the Notice of Civil Claim anywhere in the United States of America, within 35 days after that service,
- (c) if you were served with the Notice of Civil Claim anywhere else, within 49 days after that service, or
- (d) if the time for Response to Civil Claim has been set by order of the court, within that time.

## Claim of the Plaintiff

### Part 1 - STATEMENT OF FACTS

#### Overview

1. The plaintiff (also referred to here as "Mr. Barker") advances a claim in wrongful dismissal ~~and intentional infliction of mental suffering~~ against his former employer, a trade union known as LiUNA Local 1611 (the "Union"). He also claims that the Union engaged in a pattern of bad faith conduct in its dealings with the plaintiff for a period of several years leading up to his termination. This pattern of bad faith conduct was a component in the manner of the plaintiff's termination and supports an independent cause of action for breach of the duty of good faith.
2. While employed by the Union, the plaintiff discovered that his direct supervisor Nav Malhotra ("Mr. Malhotra") was having an affair with ~~the plaintiff's~~ his wife, an employee of the international chapter of the Union (the "Affair").
3. Mr. Malhotra engaged in the Affair contrary to the Union Policy and was dishonest when confronted about it. He repeatedly and falsely denied the affair while continuing to

~~require the plaintiff to report to him. misconduct and dishonest conduct, first by engaging in the Affair and then denying it repeatedly.~~

4. The plaintiff repeatedly asked the Union President to investigate the Affair and advised the Union President that having to report to Mr. Malhotra's misconduct was while Mr. Malhotra was having an affair with his wife (contrary to the Union policy) and repeatedly denying it was causing him serious mental distress. The Union refused to investigate. Instead, it authorized Mr. Malhotra to terminate Mr. Barker's employment.
5. In order to limit damages, the Union is attempting to rely on an unenforceable severance clause. The plaintiff is entitled to a common law notice period or damages in lieu, as well as damages for the Union's breach of its duty of honesty, its bad faith conduct and the mental suffering inflicted by the Union, distress he experienced arising from the Union's treatment of Mr. Barker in bad faith, including in the manner of dismissal.
6. ~~The Union was aware of Mr. Barker's mental illness and disability. Mr. Barker confronted Mr. Malhotra about the Affair, and also told the Union President, Mark Olsen, about the Affair and the mental disability he developed as a result of it.~~
7. ~~The Union intentionally or negligently caused Mr. Barker's mental disability.~~

## Parties

6. The plaintiff, age 54 at the point of dismissal, resides in Chilliwack, BC.
7. The defendant is a duly constituted trade union as defined in the British Columbia *Labour Relations Code*, RSBC 1996, c 244, with its head office located at #200-19092 26 Avenue, Surrey, BC, V3Z 3V7.
8. The defendant is a trade union representing employees across a wide variety of sectors in British Columbia.

### **The Employment and the Affair between the Plaintiff's Supervisor and Plaintiff's Wife**

9. From January 30, 2001 until February 16, 2016, prior to the commencement of his employment with the defendant, the plaintiff worked as a unionized employee represented by the defendant.
10. In or about 2015, the plaintiff was approached by the defendant and recruited to work for the defendant. As a result, the plaintiff resigned from his unionized employment in order to work for the defendant in a non-unionized capacity.
11. The plaintiff commenced employment with the defendant on or about February 16, 2015.
12. It was an implied term of the employment contract that the plaintiff would receive reasonable notice of dismissal.
13. The Union was required to perform its obligations under the employment contract honestly and in good faith. This duty required the Union not to lie or knowingly mislead the plaintiff, and to act in good faith in its dealings with the plaintiff, including in the manner of termination.
14. At all times during the employment, the plaintiff was employed as a Service Representative.
15. The plaintiff performed his duties as a Service Representative/Organizer well throughout the employment, except when grappling with the symptoms of the mental illness and disability caused by the Affair and the Union's failure to address it.
16. As a Service Representative/Organizer, the plaintiff reported directly to the Union's Business Manager, Mr. Nav Malhotra.



17. Mr. Malhotra is an individual at or near the top of the Union's corporate hierarchy. He has significant power within the Union and he is subject to little or no oversight by the Union. At all material times in matters relating to the plaintiff's employment, Mr. Malhotra acted on behalf of the Union and/or under the Union's authority. At all material times in matters relating to the plaintiff's employment, Mr. Malhotra exercised the authority the Union conferred on him to deal with the plaintiff's employment.
18. At all material times, the plaintiff's wife, Jennifer Farish, was an employee of the international chapter of the Union or of the Union itself.
19. Throughout the plaintiff's employment, the Union's Policy Manual prohibited employees from engaging in romantic relationships with other Union employees. The February 2020 Policy Manual prohibiting relationships with other Union employees was signed by Mr. Malhotra as Business Manager.
20. In or around late December 2019, the plaintiff discovered through Mr. Malhotra's wife that the plaintiff's wife may be having an affair. In 2020, the plaintiff's wife confirmed that she ~~his wife~~ was having an affair with Mr. Malhotra.
21. The plaintiff informed the Union President, Mr. Mark Olsen, of the Affair and on three occasions asked him to investigate it as a breach of the Union Policy.
22. The plaintiff also informed Mr. Olsen that having to report to the person having an affair with his wife was causing him mental distress and he asked Mr. Olsen to assist to address this situation.
23. Mr. Olsen failed and/or refused to investigate the matter.
24. In or around March 2021 Mr. Malhotra had the plaintiff's wife work for Mr. Malhotra as his assistant.

25. The plaintiff confronted Mr. Malhotra about the Affair on four separate occasions:
- a. In or around August or September 2020;
  - b. In or around March 2021;
  - c. In or around May 2021; and
  - d. In or around November 2022.
26. ~~Mr. Malhotra always denied the Affair.~~ On all four occasions, Mr. Malhotra falsely denied having the Affair. In fact, Mr. Malhotra suggested that the plaintiff was a psycho for even suggesting Mr. Malhotra was having the Affair.
23. ~~The plaintiff spoke to the Union President on three occasions, requesting that the Union investigate Mr. Malhotra's misconduct and dishonesty. The Union President and the Union refused to do so.~~
27. The plaintiff suffered a mental breakdown arising from various circumstances, including:
- a. Mr. Malhotra was having an affair with the plaintiff's wife, contrary to the Union Policy;
  - b. Mr. Malhotra made the plaintiff's wife his personal assistant;
  - c. The plaintiff was required to report to Mr. Malhotra;
  - d. Mr. Malhotra falsely denied having the Affair; and
  - e. The Union President refused to investigate the matter or take any steps to address Mr. Malhotra's dishonesty and breach of the Union Policy.

24. ~~Arising from Mr. Malhotra's dishonesty and the Union's refusal to investigate the matter (while still requiring the plaintiff to report to the person having an affair with his wife) the plaintiff suffered a mental breakdown.~~
28. By virtue of his dishonesty about the Affair while having the plaintiff and the plaintiff's wife report to him, Mr. Malhotra poisoned the working relationship between himself and the plaintiff.
29. In or around November 2022, at the Union's office, the plaintiff had two confrontations with Mr. Malhotra caused by Mr. Malhotra's continued refusal to acknowledge the Affair and deal with the reporting relationship requiring Mr. Barker to report to Mr. Malhotra.
30. As a result of the November 2022 workplace incidents, Mr. Malhotra suspended the plaintiff without pay and required him to complete certain anger management courses and other training before being allowed to return to work. The plaintiff was not paid his salary in December 2022 or January 2023.
31. By January 2023, the plaintiff completed a course on Workplace Violence & Harassment, offered by Worksite Safety, and a course on Respectful Workplaces, offered by BCIT. By then, he had been suspended without pay for approximately two months.
32. On or around February 6, 2023, the plaintiff asked Mr. Malhotra to recuse himself from making decisions relating to the plaintiff's employment due to Mr. Malhotra being in a conflict of interest as a result of the Affair and his dishonesty about it.
33. On or around February 7, 2023, Mr. Malhotra and Mr. Barker were scheduled to meet to discuss Mr. Barker's return to work. Mr. Malhotra unreasonably refused to meet with Mr. Barker.
34. On February 17, 2023, the defendant dismissed the plaintiff effective immediately without cause and without notice. The decision to terminate the plaintiff was made by

Mr. Malhotra alone, despite the plaintiff's request that Malhotra recuse himself from decisions regarding the plaintiff's employment due to Mr. Malhotra being in a conflict of interest as a result of the Affair.

~~28. On or about February 17, 2023, Mr. Barker was terminated.~~

35. At the time of dismissal, the plaintiff's remuneration and benefits included the following:

- a. base salary of \$128,390.08 per year;
- b. pension contributions equal to 29% of salary contributed to the LiUNA Staff & Affiliates Pension Fund;
- c. pension contributions equal to \$6,864.00 per year to the Labourers' Pension Plan of BC;
- d. vehicle allowance of \$1,000 per month;
- e. a company gas card for professional and personal use except when on holiday;
- f. cell phone and cell phone plan paid;
- g. BCAA membership;
- h. vacation entitlement of 6 weeks per year;
- i. paid statutory holidays;
- j. \$2,500 per year for insurance;
- k. vehicle repair costs for minor maintenance and mechanical repairs;

- l. medical and dental plan contributions; and
- m. contribution to Canada Pension Plan premiums.

### Wrongful Dismissal

- ~~30. On February 17, 2023, the defendant dismissed the plaintiff effective immediately without cause and without notice.~~
36. The dismissal of the plaintiff without cause and without reasonable notice was a wrongful dismissal.
37. The plaintiff was terminated in whole or in part due to:
- a. the fact that Mr. Malhotra did not want to admit the Affair knowing it was contrary to the Union Policy.
  - b. the acrimonious relationship between Mr. Malhotra and Mr. Barker arising out of the Affair and Mr. Malhotra's denials; or
  - c. Mr. Malhotra's personal dislike of Mr. Barker arising out of Mr. Barker confronting him about the Affair and the consequent deterioration of their working relationship.
38. Any performance issues on which the Union relied to justify the termination were caused by the intolerable work environment to which the plaintiff was subjected in having to report directly to the person having an affair with his wife and regularly and falsely denying it while suggesting the plaintiff was mentally unstable for suggesting it.
39. The termination provision incorporated by reference into the plaintiff's contract of employment is invalid and therefore the plaintiff is entitled to notice at common law.

**Breach of Duty of Honesty and Good Faith and Acting in Bad Faith** ~~Bad Faith in the Manner of Dismissal~~

~~33. The Union acted in bad faith in the manner of the plaintiff's dismissal, particulars of which are set out above at paragraphs 17-28.~~

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

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

- g. failing to consider or respond to the plaintiff's request to have Mr. Malhotra recuse himself from decisions relating to the plaintiff's employment due to a conflict of interest arising from the Affair;
- h. permitting Mr. Malhotra to make the decision, alone, to terminate the plaintiff's employment despite Mr. Malhotra being in a conflict of interest due to the Affair and the acrimonious relationship between the plaintiff and Mr. Malhotra. Due to this conflict of interest and acrimonious relationship, Mr. Malhotra was unable to exercise objective, independent judgment with respect to the plaintiff's employment and should not have been permitted by the Union to deal with Mr. Barker's employment;
- i. claiming that the plaintiff's termination was due in part to performance issues without recognizing the intolerable work environment to which the plaintiff was subjected as a result of Mr. Malhotra's misconduct and dishonesty in engaging and denying the Affair;
- j. terminating the plaintiff before conducting an investigation into the plaintiff's allegation that Mr. Malhotra had engaged in misconduct and dishonesty by engaging in the Affair and denying it;
- k. suspending the plaintiff without pay in November 2022 and requiring the plaintiff to take an anger management course after it was Mr. Malhotra that was being fundamentally dishonest and gaslighting the plaintiff by continually and falsely denying he was having an affair with the plaintiff's wife;
- l. not permitting the plaintiff to have a return to work meeting with a representative of the Union as agreed by the Union when it suspended the plaintiff without pay in November 2022;

- m. not permitting the plaintiff to make his case as to why he should not be terminated to anyone other than Mr. Malhotra, the person having an affair with his wife;
- n. terminating the plaintiff despite having represented to the plaintiff in November 2022 that he was being suspended without pay and he would be permitted to return to work upon completion of anger management training, which he completed at his own expense;
- o. terminating the plaintiff despite having already disciplined the plaintiff through a suspension without pay in November 2022.

(Collectively, the “Bad Faith Conduct”)

- 41. The Union’s pattern of bad faith conduct starting in February 2020 and continuing until the termination of the plaintiff’s employment was a component of the manner of dismissal and intimately connected to the Union’s final decision to terminate the plaintiff’s employment.

### **Vicarious Liability**

- 42. In the alternative, if any of the acts or omissions set out at paragraph 40 were acts or omissions of Mr. Malhotra acting outside of the scope of his duties as Business Manager, the Union is vicariously liable for said acts or omissions and the bad faith conduct to which they amount.

### **Damages**

- 43. Upon dismissal, the Union, relying on an unlawful termination clause, provided the plaintiff with severance pay in the amount of \$28,048.29.



44. As a result of the wrongful dismissal, the plaintiff has suffered a loss of employment income and is now owed pay in lieu of the remuneration and benefits that he otherwise would have earned during the reasonable notice period.

#### **Intentional Infliction of Mental Suffering by the Union**

- ~~36. The Union engaged in flagrant or outrageous conduct during the course of the plaintiff's employment, particulars of which are set out above at paragraphs 17-28 (the "Outrageous Conduct").~~

- ~~37. The Union's Outrageous Conduct (including but not limited to Mr. Malhotra's Affair, his repeated denials of the Affair and his unilateral termination of the plaintiff as a result of the Affair and the plaintiff's mental disability) was calculated to produce harm. The Outrageous Conduct resulted in a visible and provable illness suffered by the plaintiff.~~

#### **The Union's Counterclaim**

45. The Union did not allege cause at the time of the plaintiff's termination.
46. After the plaintiff commenced this action, the Union filed a counterclaim on January 23, 2024, alleging it had cause to terminate the plaintiff.
47. In the counterclaim, the Union does not rely on any information not available to it in February 2023, when it terminated the plaintiff without cause.
48. The Union, to now allege cause, relies on alleged misconduct for which it had already disciplined the plaintiff prior to termination, through a suspension without pay. A termination for alleged misconduct that has already been addressed through a suspension offends the principle against double jeopardy.

49. The counterclaim amounts to improper retaliation against the plaintiff for commencing legal proceedings. The Union's conduct in that respect is high-handed, vindictive and malicious.

## Part 2 - RELIEF SOUGHT

- a. General Damages for wrongful dismissal, including damages for bad faith in the manner of dismissal;
- b. Damages for breach of the duty of honesty and good faith;
- ~~b. Damages for intentional infliction of mental suffering;~~
- c. Aggravated damages;
- d. Punitive damages;
- e. Costs, including ~~S~~special costs;
- f. Interest;
- g. Such further and other relief as this Honourable Court may deem just.

## Part 3 - LEGAL BASIS

### Wrongful Dismissal

1. The facts establish a cause of action against the defendant for wrongful dismissal and breach of contract.
2. At common law, it is an implied term of an employment contract that an employer may only dismiss an employee without cause by providing reasonable notice of termination.

Dismissal of an employee without cause and without reasonable notice is a breach of the employment contract and is a wrongful dismissal of the employee.

3. The Union failed to provide the plaintiff with reasonable notice at common law as it is required to do. Instead, the Union seeks to rely on an unlawful termination provision in an attempt to improperly limit severance.
4. The termination of the employment contract by the defendant without cause and without reasonable, or any, notice is a wrongful dismissal of the plaintiff, entitling the plaintiff to wrongful dismissal damages.
5. ~~The plaintiff will rely on the Supreme Court Civil Rules including Rules 1-3 and 14-1.~~

#### **Breach of Duty of Honesty and Good Faith and Bad Faith in Manner of Termination and Subsequent to Termination**

6. The Union, by virtue of the employment contract, was required to act honestly and in good faith in its dealings with the plaintiff throughout the course of the plaintiff's employment.
7. This duty required the Union not to lie or knowingly mislead the plaintiff.
8. A violation of the duty of good faith is a contractual breach distinct from an employer's obligation to provide reasonable notice of termination and can give rise to distinct damages: *Matthews v. Ocean Nutrition Canada Ltd.*, 2020 SCC 26 at paras. 4, 39, 81, 83.
9. In engaging in the conduct set out at paragraph 40 above, the Union breached its duty of honesty and good faith.
10. Where a defendant acts in bad faith and/or dishonestly, the plaintiff is entitled to additional damages: *Bhasin v. Hrynew*, 2014 SCC 71; *Honda Canada Inc. v. Keays*, 2008 SCC 39.

11. The Union's manner of dismissal and retaliatory counterclaim constitutes bad faith conduct and a breach of the duty of honesty.
12. As a result of the Union's bad faith conduct, the plaintiff has suffered and continues to suffer damages and loss.
- ~~9. The Union's bad faith conduct is independently actionable and warrants an award of damages for breach of the duty to act with honesty and good faith.~~

### **~~Intentional Infliction of Mental Suffering~~**

- ~~10. The Union engaged in flagrant and outrageous conduct.~~
- ~~11. The Outrageous Conduct was calculated to produce harm.~~
- ~~12. The Outrageous Conduct resulted in the plaintiff suffering from a provable and visible illness.~~

### **Vicarious Liability**

13. The Union's bad faith conduct is independently actionable and warrants an award of damages for breach of the duty to act with honesty and good faith.
14. Where an employee commits an actionable wrong in the workplace, the employer is liable for the employee's conduct.
15. If any of the acts or omissions set out at paragraph 40 of Part 1 were the acts or omissions of Mr. Malhotra acting outside of the scope of his duties as Business Manager, the Union is vicariously liable for Mr. Malhotra's conduct.

### **Aggravated Damages**

16. The plaintiff suffered from mental distress resulting from the Bad Faith Conduct, including the manner of termination of his employment, and is entitled to aggravated damages. The mental distress suffered by the plaintiff as a result of the Bad Faith conduct went beyond the ordinary upset that accompanies the termination of employment.

### **Punitive Damages**

17. The Union engaged in outrageous conduct deserving of this Court's rebuke. The outrageous conduct includes:
- a. the Affair, the Union's failure to address Mr. Malhotra's misconduct, Mr. Malhotra's dishonesty and the Bad Faith Conduct, including the Union's bad faith termination of Mr. Barker's employment;
  - b. the Union's retaliatory counterclaim, alleging cause for the first time after terminating the plaintiff's employment without cause. The Union filed a counterclaim alleging cause despite not having discovered any new information after the plaintiff's termination justifying an allegation of after-acquired cause.
18. In the circumstances, a combined award of general and aggravated damages is not sufficient to address the Union's conduct and achieve the goals of punishment and deterrence.
19. The plaintiff is entitled to punitive damages.

### **Special Costs**

20. The Union's improper and retaliatory counterclaim amounts to reprehensible conduct in the litigation justifying an award of special costs.

Plaintiff's address for service:

Mitha Law Group  
Barristers and Solicitors  
570 Granville Street, Suite 300  
Vancouver, BC V6C 3P1  
Attention: Nazeer T. Mitha, KC

Email address for service:

Service by email will only be accepted if  
delivered to both email addresses below:  
service@mithalawgroup.ca  
nmitha@mithalawgroup.ca

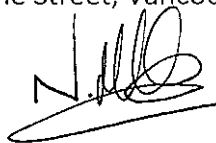
Place of trial:

Vancouver, British Columbia

The address of the registry is:

The Law Courts  
800 Smithe Street, Vancouver, BC V6Z 2E1

Dated: 07/Mar/2024



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Signature of lawyer for plaintiff  
Nazeer T. Mitha, KC

Rule 7-1(1) of the Supreme Court Civil Rules states:

- (1) Unless all parties of record consent or the court otherwise orders, each party of record to an action must, within 35 days after the end of the pleading period,
  - (a) prepare a list of documents in Form 22 that lists
    - (i) all documents that are or have been in the party's possession or control and that could, if available, be used by any party at trial to prove or disprove a material fact, and
    - (ii) all other documents to which the party intends to refer at trial, and
  - (b) serve the list on all parties of record.

## Appendix

### Part 1: CONCISE SUMMARY OF NATURE OF CLAIM:

Breach of contract and wrongful dismissal

### Part 2: THIS CLAIM ARISES FROM THE FOLLOWING:

#### A personal injury arising out of:

- ☐ a motor vehicle accident
- ☐ medical malpractice
- ☐ another cause

#### A dispute concerning:

- ☐ contaminated sites
- ☐ construction defects
- ☐ real property (real estate)
- ☐ personal property
- ☐ the provision of goods or services or other general commercial matters
- ☐ investment losses
- ☐ the lending of money
- ☒ an employment relationship
- ☐ a will or other issue concerning the probate of an estate
- ☐ a matter not listed here

### Part 3: THIS CLAIM INVOLVES:

- ☐ a class action
- ☐ maritime law
- ☐ aboriginal law



- ☐ constitutional law
- ☐ conflict of laws
- ☒ none of the above
- ☐ do not know

#### **Part 4: STATUTES**

*Court Order Interest Act*, R.S.B.C. 1996, c. 79