COURT OF APPEAL FOR ONTARIO

CITATION: Abbasbayli v. Fiera Foods Company, 2021 ONCA 95
DATE: 20210216
DOCKET: C66948

van Rensburg, Hourigan and Brown JJ.A.

BETWEEN

Ismail Abbasbayli

Plaintiff (Appellant)

and

Fiera Foods Company
Bakery Deluxe Company
2168587 Ontario Ltd.
David Gelbloom and
Boris Serebryany

Defendants (Respondents)

Nikolay Y. Chsherbinin and Shawn Quigg, for the appellant

Matthew P. Sammon and S. Jessica Roher, for the respondents

Heard: November 17, 2020 by video conference

On appeal from the order of Justice Andra Pollak of the Superior Court of Justice, dated December 16, 2019, with reasons reported at 2019 ONSC 948, and from the costs order, dated June 24, 2019, with reasons reported at 2019 ONSC 2905.

van Rensburg J.A.:

A. INTRODUCTION

[1] The appellant is pursuing an action arising out of the termination of his employment against the respondents: three corporations alleged to have been his common employer and two individual corporate directors. In addition to claiming wrongful dismissal damages and punitive damages, the appellant claims against the individual respondents unpaid vacation pay under s. 81 of the *Employment Standards Act, 2000,* S.O. 2000, c. 41 ("ESA") and s. 131 of Ontario's *Business Corporations Act*, R.S.O. 1990, c. B.16 ("OBCA"), and relief from oppression under s. 248 of the OBCA.

[2] The respondents brought a motion to strike certain claims and paragraphs of the statement of claim under rr. 21.01(1)(b) (for failure to disclose a reasonable cause of action), 25.06 (as pleading evidence) and 25.11 (as irrelevant and inflammatory) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. The motion judge struck certain pleadings without leave to amend and other paragraphs with leave to amend. She awarded costs of $14,569.52 against the appellant.

[3] The appellant asserts that the motion judge erred in striking his s. 81 ESA and s. 131 OBCA claims at paras. 56-61 of the statement of claim without leave to amend, and his s. 248 OBCA claim in the same paragraphs and paras. 14-23 and 40 of the statement of claim with leave to amend. He argues that none of the

paragraphs ought to have been struck, with or without leave to amend. He also seeks to appeal the costs award.

[4] For the reasons that follow I would allow the appeal, but only in part. I would uphold the motion judge's striking of the appellant's s. 81 ESA claim without leave to amend and her striking of the s. 248 OBCA claim with leave to amend. I would set aside the motion judge's order striking the appellant's s. 131 OBCA claim without leave to amend, as well as her order striking paras. 14-23 of the statement of claim with leave to amend. I would vary her order with respect to para. 40, striking only the text at para. 40(iii), and not requiring any other amendment to that paragraph. I would also vary the costs award in view of the outcome of the appeal.

B. THE STATEMENT OF CLAIM

[5] The appellant commenced an action in August 2018 with respect to the termination of his employment for cause on March 26, 2018. He alleges that the corporate respondents are manufacturers of frozen dough and fully baked bakery products and his common employer (which he refers to together as "Fiera"), and that each of the individual respondents was a director and the directing mind and will of one or more of the corporate respondents.

[6] According to the statement of claim, the appellant began working as a security guard at Fiera in 2002, moved to the role of boxing line operator, then to leadhand, and eventually back again to boxing line operator, the position he was

in when he was fired. He pleads that his employment was terminated allegedly for cause on March 26, 2018, after he was accused of punching a colleague's time card. The appellant pleads that the time-theft allegation was deliberately false, that Fiera failed to conduct a proper investigation, and that he was dismissed as a reprisal because he had raised concerns about manufacturing, health and safety, and storage requirement violations by Fiera, and he had taken steps to encourage employees to organize a labour union.

[7] The appellant seeks wrongful dismissal damages, moral damages "arising from the bad faith manner of dismissal", and punitive damages. At paras. 56-61 of the statement of claim (under the heading "Director's Liability"), he asserts claims against the two individual respondents, including under s. 131 of the OBCA, s. 81 of the ESA, and s. 248 of the OBCA.

C. THE MOTION JUDGE'S REASONS

[8] The respondents moved under r. 21.01(1)(b) to strike certain paragraphs of the statement of claim, asserting that they did not disclose a reasonable cause of action for oppression under s. 248 of the OBCA or a claim for unpaid wages under the OBCA and the ESA. They moved to strike other paragraphs as pleading evidence contrary to r. 25.06(1) and containing irrelevant and vexatious allegations contrary to r. 25.11(b).

[9] The motion judge first dealt with the claims against the individual respondents under s. 131 of the OBCA and s. 81 of the ESA, which are pleaded at paras. 56-61 of the statement of claim. The motion judge observed that under these statutory provisions, "[t]he directors of a corporation may be held jointly and severally liable for unpaid wages in specific circumstances if certain preconditions are met": at para. 6.

[10] She noted that s. 131 of the OBCA only provides for a director's liability for debts for services performed and vacation pay accrued and not for severance pay, termination pay, or damages for wrongful dismissal. The respondents had argued that the appellant did not plead that the directors were liable for debts for services performed or vacation pay accrued, and the motion judge concluded that he did not plead the material facts necessary to establish a cause of action under s. 131 of the OBCA. As for the claim under s. 81 of the ESA, the motion judge observed that the appellant had pleaded that the directors were liable for unpaid vacation pay under this provision, however, no such relief had been claimed in the prayer for relief, and the appellant had not included any material facts addressing any of the statutory requirements to establish the directors' liability under this section. Accordingly, the motion judge concluded that it was plain and obvious that the s. 131 OBCA and s. 81 ESA claims had no reasonable prospect of success, and she struck these claims without leave to amend.

[11] The motion judge then dealt very briefly with the other paragraphs of the statement of claim challenged by the respondents. After observing that paras. 14-23 and 40 of the statement of claim contained predominantly evidence, she struck those pleadings. The respondents had submitted that these paragraphs, as well as paras. 56-61, contained irrelevant facts and inflammatory attacks on the corporate respondents' integrity. She also referred to the respondents' submission that these paragraphs were included to embarrass them rather than to advance the action in any meaningful way, and she struck the pleadings as violating r. 25.11. The motion judge went on to grant the appellant leave to amend these paragraphs, observing that the respondents had provided the appellant with a roadmap of what was required to fix the pleadings.

[12] The parties returned to the motion judge as her reasons had not addressed the motion to strike the appellant's claim under s. 248 of the OBCA. In a supplementary endorsement the motion judge noted the respondents' arguments: that the appellant did not have standing to make a claim under s. 248, that he had not pleaded the necessary material facts to support the claim, and that he had not pleaded his reasonable expectations or that the conduct of the directors affected his ability to recover judgment against the corporate defendants. The motion judge struck the s. 248 OBCA claim with leave to amend, again stating that the respondents had provided the appellant with a roadmap of what was required to fix the pleading.

[13] In a separate endorsement, after receiving the parties' written submissions, the motion judge awarded costs of the motion to the respondents, fixed at $14,569.52.

D. JURISDICTION TO HEAR THE APPEAL

[14] As a preliminary issue, the respondents raise two objections to this court's jurisdiction to deal with certain issues on this appeal. First, they assert that the order striking the s. 131 OBCA claim is an "order made under" the OBCA which, pursuant to s. 255 of the OBCA, must be appealed to the Divisional Court. Second, they say that the motion judge's order striking pleadings in the statement of claim with leave to amend can only be appealed to the Divisional Court, with leave, pursuant to s. 19(1)(b) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 ("CJA"), as these parts of the order are interlocutory.

[15] It is not always clear whether an order dealing with an OBCA claim at an early stage is an "order made under" the OBCA. The question is whether the court, in making the order, was exercising a power sufficiently close to a legislative source under the OBCA or whether the source of authority is the common law or equity as opposed to the OBCA: see *Ontario Securities Commission v. McLaughlin*, 2009 ONCA 280, 248 OA.C. 54, at para. 16; *Buccilli v. Pillitteri*, 2016 ONCA 775, 410 D.L.R. (4th) 480, at para. 19. In *McLaughlin* O'Connor A.C.J.O. held that a final order dismissing a motion to amend a statement of defence to

plead certain defences against an oppression claim was such an order, such that the proper route of appeal was to the Divisional Court. In *Buccilli*, a panel of this court concluded that an order requiring certain interim payments to be made pending a later trial "to determine the value of the plaintiffs' declared interests and the appropriate equitable and monetary remedies under the [OBCA]" was rooted in a common law or equitable claim, such that s. 255 of the OBCA did not apply.

[16] It is unnecessary to determine whether the part of the motion judge's order that dismissed the appellant's s. 131 OBCA claim, standing alone, is an "order made under" the OBCA and appealable to the Divisional Court under s. 255. Section 6(2) of the CJA permits this court to hear and determine an appeal that lies to the Divisional Court "if an appeal in the same proceeding lies to and is taken to the Court of Appeal." This was an alternative basis for this court having taken jurisdiction in *Buccilli*, and it is equally available in the present case where there is also an appeal from the final order striking the s. 81 ESA claim.

[17] Section 6(2) also permits this court to take jurisdiction over the appeal of the interlocutory aspects of the order of the motion judge because there are aspects of the order that are appealable to this court. The motion judge struck certain claims without leave to amend (a final order) and other claims and paragraphs with leave to amend (an interlocutory order). This court can take jurisdiction under s. 6(2) where the issues relating to the final and interlocutory aspects of the order are so interrelated that once the issues arising from the final aspects of the order

were before this court, leave would inevitably have been granted on the issues arising from the interlocutory portions: see *Lax v. Lax* (2004), 239 D.L.R. (4th) 683 (Ont. C.A.), at para. 9; *Azzeh v. Legendre*, 2017 ONCA 385, 135 O.R. (3d) 721, at paras. 25-26, leave to appeal refused, [2017] S.C.C.A. No. 289; *2099082 Ontario Limited v. Varcon Construction Corporation*, 2020 ONCA 202, 97 C.L.R. (4th) 26, at para. 17; and *Cooper v. The Laundry Lounge, Inc.*, 2020 ONCA 166, at para. 2. This is such a case. The order under appeal arose out of a motion to address the sufficiency of a single pleading – the statement of claim in a wrongful dismissal action.

[18] Accordingly, I would not give effect to the respondents' challenge to this court's jurisdiction over the appeal of certain aspects of the motion judge's order, and I will now proceed to consider and determine all of the issues raised in this appeal.

E. DISCUSSION

[19] At issue on this appeal is whether the motion judge erred in striking the s. 131 OBCA and s. 81 ESA claims against the individual respondents without leave to amend and the s. 248 OBCA claim with leave to amend under r. 21.01(1)(b), and in striking with leave to amend paras. 14-23 and 40 of the statement of claim as pleading evidence (contrary to r. 25.06(1)) and as inflammatory and irrelevant (under r. 25.11(b)).

(1) The Order Striking Claims Under Rule 21.01(1)(b)

[20] I consider first the motion judge's order striking the s. 81 ESA and the s. 131 OBCA claims without leave to amend and the s. 248 OBCA claim with leave to amend. The motion judge struck these claims under r. 21.01(1)(b) for failure to disclose a reasonable cause of action. The test is whether, assuming that the facts as stated can be proved, and reading the pleading generously with allowances for drafting deficiencies, it is "plain and obvious" that an action or a claim within the action will not succeed: see *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, at pp. 979-80; *Wellington v. Ontario*, 2011 ONCA 274, 105 O.R. (3d) 81, at para. 14, leave to appeal refused, [2011] S.C.C.A. No. 258; *Grand River Enterprises Six Nations Ltd. v. Attorney General (Canada)*, 2017 ONCA 526, at paras. 15-16. Striking pleadings under this rule serves to "[weed] out the hopeless claims and [ensure] that those that have some chance of success go on to trial": see *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45, at para. 19. A pleading in a statement of claim will be deficient under this rule where it fails to plead material facts required to sustain a particular cause of action: see *Apotex Inc. v. Eli Lilly and Co.*, 2015 ONCA 305, 125 O.R. (3d) 561, at para. 21, leave to appeal refused, [2015] S.C.C.A. No. 291. The court should always consider whether the deficiency can be addressed through an amendment to the pleading: see *Tran v. University of Western Ontario*, 2015 ONCA 295, at paras. 26-27.

[21] As I will explain, in my view the motion judge was correct to have struck the claim under s. 81 of the ESA without leave to amend as it is plain and obvious that the claim could not succeed, and no amendment could have rectified the pleading in the circumstances of this case. However, the motion judge ought not to have struck the s. 131 OBCA claim without leave to amend. A claim for unpaid vacation pay under this section could be asserted by the appellant against the individual respondents, with the appropriate amendments to the pleading. Finally, the motion judge did not err in striking the s. 248 claim with leave to amend, as the appellant did not plead the necessary material facts to support the claim, and the respondents do not cross-appeal the motion judge's refusal to strike the s. 248 claim without leave to amend.

(a) The Section 81 ESA Claim

[22] Section 81 of the ESA provides that the directors of an employer are liable for an employee's unpaid wages (which includes vacation pay) in certain circumstances enumerated in ss. 81(1)(a) through (d). Section 81(1) is found under Part XX of the ESA entitled "Liability of Directors", and provides as follows:

> 81(1) The directors of an employer are jointly and severally liable for wages as provided in this Part if,
>
> > (a) the employer is insolvent, the employee has caused a claim for unpaid wages to be filed with the receiver appointed by a court with respect to the employer or with the employer's trustee in bankruptcy and the claim has not been paid;

> (b) an employment standards officer has made an order that the employer is liable for wages, unless the amount set out in the order has been paid or the employer has applied to have it reviewed;
>
> (c) an employment standards officer has made an order that a director is liable for wages, unless the amount set out in the order has been paid or the employer or the director has applied to have it reviewed; or
>
> (d) the Board [the Ontario Labour Relations Board] has issued, amended or affirmed an order under section 119, the order, as issued, amended or affirmed, requires the employer or the directors to pay wages and the amount set out in the order has not been paid.

[23] A director's liability for unpaid wages does not include severance or termination pay pursuant to s. 81(3), but it does include liability for vacation pay as provided for under the ESA or an employment contract for up to 12 months: ss. 81(3), (4) and (7). The appellant confirms that the only unpaid wages he is seeking from the individual respondents are three weeks' vacation pay.

[24] The appellant submits that the motion judge erred when she struck his s. 81 ESA claim because a claim for vacation pay was not included in the prayer for relief in para. 1 of the statement of claim. He argues that he ought to have been granted leave to amend to assert such a claim in his prayer for relief. The respondents contend that the motion judge properly struck the s. 81 ESA claim because the appellant did not and could not plead the existence of one of the necessary preconditions for a claim under that section.

[25] The appellant argues that he is entitled to make a claim against the individual respondents in this action under s. 81 of the ESA without the need for any of the conditions set out in s. 81(1). In asserting that his pleading is sufficient he relies on s. 81(2) of the ESA (which provides that proceedings against the employer under the ESA need not have been exhausted before proceedings may be commenced to collect wages from directors under Part XX of the ESA), as well as two cases: *Ricci v. Chippingham Financial Group Ltd.*, 2017 ONSC 6958 and *Beadle v. Gudgeon Brothers Ltd.*, 2006 CanLII 2612 (Ont. S.C.).

[26] Neither *Ricci* nor *Beadle* provides a persuasive precedent for the appellant. *Ricci* involved the appeal of an order to produce certain documents on discovery, where the appeal judge rejected the argument that the Master could not order production of documents relevant to, among other things, a s. 81 claim, before one of the preconditions in s. 81(1) had been met. The case did not deal with the sufficiency of the plaintiff/respondent's pleading of a s. 81 ESA claim. In *Beadle* the motion judge refused to strike a claim under s. 81 of the ESA, stating that "the pleading disclose[d] a cause of action against the moving defendants because on the date the claim was issued, the plaintiff was owed unpaid wages and accrued vacation pay by the corporate defendant", however, there is no indication of what was specifically pleaded and there was no further analysis of the issue. The plaintiff had acknowledged in evidence (the court was also considering a summary

judgment motion) that he had been paid his outstanding wages and vacation pay, so the s. 81 claim would not have succeeded in any event.

[27] On a plain reading of the ESA, a director is only liable for an employee's outstanding unpaid wages under s. 81 in certain prescribed circumstances. The employee must have filed a claim in the employer's receivership or bankruptcy (under s. 81(1)(a)); an employment standards officer must have made an order that the employer or a director is liable for the wages, which order is not under review (under ss. 81(1)(b) and (c)); or the Board must have issued, amended or affirmed such an order (under s. 81(1)(d)).

[28] Section 97(1) provides that a person who files a complaint under the ESA with respect to an alleged failure to pay wages may not commence a civil proceeding with respect to the same matter. In other words, employees are put to an election: to pursue their claims under the summary procedures provided for under the ESA (including the complaints procedure and orders by employment standards officers under ss. 103, 106 and 107, with the potential for review under s. 116) or to pursue litigation in the courts. It is in this context that s. 81(2) must be understood, permitting an employee to pursue claims against both the employer and directors in proceedings under Part XX of the ESA, which provides for directors' liability in certain circumstances.

[29] Typically, a claim against a director for unpaid wages under s. 81 of the ESA will operate and be enforced within the statutory regime. Assuming without deciding that a s. 81 claim could be pursued in a wrongful dismissal action, the appellant failed to set out any material facts in the statement of claim that, if proved, could satisfy any of the statutory preconditions. In the circumstances of this case, this defect cannot be cured with an amendment. The appellant's only proposed amendment is to amend para. 1 to specifically include this claim in the prayer for relief. He does not assert that any of the four preconditions exist nor does he propose to plead them; rather his position is simply that they are unnecessary. It is plain and obvious that the appellant's s. 81 ESA claim cannot succeed and as such it was properly struck without leave to amend.

(b) The Section 131 OBCA Claim

[30] The appellant also seeks to pursue his claim for unpaid vacation pay against the individual respondents under s. 131 of the OBCA. Section 131 provides that the directors of a corporation are jointly and severally liable for up to six months' wages and for accrued vacation pay for up to one year if (a) the corporation is sued in the action and execution is returned unsatisfied; or (b) the corporation is involved in certain insolvency proceedings and the employee's claim has been proved:

> 131(1) The directors of a corporation are jointly and severally liable to the employees of the corporation for all debts not exceeding six months' wages that become payable while they are directors for services performed for the corporation and for the vacation pay

> accrued while they are directors for not more than twelve months under the *Employment Standards Act*, and the regulations thereunder, or under any collective agreement made by the corporation.
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> (2) A director is liable under subsection (1) only if,
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> > (a) the corporation is sued in the action against the director and execution against the corporation is returned unsatisfied in whole or in part; or
> >
> > (b) before or after the action is commenced, the corporation goes into liquidation, is ordered to be wound up or makes an authorized assignment under the *Bankruptcy and Insolvency Act* (Canada), or a receiving order under that Act is made against it, and, in any such case, the claim for the debt has been proved.

[31] The motion judge observed that the appellant failed to plead material facts in the statement of claim necessary to establish a cause of action against the defendant directors pursuant to s. 131 of the OBCA.

[32] The respondents argue that s. 131 of the OBCA has no application to the appellant's claim as framed in the statement of claim. The only place where s. 131 is mentioned is at para. 57, which pleads that the individual respondents are jointly and severally liable under s. 131 (and under s. 248) of the OBCA for "the aforementioned claims", which would include all of the appellant's claims for damages, including for compensation in lieu of reasonable notice. The respondents correctly point out that the scope of s. 131 is limited to a claim for unpaid wages and vacation pay.

[33] In argument the appellant clarified that, although pleaded broadly, his intention is to claim only unpaid vacation pay against the directors under s. 131 of the OBCA. He says that the material facts were pleaded – that he was owed vacation pay at the date of termination and that it remained unpaid, and that he is entitled to make the claim at this time. He asserts that he is entitled to include the claim against the individual respondents in the action as this is contemplated by s. 131(2).

[34] I do not agree with the motion judge that the material facts to support a claim against the individual respondents under s. 131 have not been pleaded. While the s. 131 pleading as it currently stands is too broad (the “aforementioned claims” would include claims for damages for wrongful dismissal that are not covered under s. 131), the appellant did plead in para. 58 of the statement of claim that he was entitled to three weeks’ vacation pay at the time of his dismissal and that this pay was not received. While the appellant only pleaded this in para. 58 as a claim under s. 81 of the ESA, the claim for vacation pay is a claim that he can assert against the individual respondents under s. 131 of the OBCA. Further, it is not premature to assert the claim in this action: s. 131(2)(a) contemplates that the corporate employer will be sued in the same action as the director, although the director will not become liable to pay the accrued vacation pay until execution against the corporation is returned unsatisfied.

[35] While the pleading is awkward, the appellant has pleaded the necessary material facts to support a claim against the individual respondents under s. 131 of the OBCA for unpaid vacation pay. The statement of claim discloses a reasonable cause of action under s. 131 of the OBCA and the claim should not have been struck. The appellant will however need to amend the pleading to clarify that his claim under that section against the individual respondents is limited to a claim for vacation pay.

(c) The Section 248 OBCA Claim

[36] The appellant is seeking relief under s. 248 of the OBCA against the individual respondents as part of his wrongful dismissal action. Section 248 provides a "complainant" with a remedy for "oppression" – conduct that is "oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer of the corporation". "Complainant" is defined at s. 245 as (a) a registered holder or beneficial owner, and a former registered holder or beneficial owner, of a security of a corporation or any of its affiliates, (b) a director or an officer or a former director or officer of a corporation or of any of its affiliates, or (c) any other person who, in the discretion of the court, is a proper person to make a s. 248 application.

[37] The s. 248 OBCA claim is asserted at paras. 56-61 of the statement of claim under the heading "Director's Liability". As already noted, these paragraphs seek

to hold the individual respondents liable for various kinds of damages, relying in part on the statutory claims. The appellant alleges at para. 56 that the individual respondents "used their directorial powers oppressively by directing Fiera to dismiss [him] for cause", and at para. 57 he pleads that they "exercised the powers of directors in an oppressive manner, without legal or moral justification, and as such are jointly and severally liable for the aforementioned claims pursuant to sections 131 and, *inter alia*, 248 of the [OBCA]." At para. 59 he pleads that the individual respondents did not carry out their duties in good faith when they failed to instruct Fiera to remit the wages owing to him before the dismissal, made the decision on behalf of Fiera to dismiss him without notice or compensation, and did not issue him a record of employment. He pleads at para. 60 that he "remains a creditor and complainant of Fiera pursuant to the [OBCA]" and at para. 61 he pleads that the individual respondents are "liable for all compensation and damages sought against Fiera, jointly and severally", that are claimed in his prayer for relief.

[38] The respondents sought to strike the appellant's s. 248 claim under r. 21.01(1)(b). The motion judge, in supplementary reasons, struck the oppression claim with leave to amend, observing that the respondents had provided the appellant with a roadmap of what is required to fix the pleading. On the motion to strike, the respondents had submitted that the appellant did not have standing to make the claim, that he did not plead what the reasonable expectations were or

what the conduct was of the defendant directors which disregarded his reasonably held expectations, and that he did not plead that the directors' conduct affected his ability to recover judgment against the corporate defendants. It appears that the motion judge may have been referring to these arguments on the motion to strike as the "roadmap" guiding the appellant on how to fix his pleadings.

[39] The appellant argues that the motion judge erred in striking the s. 248 OBCA oppression claim, as he had pleaded the necessary material facts, and in failing to provide an explanation for striking the claim.

[40] The respondents argue that the motion judge correctly struck the s. 248 OBCA oppression claim as the appellant does not have standing to advance such a claim and has failed to plead that the conduct of the directors disregarded his reasonable expectations. The respondents however did not cross-appeal the motion judge's refusal to strike the s. 248 claim without leave to amend.

[41] The motion judge did not err in striking the oppression claim under s. 248 of the OBCA with leave to amend.

[42] I begin by noting that wrongful dismissal by itself will not usually justify a finding of oppression; nor is a terminated employee always a "complainant" who has standing to bring an oppression proceeding under s. 248 of the OBCA. Typically, oppression claims that are asserted in the context of wrongful dismissal are made by shareholder employees whose interests have been unfairly

disregarded: see e.g. *Walls v. Lewis* (2009), 97 O.R. (3d) 16 (S.C.). Claims have been asserted successfully by non-shareholder employees where a director's conduct has prevented the corporate employer from paying wages or wrongful dismissal damages: see e.g. *Churchill v. Aero Auction Sales*, 2019 ONSC 4766, 147 O.R. (3d) 44 (the director, also the plaintiff's former common law spouse, withheld wages, terminated her employment, caused the corporation to cease operations, and transferred its assets to a related corporation); *Downtown Eatery (1993) Ltd. v. Ontario* (2001), 200 D.L.R. (4th) 289 (Ont. C.A.), leave to appeal refused, [2001] S.C.C.A. No. 397 (directors caused the company to go out of business and transferred its assets to related companies they owned and operated a few months before a scheduled wrongful dismissal trial). Similarly, such a claim was permitted to proceed as part of a proposed class proceeding in *Brigaitis v. IQT, Ltd. c.o.b. as IQT Solutions*, 2014 ONSC 7, 22 B.L.R. (5th) 297, at paras. 90-99, where it was alleged that the directors had diverted funds for personal use before the corporation terminated the employment of employees, leaving insufficient funds to pay termination pay and other amounts.

[43] It is not sufficient for a terminated employee, as here, to plead that the individual defendants acted oppressively as directors of the corporate defendants, and to claim all of their damages against such individuals, relying on s. 248 of the OBCA. Nor is it sufficient to allege that the directors directed the appellant's termination, or that they failed to ensure that he received a record of employment.

[44] The necessary elements of an oppression claim were recently articulated by the Supreme Court in *Wilson v. Alharayeri*, 2017 SCC 39, [2017] 1 S.C.R. 1037. First, the complainant must identify the reasonably held expectations they claim to have been violated by the conduct at issue. Second, the complainant must show that these reasonable expectations were violated by corporate conduct that was oppressive or unfairly prejudicial to or that unfairly disregarded the interests of any security holder, creditor, director or officer of the corporation: at para. 24. The Supreme Court in *Wilson* also observed that to impose personal liability, there must be oppressive conduct that is properly attributable to the director's implication in the oppression and the imposition of personal liability must be fit in all the circumstances: at paras. 47-48.

[45] The appellant did not address these elements in his pleading. He did not plead his reasonable expectations of the directors or that those reasonable expectations were violated by oppressive corporate conduct. The appellant's reasonable expectations cannot simply be inferred from his pleadings of what the directors did or failed to do. As such, there were insufficient material facts in the statement of claim to establish a claim for oppression under s. 248 of the OBCA.

[46] I would therefore uphold the motion judge's order striking the s. 248 claim with leave to amend. Before leaving this ground of appeal however I would observe that nothing in these reasons is intended to determine whether a claim for an oppression remedy is appropriate in the circumstances of this case, whether the

appellant would have standing as a “complainant” (which is in the discretion of the court), or even whether, having been granted leave to amend his pleadings, the appellant will be able to plead the facts that are necessary to seek an oppression remedy against the individual respondents under s. 248.

(2) The Order Striking Paras. 14-23 and 40 With Leave to Amend

[47] I will next address the motion judge’s order striking paras. 14-23 and 40 of the statement of claim with leave to amend. The respondents moved to strike these paragraphs on the basis that they plead evidence, contrary to r. 25.06(1), and contain pleadings that are “scandalous, frivolous and vexatious”, contrary to r. 25.11(b). The motion judge struck these paragraphs with leave to amend. She did not identify the specific amendments that would address the deficiencies, observing that the respondents had provided the appellant with a roadmap of what was required to fix the pleadings.

[48] Rule 25.06(1) provides that pleadings are to contain a concise statement of the material facts on which the party relies for the claim or defence, but not the evidence by which the facts are to be proved. As Perell J. noted in *Jacobson v. Skurka*, 2015 ONSC 1699, 125 O.R. (3d) 279, at paras. 43-44, the difference between pleading material facts and pleading evidence is a difference in degree and not of kind, and the prohibition against pleading evidence is designed to restrain the pleading of facts that are subordinate and that merely tend toward

proving the truth of the material facts. As the same judge observed in *Mirshahi v. Suleman*, 2008 CanLII 64006 (Ont. S.C.), seeking to strike a pleading for pleading evidence can be a technical objection and pleading evidence may be closer to providing particulars, which in most cases is more helpful than harmful: at para. 21. Particulars are not evidence but "additional bits of information, or data, or detail, that flesh out the 'material facts'": see *Janssen-Ortho Inc. v. Amgen Canada Inc.* (2005), 256 D.L.R. (4th) 407 (Ont. C.A.), at paras. 89-90, citing *Copland v. Commodore Business Machines Ltd.* (1985), 52 O.R. (2d) 586 (S.C., Master), aff'd (1985), 52 O.R. (2d) 586 (note) (H.C.).

[49] Rule 25.11(b) provides that 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 is "scandalous, frivolous or vexatious". A scandalous pleading includes those parts of a pleading that are irrelevant, argumentative or inserted for colour, and unfounded and inflammatory attacks on the integrity of a party: see *George v. Harris*, [2000] O.J. No. 1762 (S.C.), at para. 20. The focus in considering a challenge to a pleading under this rule is on the relevance of the pleading to a cause of action or defence. As this court recently noted in *Huachangda Canada Holdings Inc. v. Solcz Group Inc.*, 2019 ONCA 649, 147 O.R. (3d) 644, at para. 15, "[a] fact that is relevant to a cause of action cannot be scandalous, frivolous or vexatious. On the other hand, a pleading that raises irrelevant or superfluous

allegations that cannot affect the outcome of an action is scandalous, frivolous or vexatious, and should be struck out".

[50] The appellant contends that the motion judge ought to have simply refused to strike paras. 14-23 and 40. He asserts that these paragraphs contain narrative facts related to his length of employment, the history of his working relationships, and the breaches of his employment contract and reprisals. The respondents assert that this court should not interfere with the motion judge's order striking these paragraphs with leave to amend on the basis that they contain evidence, inflammatory attacks and irrelevant facts.

[51] I begin by observing that the motion judge's reasons for striking these paragraphs with leave to amend are conclusory. She stated only that she found that paras. 14-23 and 40 contain predominantly evidence contrary to r. 25.06(1) and, after referring to the respondents' submissions that these paragraphs include irrelevant facts and inflammatory attacks on the corporate respondents' integrity and have been included to embarrass the respondents rather than to advance the action in any meaningful way, she held that these pleadings ought to be struck as they violate r. 25.11.

[52] Her reasons do not explain what the deficiencies are, which parts of what paragraphs contain evidence, or which parts contain irrelevant facts and inflammatory attacks. There is nothing in the reasons that would assist the

appellant in amending his pleading to address her concerns. Again, the motion judge refers to the respondents as having provided the appellant with a roadmap of what is required to fix the pleadings, however there was nothing in the record on this appeal that pointed to a "roadmap" for any required amendment.

[53] Since the motion judge did not provide reasons that would assist in understanding why she struck paras. 14-23 and 40, or the amendments required to address her concerns, it falls to this court to consider the matter afresh.

(a) Paragraphs 14 to 23

[54] Paragraphs 11-24 of the statement of claim are preceded by the heading "Employment History". The appellant pleads that he was hired by Fiera as a security guard, and that he moved to the position of boxing line operator, to leadhand, and eventually back to boxing line operator. He pleads, at paras. 14-23, that certain changes to his position as well as a reduction in his hours resulted from ongoing "production-related conflicts" he had with the Director of Manufacturing who routinely pressured him to overlook discrepancies in the raw goods, and that he refused to do so.

[55] The respondents submit that these paragraphs contain irrelevant and immaterial facts that are unrelated to the appellant's wrongful dismissal that have been inserted for the sole purpose of attacking the integrity of the corporate respondents. They point to pleadings in paras. 16 and 19 of irrelevant facts

concerning other employees, and they argue that the pleadings of historical conflict during the appellant's employment and well before his termination are irrelevant to his wrongful dismissal claim.

[56] I do not agree with the respondents that paras. 14-23, or any parts of these paragraphs, should be struck as pleading evidence or as containing irrelevant facts inserted only for atmosphere and to impugn the corporate respondents' integrity. At para. 37(a) the appellant pleads that "Fiera's allegations of time-theft are deliberately false and were deployed as a means to rid itself of an employee who: (a) repeatedly raised concerns about Fiera's failure to observe manufacturing, health and safety, and storage requirements". The facts pleaded at paras. 14-23 are relevant to the appellant's assertion that he was fired, not because of the alleged time-theft, but as a reprisal for having brought certain violations of manufacturing requirements to the attention of management. They plead a course of conduct alleged to have culminated in the appellant's termination as a reprisal for repeatedly raising issues. The references to two other employees at paras. 16 and 19 are not inflammatory or inserted merely for colour; rather they are part of the pleading that the appellant, after raising issues, was instructed to train other employees to replace him in the leadhand position, resulting in his return to the position of boxing line operator. While it was unnecessary for the appellant to identify the other employees by name in the statement of claim, this does not in

itself amount to a pleading of evidence that would require this part of the pleading to be struck.

[57] Accordingly, I would not strike any of these paragraphs, and I do not see any reasoned basis for requiring their amendment.

(b) Paragraph 40

[58] Paragraph 40 is a lengthy paragraph that begins as follows:

> 40. In support of the allegations referred to in paragraph 37(a) above, Abbasbayli states that during his tenure at Fiera, he observed, documented, recorded and regularly reported to Fiera's management, the following violations that, he states, routinely occurred, but to no avail. In this regard, Abbasbayli pleads that, *inter alia*, the following violations occurred…. [Emphasis in original.]

[59] Paragraph 40 continues with three headings: (i) Violation of Specific Requirements for the Refrigeration and Storing of Raw Goods; (ii) Violation of Specific Requirements for the Production of Allergen Goods; and (iii) Violation of Specific Requirements for the Storing of Dough. Each of the first two headings is followed by a list of instances of violations, identified by date, product, and code, that the appellant "observed, documented, recorded and regularly reported to Fiera's management" (emphasis in original). Under the first two headings, the appellant also asserts that the corporate respondents routinely breach specific requirements for the storing of raw goods and routinely mix allergen and non-allergen goods. The third heading is followed by three additional allegations, that

the corporate respondents (a) routinely violate requirements for storing dough by storing it in places that would allow it to expand and re-using dough that falls on the floor for orders that call for the same type of dough; (b) routinely defreeze, repack and then refreeze their raw goods, resulting in substandard baking properties; and (c) routinely mix stale baked goods with water to create a mixture that is combined with fresh dough which is then used to manufacture various goods.

[60] The respondents contend that para. 40 pleads evidence and makes allegations of wrongdoing against the corporate respondents that are inserted solely to impugn their integrity and for atmosphere. The appellant argues that this paragraph contains facts that are related to his pleading of bad faith conduct and the allegation at para. 37(a) that his employment was terminated as an act of reprisal after he "repeatedly raised concerns about Fiera's failure to observe manufacturing, health and safety, and storage requirements".

[61] I will deal first with the argument that para. 40 contains evidence. This is primarily based on the fact that the paragraph contains a lengthy list of violations that the appellant claims he observed and reported to management (at paras. 40(i)(a)-(fff) and (ii)(a)-(ii)). Each entry includes a date, product, and code, which presumably corresponds with Fiera's records. While it may well have been sufficient for the appellant to have pleaded that he observed, documented, recorded and regularly reported to Fiera's management violations between the

dates indicated (April 3, 2017 to March 12, 2018), or even a certain number of violations, the list of the various instances is a pleading of particulars, not evidence. I would not strike these parts of para. 40 as pleading evidence.

[62] I turn to the assertion that para. 40 contains irrelevant facts and inflammatory attacks – allegations of wrongdoing that are inserted only for colour and to impugn the integrity of the corporate respondents. I agree that it is appropriate to strike under r. 25.11(b) allegations of wrongdoing or illegal conduct of a party which have no relevance to a claim or defence: see e.g. *Foodcor Services Corp. v. Seven-Up Canada Inc.*, [1998] O.J. No. 2576 (Gen. Div.), at para. 32; *Ontario Consumers Home Services Inc. v. EnerCare Inc.*, 2014 ONSC 4154, at paras. 45-47; *Transamerica Occidental Life Insurance Co. v. Toronto-Dominion Bank*, [1997] O.J. No. 1 (Gen. Div.), at para. 12. In the present case, the question is whether the pleading of violations of various requirements for the production and storage of bakery products by the corporate respondents is relevant to the appellant's claim.

[63] In my view, most of what is contained in para. 40 is relevant to the appellant's claim that his employment was terminated as a reprisal. It identifies the occasions when he observed, documented, recorded and reported alleged manufacturing deficiencies and regulatory violations: at para. 40(i), violations of requirements for the refrigeration and storing of raw goods and at para. 40(ii), violations of requirements for the production of allergen goods. At the conclusion of each of para. 40(i) and (ii) the appellant pleads that "based on his extensive

knowledge of Fiera's violations" approximately 25% of all of its raw goods have been repacked in breach of requirements for the storage of raw goods and that Fiera disregards the requirements for the production of allergen goods.

[64] Paragraph 40(iii) however is different. Under the heading "Violation of Specific Requirements for the Storing of Dough" the appellant pleads various egregious practices by the corporate respondents, but there is no indication that the appellant "observed, documented, recorded and regularly reported" (emphasis in original) these practices. In contrast to the allegations under paras. 40(i) and (ii), there is no list of incidents, nor does the appellant connect these general allegations to his own knowledge or experience. Rather, he simply "states" and "pleads" the egregious practices described at para. 40(iii). There is no apparent connection between para. 40(iii) and the appellant's claim that his employment was terminated as a reprisal for bringing violations to the corporate respondents' attention. As such, it is appropriate to strike these other allegations of wrongdoing, which are not relevant to the appellant's wrongful dismissal claim.

[65] Accordingly, I would set aside the motion judge's order striking paras. 14-23 and 40 with leave to amend and instead only strike para. 40(iii) without leave to amend. No other amendment to that paragraph is required.

(3) Costs in the Court Below

[66] The motion judge awarded costs to the respondents in the sum of $14,569.52, based on their success on the motion. The appellant seeks to appeal the costs award.

[67] A motion judge's costs award is entitled to deference. Unless the judge has made an error in principle or the costs award is plainly wrong, an appellate court should not set aside the costs award: see *Hamilton v. Open Window Bakery Ltd.*, 2004 SCC 9, [2004] 1 S.C.R. 303, at para. 27. Where, as in this case, an appeal is allowed in whole or in part, it is appropriate to revisit the costs award in the court below having regard to the outcome on appeal.

[68] The appellant asserts that the motion judge erred in principle by failing to make a costs award that was proportionate, and in double-counting certain entries in the respondents' bill of costs. I disagree. In the context of the appellant's wrongful dismissal claim asserting various claims against the corporate and individual respondents, and the range of issues raised by the motion, the award of partial indemnity costs of $14,569.52, inclusive of HST and disbursements, reflected the respondents' substantial success at first instance, was proportionate and fair, and did not contain any element of double-counting.

[69] I would however reduce the costs award in the court below to reflect the appellant's partial success on appeal: see *Mihaylov v. 1165996 Ontario Inc.*, 2017

ONCA 218, at para. 8; *Mitchell v. Lewis*, 2017 ONCA 105, at paras. 3-5. I would vary the motion judge's costs order to fix the respondents' costs at $8,000, inclusive of disbursements and HST.

F. DISPOSITION

[70] For these reasons, I would allow the appeal to the extent and on the terms indicated. I would not award any costs of the appeal.

Released: February 16, 2021 ("K.M.v.R.")

"K. van Rensburg J.A."
"I agree. C.W. Hourigan J.A."
"I agree. David Brown J.A."