CITATION: Humphrey v. Mene, 2021 ONSC 2539
COURT FILE NO.: CV-19-00618420
DATE: 20210504

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
JACQUELYN HUMPHREY	)	Jordan Goldblatt and Iris Graham for the Plaintiff
Plaintiff	)	
	)	
– and –	)	
	)	
MENE INC.	)	Khrystina McMillan and Jessica Donen, for the Defendant
Defendant	)	
	)	
	)	
	)	
	)	**HEARD:** October 15, 2020

PAPAGEORGIOU J.

Nature of the Case and Motion

[1] The plaintiff, Jacquelyn Humphrey ("Ms. Humphrey"), claims wrongful dismissal against the defendant Menē Inc. ("Menē"). She brought a motion for summary judgment claiming damages for wrongful dismissal, aggravated damages for mental distress and punitive damages.

The Main Issue

[2] Although Menē originally terminated Ms. Humphrey for cause, approximately one year later, it withdrew this allegation and advised that it relied upon a provision in her employment agreement which limits her entitlement upon termination without cause to her entitlements under the *Employment Standards Act, 2000*, S.O. 2000, c. 41 ("ESA"), which in this case is approximately $2,283 (the "Without Cause Termination Provision"). In fact it has mistakenly paid $3,424.55, and agrees that it does not wish to claw that back. Ms. Humphrey argues that Menē

may not rely upon the Without Cause Termination Provision because there was no consideration and that in any event, Menē's repudiation of the employment agreement disentitles it from relying on it.

[3] For the reasons that follow, I am granting summary judgment in favour of Ms. Humphrey.

Analysis

What is the test on a summary judgment motion?

[4] In accordance with r. 20.04(2), of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 (the "Rules"), the court shall grant summary judgment if:

> (a) the court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence; or
>
> (b) the parties agree to have all or part of the claim determined by a summary judgment and the court is satisfied that it is appropriate to grant summary judgment.

[5] In determining whether there is a genuine issue requiring a trial, the court shall consider the evidence submitted by the parties and a judge may exercise any of the following powers under r. 20.04(2.1): (1) weighing the evidence; (2) evaluating the credibility of a deponent; and (3) drawing any reasonable inference from the evidence.

[6] The Supreme Court of Canada in *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87 ("*Hryniak*"), at para. 49, succinctly explained when there will be no genuine issue for trial:

> There will be no genuine issue requiring a trial when the judge is able to reach a fair and just determination on the merits on a motion for summary judgment. This will be the case when the process: (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result.

[7] In order to defeat a motion for summary judgment, the responding party must put forward some evidence to show that there is a genuine issue requiring a trial. A responding party on a summary judgment motion cannot rest solely on allegations in a pleading. Each side must "put

their best foot forward" with respect to the existence or non-existence of material issues to be tried: *Mazza v. Ornge Corporate Services Inc.*, 2016 ONCA 753, at para. 9. Furthermore, "a summary judgment motion cannot be defeated by vague references as to what may be adduced if the matter is allowed to proceed to trial": *Diao v. Zhao*, 2017 ONSC 5511, at para. 18.

[8] In this case, as will become apparent, there are some factual disputes and credibility issues which are genuine issues, in particular the manner in which Mr. Sebag is alleged to have treated Ms. Humphrey, the reasons why she was terminated. However, I am satisfied that using the expanded power in r. 20, deciding this case by way of the summary judgment procedure is appropriate and that I can arrive at a fair and just determination of the merits for the following reasons:

a. Courts have accepted that wrongful dismissal cases are "particularly well suited to summary judgment" as they "assist the parties in obtaining affordable access to the justice system.": *Asgari v. 975866 Ontario Ltd.* 2015 ONSC 7508 at para 4, *Merritt v. Tigercat Industries Inc.*, 2016 ONSC 1214, *Johar v. Best Buy Canada Ltd.*, 2016 ONSC 5287, *Di Tomaso v. Crown Metal Packaging Canada* LP, 2010 ONSC 5761, aff'd 2011 ONCA 469.

b. Menē initially opposed this matter being decided by way of summary judgment on the basis that the plaintiff was seeking exemplary damages and human rights damages. The plaintiff agreed to withdraw its claim for human rights damages in order to have this matter heard by way of summary judgment.

c. The parties ultimately agreed that summary judgment was appropriate with the exception of the plaintiff's argument that the Without Cause Termination Provision was void for want of consideration. Menē asserted that it had not been given fair notice of this issue.

d. I advised the parties of the credibility issues before me and requested further submissions from the parties on the appropriateness of summary judgment in this matter after the Court of Appeal released its decision in *Royal Bank of Canada v. 1643937 Ontario Inc.*, 2021 ONCA 98. Both parties doubled down on the appropriateness of summary judgment in this case on all issues

although Menē maintained that it was inappropriate to decide the consideration issue as a matter of fairness.

e. I then provided Menē with an opportunity to call viva voce evidence on the consideration issue and also gave the parties leave to conduct further in court cross-examinations as well as re-examinations. Menē advised that it did not wish to call additional evidence on the issue of consideration and that it would rest on the record. The parties also made a joint submission that neither party wished to conduct further cross-examination on any other issue.

f. The details of these supplementary submissions can be found in my endorsements dated March 8, 2021, April 6, 2021 and April 22, 2021.

g. I am entitled to assume that the record before me includes all the evidence that would be present at trial: *Tim Ludwig Professional Corporation v. BDO Canada LLP*, 2017 ONCA 292, 137 O.R. (3d) 570, at para. 54. In this case it is more than a permitted assumption; I have had three sets of submissions from the parties where they have affirmed that this is the record which they rest on. There is no reason to think that there would be any additional evidence if this matter proceeded to trial. Indeed, as will be seen, Mene claims to have lost all other relevant documents.

h. In this case there is a robust documentary record before me and many important facts are not in dispute. I am satisfied that the record permits me to find facts, make credibility findings and make the necessary inferences to decide this matter and that in all the circumstances summary judgment is a proportionate and fair process.

i. Further, I am satisfied that I have addressed any fairness concerns associated with deciding the credibility issues before me on a paper record. The parties are represented by competent counsel. They must have their reasons for not wishing to give viva voce evidence or conduct further cross-examinations before me. My sense is that both parties believe that the written record favours them and are confident that the other side cannot make out their case on the paper record. Although only one of them can be correct, this is a strategic decision which they

are entitled to make, just as they would be entitled to conduct no cross-examinations at trial or call no evidence at trial at all, and rest on discovery transcripts or admissions, even if those strategic decisions were unwise.

Background

[9] Ms. Humphrey began her career in communications in Toronto in 2012. In January 2016, she was a senior account executive at Edelman, a global communications firm, and secured Goldmoney Inc. ("Goldmoney") as a client. Through her work with Goldmoney, Ms. Humphrey came to know Mr. Sebag, its co-founder and CEO.

[10] On or around July 28, 2016, she became Goldmoney's Director of Global Communications. Soon her responsibilities included not only communications, but also investor relations and marketing.

[11] From December 2016 and throughout 2017, Ms. Humphrey assisted Mr. Sebag in creating a new subsidiary company, Menē – a publicly-traded designer, manufacturer, and online retailer of 24-karat gold and platinum jewellery, of which Mr. Sebag is the CEO.

[12] On or about September 26, 2017, Ms. Humphrey became the Vice President ("VP") Operations of Menē pursuant to a Consulting Services Agreement between Menē Inc., Goldmoney Inc. and her corporation JCKH Consulting Inc. (the "Consulting Services Agreement.")

[13] The Consulting Service Agreement provided that either Ms. Humphrey or Menē could terminate the agreement upon five days' notice.

Ms. Humphrey becomes COO

[14] There is some dispute in the record as to when Ms. Humphrey became Chief Operating Officer ("COO"). She says it was in May 2018. Menē says it was in July 2018. In my view, this timing dispute is not significant and need not be resolved on this motion.

[15] On July 30, 2018, Menē and JCKH Consulting Inc. signed an amending agreement reflecting this change (the "Amending Agreement") In particular, it set out additional compensation she would receive in terms of stock options.

[16] As COO, Ms. Humphrey continued to be involved in bringing Menē public on the TSX Venture Exchange on November 6, 2018.

The 2018 Employment Agreement

[17] On December 13, 2018, Ms. Humphrey signed a new employment agreement with Menē, with an effective start date of January 1, 2019 (the "December 2018 Agreement").

The Without Cause Termination Provision

[18] The termination provision of the December 2018 Employment Agreement provided as follows:

> TERMINATION
>
> 4.1 CAUSE
>
> The Company has the right, at any time, to terminate your employment under this Agreement for cause, in which case you shall have no entitlement to any notice or pay in lieu thereof, save and except for where required by the ESA,
>
> 4.2 WITHOUT CAUSE
>
> The Company may terminate your employment without cause upon providing you with only such minimum notice of termination, or pay in lieu thereof, and severance pay (if applicable) as is required by the ESA. You will also be paid any outstanding wages and vacation pay owed to you as of the date of termination. If applicable, the Company will continue to make its premium contributions on your behalf so as to provide for your participation in the Company's group benefit plans in which you participated immediately prior to termination, where required to do so under the ESA and for such minimum amount of time as required under the ESA. You understand that the payments noted in this paragraph shall satisfy any common law, contractual or statutory rights you may have to notice of termination of your employment, or pay in lieu of notice, and severance pay. Further, you understand and agree that this provision shall apply to you throughout your

> employment with the Company, regardless of its duration or any changes to your position or compensation.

The Without Cause Termination is Void for Want of Consideration

[19] Ms. Humphrey argues that the Without Cause Termination Provision is void for want of consideration because Ms. Humphrey's compensation under the December 2018 Agreement was the same as what she had previously been earning $90,000. She was not given the opportunity to negotiate her salary and received no additional benefits, and no additional shares or stock options in the company.

[20] Ms. Humphrey relies upon *Braiden v. La-Z-Boy Canada Limited*, 2008 ONCA 464 ("*Braiden*"), at paras. 48-49, where the Court stated:

> Beginning with *Francis v. Canadian Imperial Bank of Commerce* (1994), 21 O.R. (3d) 75 (Ont. C.A.), at 84, this court has repeatedly held that a new notice provision in a contract is "a tremendously significant modification of the implied term of reasonable notice", one that requires consideration flowing from the employer to support it. […]
>
> The requirement of consideration to support an amended agreement is especially important in the employment context where, generally, there is inequality in bargaining power between employees and employers. [Emphasis added.]

[21] See also *Holland v. Hostopia.com Inc.*, 2015 ONCA 762, 392 D.L.R. (4th) 650, and *Hobbs v. TDI Canada Ltd*. (2004), 246 D.L.R. (4th) 43 (C.A.), at para. 42, where Juriansz J.A. emphasized the importance of fresh consideration where an employment agreement is altered:

> The requirement of consideration to support an amended agreement is especially important in the employment context where, generally, there is inequality in bargaining power between employees and employers. Some employees may enjoy a measure of bargaining power when negotiating the terms of prospective employment, but once they have been hired and are dependent on the remuneration of the new job, they become more vulnerable. The law recognizes this vulnerability, and the courts should be careful to apply *Maguire v. Northland Drug. Co*, [1935] S.C.R. 412] and *Techniform Products v. Wolder* (2001), 56 O.R. (3d) 1 (C.A.)] only when, on the facts of the case, the employee gains increased security of employment, or other consideration, for agreeing to the new terms of employment.

[22] In reliance on cases decided in the commercial context, Menē argues that it is trite that valuable consideration "may consist either in some right, interest, profit, or benefit accruing to one party, or some forbearance, detriment, loss, or responsibility, given, suffered, or undertaken by the other": *Sandrin v. 126001 Ontario Inc.*, 2005 CanLII 18880 (Ont. S.C.), at para 129 citing *Currie v. Misa* (1875), L.R. 10 Exch. 153 (Eng Exch.) at 162. It argues that because Ms. Humphrey's status was formally changed from consultant to employee, she obtained additional benefits under the ESA.

[23] As noted above, I specifically gave Menē an opportunity to lead evidence on this issue and it declined. Menē states "given that, as a matter of law, the Court is aware of the various employer (Menē) responsibilities required under the ESA for the employee's (the Plaintiff's) benefit, any evidence from Menē on the particulars of the consideration (e.g. the amount of the employee remittances under the ESA such as EI or CPP payments made by Menē on the Plaintiff's behalf) is unlikely to of meaningful (if any) assistance to the Court in deciding this issue."

[24] I find Menē's argument in this regard is undermined by the fact that Menē has conceded (in its argument before me and in its factum) that Ms. Humphrey was at all times entitled to reasonable notice based upon the entire period that she was working for Goldmoney and Menē (assuming she was able to overcome the Without Cause Termination Provision). Mr. Sebag also acknowledged in his affidavit that "Ms. Humphrey was employed from July 2016 to February 2019: a period of three years" and Menē calculated her pay in lieu of notice under the ESA on that basis, including the time that she worked for Menē under the Consulting Services Agreement.

[25] In my view, Ms. Humphrey was an employee at all times based upon the above admissions but also based on the facts which include that she worked exclusively for Goldmoney and Menē, she was subject to their control and there is no good basis for concluding that she was engaged to perform her functions as a person in business on her own account: *Morison v. Ergo-Industrial Seating Systems Inc.*, 2016 ONSC 6725("*Morison*"), at para. 9; *Braiden*, at para. 32. Moreover, there was no persuasive evidence or argument before me that her responsibilities or functions as an "employee" COO pursuant to the 2018 Employment Agreement was any different than as COO

as a "consultant" pursuant to the Amending Agreement. In his affidavit Mr. Sebag baldly states that this "fundamentally changed [their] relationship from a consulting relationship to an employment relationship" which I note is inconsistent with the statement in his affidavit that she was an employee for three years. He was cross-examined on this issue and was evasive, striving to find some way that her duties as COO changed under the 2018 Employment Agreement without landing upon anything concrete. He ultimately said:

> A. Yeah, I mean, like I said, I'm not a lawyer, but I don't—I don't know that the formal agreement you're referring to—which, I guess, is the final agreement—wouldn't have changed her duties in any way. So I just can't answer that question.
>
> Q. Okay, To your knowledge, her duties didn't' change?
>
> A. To my knowledge, her duties obviously changed because we were growing, so she had more responsibility.

Therefore, the nature of her duties did not change, only the degree of responsibility and there is not even any evidence as to what the "more" responsibilities were. This issue is before me, Mene has had notice, had an opportunity call evidence and make argument. It has submitted no case law that suggests that the amount of responsibility is a distinguishing feature, on its own, as to whether someone is an employee or consultant, in law. Although Ms. Humphrey conceded that Mr. Sebag told her that initially she would be brought on as a consultant only (because everyone associated with Mene was initially brought on as a consultant), this evidence does not change the analysis of whether she was an employee in law.

[26] The obligations under the ESA exist for all employees regardless of what they are called. The fact that Menē was not complying with its ESA obligations in respect of Ms. Humphrey by making EI or CPP payments before the 2018 Employment Agreement does not mean that there is new consideration for the 2018 Employment Agreement when it finally did.

[27] Menē also argues that additional consideration flowed because the Consulting Services Agreement could be terminated on five days' notice whereas the 2018 Employment Agreement

could only be terminated in accordance with the ESA. It argues that this improved her situation. It is trite that termination provisions which do not comply with the minimum notice provisions contained in the ESA are unenforceable: *Cronk v. Canadian General Insurance Co*. (1995), 25 O.R. (3d) 505, 128 D.L.R. (4th) 147 ("*Cronk*"), at para. 69, citing *Machtinger v. HOJ Industries Ltd*. [1992] 1 S.C.R. 986 ("*Machtinger*").

[28] Ms. Humphrey's counsel argues that the five days' notice provision in the Consulting Services Agreement did not provide the minimum notice under s. 57 of the ESA and would be unenforceable. I agree.

[29] In all the circumstances, I am satisfied that no new consideration flowed to Ms. Humphrey pursuant to the 2018 Employment Agreement and, as such, the Without Cause Termination Provision is void and unenforceable.

[30] At this stage, I could proceed to evaluate the reasonable notice period and mitigation. However, in the event I am wrong about the Without Cause Termination Provision being void for lack of consideration, it is important that I consider Ms. Humphrey's argument that Menē's overall conduct constituted a repudiation which disentitles Menē from relying on the Without Cause Termination Provision. Indeed, this argument was Ms. Humphrey's main position and in any event the issues are also relevant to her claim for aggravated and punitive damages.

Ms. Humphrey was Constructively Dismissed

[31] On January 22, 2019, Ms. Humphrey wrote to Mr. Sebag and requested a salary review. In her email, she set out the reasons for her request, including that they had not addressed compensation since their discussions at the outset of Menē's development two years prior. In response, Mr. Sebag questioned Ms. Humphrey's dedication to the business.

[32] On February 16, 2019, Ms. Humphrey followed up with Mr. Sebag about her salary review but received no response.

[33] During the evening of February 18, 2019, Ms. Humphrey received a letter from Menē, dated February 16, 2019, advising that after "conversations with senior management and an investigation of recent performance", the company had decided to remove her as COO effective immediately, as well as suspend her from work with pay for two weeks, pending a final decision (the "Suspension Letter"). The Suspension Letter stated that at the end of the two-week period, the Board would decide either to terminate Ms. Humphrey or demote her to a non-executive level position, this latter option only if she "show[ed] interest" and if the Board "still consider[ed] that option as a viable alternative."

[34] In *Deol v. Dreyer Davison LLP*, 2020 BCSC 771 ("*Deol*"), at paras. 28-29, the court set out the principles for determining whether there has been a constructive dismissal:

> 27 In *Potter v New Brunswick (Legal Aid Services Commission*), 2015 SCC 10 (S.C.C.), the Supreme Court of Canada set out the guiding principles and test for determining whether there has been a constructive dismissal. There are two approaches: In the first approach, the court identifies an express or implied term of the contract that has been breached and then determines whether the breach was sufficiently serious to constitute a constructive dismissal.
>
> 28 With respect to the second approach, the Court said the following:
>
> > [33] However, an employer's conduct will also constitute constructive dismissal if it more generally shows that the employer intended not to be bound by the contract. In applying Farber, courts have held that an employee can be found to have been constructively dismissed without identifying a specific term that was breached if the employer's treatment of the employee made continued employment intolerable…This approach is necessarily a retrospective, as it requires a consideration of the cumulative effect of past acts by the employer and the determination of whether those acts evinced and intention to no longer be bound by the contract.
>
> 29 The employer's intent, and specifically whether the employer's treatment of an employee made continued employment intolerable, is assessed objectively. The trier of fact must determine whether the employer's conduct, when viewed in light of all of the circumstances would lead a reasonable person to conclude that the employer no longer intended to be bound by the terms of the contract. A course of conduct that does evince such an intention amounts cumulatively to an actual breach.

[35] There are several acts in this case which constitute and/or contribute to a finding that Ms. Humphrey was constructively dismissed at this point in time.

[36] The Suspension Letter fundamentally changed the terms of Ms. Humphrey's employment as it advised that if she was not terminated, she would be demoted and offered a non-executive position.

[37] Further, Menē took steps in connection with the Suspension Letter which fundamentally affected Ms. Humphrey's ability to continue in any role at Menē. Prior to receiving the Suspension Letter, one of Menē's vendors told Ms. Humphrey that she had received an email from Menē's Chief Technology Officer advising that Ms. Humphrey no longer worked at Menē. Ms. Humphrey attempted to access her business-related accounts and discovered that she could not.

[38] That afternoon, Ms. Humphrey received a second email from the same vendor, this time forwarding an email from Mr. Sebag to the vendor in which he told her that Ms. Humphrey was no longer COO of Menē. Ms. Humphrey later learned that Mr. Sebag had also sent this Slack message (a form of instant messaging) to all Menē employees at 4:23 a.m. that morning:

> Dear Team, yesterday the board of Menē Inc. has made the decision to suspend Jacquelyn Humphrey pending further investigation into a few matters.
>
> Please keep this entirely confidential. All of Jacquelyn's credentials have been suspended and she is not allowed to access our premises. Please report to myself, Steve, or Robert if she tries to contact you about work related matters or to gain any further insight into this.
>
> I have great respect for Jac's hard work and contributions to the business and we have certainly rewarded her for those contributions, but ultimately, as we scale and enter a new chapter of growth, the board has weighed a few recent events and decided she is not the right person to serve as COO within the organization.

[39] The prior communications with Menē's clients and the implications from the Slack message sent to other employees would have been damaging to Ms. Humphrey's ability to assume any other position within the company and be taken seriously. She was locked out of the premises. In my view, these statements implied misconduct and she would remain under a cloud if she

remained in the organization. Objectively, continued employment with Menē would have been intolerable in any capacity.

[40] Finally, "a fundamental and implied term of any employment relationship is that the employer will treat the employee with civility, decency, respect and dignity": *Deol*, at para. 31. In this case, there is significant evidence that Mr. Sebag violated this fundamental term throughout.

[41] Ms. Humphrey gave evidence that although she initially had a good relationship with Mr. Sebag, over time his behavior became increasingly hostile, belittling and controlling. Her evidence is corroborated by many examples of texts and emails Mr. Sebag sent to Ms. Humphrey which were unprofessional and abusive and have no place in a workplace, including swearing at her. These are some examples although her affidavit and attachments set out even more:

a. On or about July 5, 2017, when Ms. Humphrey told Mr. Sebag that she did not appreciate texts on weekends at 3 a.m., he replied, "you need to calm the fuck down…chill the F out"

b. In or around October 3, 2017, Ms. Humphrey's WhatsApp was not working and Mr. Sebag became angry with her and sent her an email stating, "I don't give a shot [sic] how but you need to get on WhatsApp//I'm so angry right now we have had the most important press say [sic] and you're fucking mia."

c. Later that month, Mr. Sebag lashed out at Ms. Humphrey as follows regarding some photos on the website:

> I DON'T GIVE A FUCK ABOUT YOUR ASSESSMENT//I GAVE YOU A CLEAR INSTRUCTION// TO ADD THAT PHOTO// I am going to lose it//I swear// I don't give a shot about what [sic] you think, your judgment has been terrible throughout the whole project// unless I ask for it you should never ever overrule me…I am not going to say it again// and the other one// you have no fucking clue// so stop acting like you do //.

d. Ms. Humphrey wrote to Mr. Sebag the next day and requested an apology to which he responded, "Yesterday is gone// You should be moving on…Don't be too emotional."

e. Shortly thereafter, when Ms. Humphrey asked Mr. Sebag to stop making rude comments about her in public channels, he again accused her of being too emotional: "…at this stage it seems you are more focused on emotional outbursts than responding to concrete work related issues."

f. On another occasion in October 2017, Mr. Sebag became angry with Ms. Humphrey when she suggested that they should have agreements in place before loaning jewellery to celebrity clients and again sent a series of texts as follows:

> I'm literally going to fire you//You are going to ruin my relationship with you [sic] nonsense//If you ever step in again and say something I haven't//I can't believe it you've literally tucked [sic] up again in yet another chance I gave you…You seem to be incapable of dealing with people on a celebrity level. Maybe you get star struck but you behave like a total idiot//I gave you a simple fucking task//And you tucked [sic] it up…What's wrong with you?// Why can't you follow instructions?...You should be like the background music in the mall//Pleasant but unassuming//Personality level should be zero..Get your shut [sic] together jacquelyn.

g. On May 15, 2018, Mr. Sebag wrote the plaintiff a string of texts:

> You know what//two days ago I was so happy with you// and now today I am so fucking angry// you are not running a tight ship the way I hoped// I see so many fucking issues its [sic] not even funny // How can you not be doing a daily inventory check and making sure products are being shown as available which are IN THE INVENTORY // I found two products which weren't available.

h. He also made inappropriate comments to her about her weight and appearances as follows:

> "Miss u and can't wait to give you a squeeze."
>
> "Also, the necklace looked great on you.//You look happy and thin."

[42] I add that Mr. Sebag's inappropriate language extends to other employees as well. This is an example of a company-wide email he sent on April 25, 2017:

> Here is one paradox I don't understand. Say you really hate your job, you hate the people you work with, you despise your boss, and you truly think management isn't doing a great job. You constantly speak negatively about the people that make it possible for you to earn a living, you repeatedly engage in gossip and the spread of misinformation, you form a clique with others hoping to induce them to agree that something is off and something is

> wrong? Well, if you have self worth and you're not a coward, why continue to work at such place? Or put differently, if you need the job and the. money, why be disrespectful to the place which provides you an honest living.
>
> This is a paradox to me. Either you enjoy where you work in which case it ticks all the boxes, or the place where you work is valuable as far as providing you with a source of income. Either way, exhibiting a lack of respect for your company, your colleagues, and cowardly spreading lies and misinformation instead of addressing the issues head on seems to provide zero value to your core position.
>
> Unless of course, your ultimate goal whether consciously or subconsciously is to not be productive with this behavior simply being an outlet. Yet, the paradox remains.
>
> Over the last few years, I have worked tirelessly to ensure that people in this group can earn a stable wage while building up a call option on future prosperity. It saddens me to see that there is a growing contingent of you who are simply cowards. You come to work each day and disrespect this company and its employees. Shame on you.
>
> **Now, hopefully I am right in which case I will hear from some of you with your resignations or apologies. Otherwise, I expect to see at least one of you commit "Seppuku" and get the fuck out. Loyalty and Respect above all else. You have a problem, you address it. [Emphasis added]**

[43] "Seppuku" is an ancient Japanese form of ritual suicide.

[44] Ms. Humphrey says that while she was employed, she did not realize the toxicity of the workplace environment but she recognizes what it was now that she is gone. I accept what she says in this regard as reasonable.

[45] I note that while the above texts are negative, they are not constructive or helpful feedback and all of the above exchanges occurred prior to her promotion to the position of COO. So, the examples above are how Mr. Sebag treated someone who he was happy enough with at the time to promote to an executive position.

[46] Mr. Sebag says in his affidavit that the text messages and examples cited by Ms. Humphrey are not examples of his usual conduct and that she has cherry-picked. One or two instances of inappropriate text messages might be cherry-picking. What I have before me is inappropriate text messaging over a period of time which demonstrates a pattern.

[47] Mr. Sebag also says he regrets the way he spoke to her at times, but that he was under a great amount of stress because of his personal investment in his start-up company. While it is admirable that he expresses his regret now, this does not excuse his behavior or change the impact it would have had on the workplace and Ms. Humphrey. He also says that he frequently praised her; this is not inconsistent with his having behaved in an inappropriate and abusive manner.

[48] Further, Mr. Sebag suggests that Ms. Humphrey had a similar and informal manner of communication which is simply not borne out by the text messages which he appended to his affidavit. She used the odd happy face or heart emoji and used the word "shit" in one message that I saw. It is not at all comparable in quantity or quality to the kinds of communications which Mr. Sebag used. And in any event, Mr. Sebag, as the employer in charge, set the tone.

[49] Mr. Sebag also argues that although Ms. Humphrey says that in hindsight she felt belittled and harassed, she "felt comfortable and empowered to stand up to him when she felt that [his] messages crossed a line." I find this troubling and a demonstrative misunderstanding of the power imbalance between him as employer and Ms. Humphrey as employee. The fact that Ms. Humphrey said things like: "Stop making rude comments about me in public channels", or "Stop treating me like shit", or "Stop taking whatever is happening out on me. All I do is work and do the best job I can," does not mean that she did not feel belittled or harassed or that she felt empowered. Indeed, it is a reasonable inference from Ms. Humphrey's reaction that she did not welcome his behaviour.

[50] During the argument, Menē's counsel also argued that I should be influenced by the fact that the written examples of Mr. Sebag's conduct in Ms. Humphrey's affidavit end in or around May 2018.

[51] The standard of proof is on a balance of probabilities. I find it difficult to accept that Mr. Sebag would have engaged in the kinds of communications before me which are demonstrably abusive and then suddenly stop or that these written communications are not reflective of his general manner of dealing with employees. As noted above, Menē declined to conduct any further cross-examination of Ms. Humphrey before me on this issue although given the opportunity.

[52] In any event, Mr. Sebag apologized in writing on December 24, 2018 for his "erratic" behavior; this, in addition to Ms. Humphrey's evidence, is support for the proposition that his mistreatment of her was ongoing. Further, as will become apparent below, Mr. Sebag has appended more recent text messaging to his affidavit which supports that his inappropriate behavior towards her was ongoing until terminated.

[53] The record before me supports Ms. Humphrey's evidence that the workplace was toxic and that she was mistreated by Mr. Sebag on an ongoing basis, and I so find.

[54] In *Matthews v. Ocean Nutrition Canada Ltd.*, 2020 SCC 26 ("*Matthews*"), the Supreme Court upheld a trial court's finding of constructive dismissal where the trial judge took into account a four-year period during which the employee had been mistreated.

[55] In my view, the cumulative impact of the toxic workplace, the imminent demotion, and the concurrent negative communications with Menē's clients and staff about Ms. Humphrey when she was suspended constitute constructive dismissal (or repudiation).

Ms. Humphrey accepts the repudiation

[56] In *Brown v. Belleville (City)*, 2013 ONCA 148, 114 O.R. (3d) 561, the court indicated that:

> [45] It appears to be settled law in Canada that where the innocent party to a repudiatory breach or anticipatory repudiation wishes to be discharged from the contract, the election to disaffirm the contract must be clearly and unequivocally communicated to the repudiating party within a reasonable time. Communication of the election to disaffirm or terminate the contract may be accomplished directly, by either oral or written words, or may be inferred from the conduct of the innocent party in the particular circumstances of the case. [Emphasis added.]

[57] On February 21, 2019, Ms. Humphrey's counsel sent a letter to Menē disputing the accuracy of the allegations in the Suspension Letter. There is a portion of the February 21, 2019 letter which is redacted following the statement "The balance of this letter is written without prejudice".

[58] When cross-examined, Ms. Humphrey says that after she received the Suspension Letter, she advised Menē through counsel that she was not willing to consider any other position within Menē. Further, Menē referenced Ms. Humphrey's counsel's letter in a subsequent memo dated February 26, 2019, where it indicated that it had considered offering her an alternate position but "the legal letter makes it clear this path is no longer viable." It also stated, "It seemed Jacquelyn preferred to seek legal advice and strategize a profitable exit from the company rather than address any of the issues raised in the letter." When cross-examined, Mr. Sebag stated that "As a result of the receipt of [the February 21, 2019] letter, the board realized that there was no other option for Ms. Humphrey and proceeded to terminate with cause."

[59] Based upon all of the above facts, I infer that the letter of February 21, 2019 from Ms. Humphrey's counsel contained some communication about terms for Ms. Humphrey's departure from Mene. In my view, taking into account the particular circumstances of this case, which includes a vulnerable employee in what appears to me to have been a "no win" situation, Ms. Humphrey's counsel's letter of February 21, 2019 constitutes sufficiently clear and unequivocal acceptance of the repudiation.

Menē formally terminates Ms. Humphrey

[60] On February 26, 2019, Menē delivered its termination letter (the "Board Memo"). The Board Memo claimed that there had been ongoing discussions into her performance for two months:

> The decision to suspend Jacquelyn from her position as Chief Operating Officer of the company was taken following extensive conversations between Thomas Kennedy, Roy Sebag, Steve Fray, Sunjoo Moon, Diana Picasso, and other members of the Menē Inc. executive team and board over a two-month period. The conversations were centered on increasing complaints and concerns which were being raised against Jacquelyn from her team mates, senior executives, and third-party colleagues. In aggregate, the claims put forward a reasonable cause for termination.

[61] The nature of the alleged issues included: irregular work hours, being late for photoshoots with a few examples, a vague allegation of an inability to separate work from personal life with

the only example cited being her having a glass of wine with lunch on one occasion, an allegation that she had breached confidentiality merely because she scheduled a meeting with a former executive of Goldmoney after she was suspended, vague concerns regarding her management skills, a failure to address quality control issues, vague customer service issues, and vague allegations of her "judgment". There were two specific incidents referenced which had arisen in or around February 2019:

a. **The Working Capital Issue**: In or around January 2019, Mr. Sebag, instructed Ms. Humphrey to review a disputed invoice with Brinks and have Brinks issue a corrected invoice. Thereafter, on February 14, 2019, Ms. Humphrey reported to the Board and Mr. Sebag that she had entered into negotiations with Brinks to overhaul the existing rate structure and billing practices such that Brinks would invoice Menē twice a month instead of once a month. On February 15, 2019, Mr. Sebag responded to Ms. Humphrey indicating his displeasure at the action she had taken. Consistent with his previous manner of communicating with her which his counsel argues there is no evidence of post May 2018, he states, "Why did you fucking agree to pay LVP bimonthly?" The Board Memo describes this as her making a unilateral decision which affected working capital (the "Working Capital Issue") and in his affidavit, Mr. Sebag describes this as Ms. Humphrey going beyond her authority. As will be seen below, there is an Amending Agreement which sets out her duties as COO and it expressly references her duty to oversee Menē's external vendors including Brinks. I note that in any event as Mr. Sebag says that he was able to negotiate a successful resolution with Brinks.

b. **The Insurance Issue:** Jewellery was stolen from one of Menē's locations, 38 Avenue Road, on or about December 28, 2018. In or around February 2019, the insurer denied a $50,000 claim (the "Insurance Issue"). The acting-Controller provided the Board a memo on this issue on February 22, 2019 which indicated that it was Ms. Humphrey's responsibility to request the addition of the 38 Avenue Road location to Menē's insurance policy. The report says that she did send emails to the insurer requesting the quotes for the addition of 38 Avenue Road, but Menē changed its insurer before the new policy including 38 Avenue Road was added. The report concludes that Ms. Humphrey did not request the addition of this property with the new

> insurer. Ms. Humphrey's response was that she believed that she had obtained all the necessary insurance coverage. In his affidavit, Mr. Sebag says that Ms. Humphrey lied to the Board about her failure to obtain the necessary insurance although in my view the evidence does not support that even if she made this mistake. Moreover, the report prepared by the investigator of this incident dated February 22, 2019, which Mr. Sebag references in his affidavit, did not conclude or even suggest that she had lied. I note as well that there is an email from Robert Lee of Goldmoney regarding this matter dated February 5, 2019 which states "We disagree with the decision. There is definitely a discord between what Menē submitted to be included in the polices and what the underwriters have on their policies. We are looking into this matter and will determine whether the policy information became inconsistent to what Menē requested and agreed to."

[62] In the Board Memo, it claimed that it had "extensive employee affidavits, complaints, and other concerns shared by the Board", as well as "additional materials" that it would "provide in any court process to further solidify [its] position that this termination is with cause".

[63] In letters dated February 21 and 27, 2019, Ms. Humphrey's counsel requested that Menē preserve all documents related to the investigation matter and made many unsuccessful attempts to obtain them. However, these materials have not been produced (with a limited exception set out below) because Menē ultimately advised on February 21, 2020 that documents related to this matter and Ms. Humphrey's termination had been destroyed in accordance with its document retention policy. Menē withdrew its cause allegation on January 15, 2020 because of this.

[64] Ms. Humphrey argues that Menē's stated reasons for terminating her were insincere or dishonest and that in fact, it terminated her because of her request for a raise or for other improper motivations.

[65] Ms. Humphrey drew many facts to my attention in support of the inferences she asks me to make:

a. Mr. Sebag had previously overreacted to Ms. Humphrey's request for vacation days, taking away an earlier offer to make her COO on that basis. Mr. Sebag made an offer to promote Ms. Humphrey to COO in August 2017 which he withdrew when she asked about her vacation days. Although Mr. Sebag denies this, saying that his discussions did not progress to a formal offer because the Board determined that she was not ready at that time, his evidence is inconsistent with the contemporaneous communications. He called her "fucking petty", and "greedy" and directed her to "stop talking about vacation days you're owed and stupid shit like that". Ultimately, Mr. Sebag sent the following text on this issue:

> You mistook the causation for why you were handed this opportunity and instead chose to use the promotion juncture to leverage more economic gain for yourself. It's ok, you have caused. Me great harm now, but I will roll up my sleeves and do your work for you and then hire a new COO that appreciates the opportunity!
>
> Take those vacation days that were so dear to you starting tomorrow as I said, and when you are back, a full scope of your PR/IR role will be expected for GM and various subsidiaries. You are a hard worker, nobody doubts that, but being an early stage founder and COO of a new startup requires-sacrifice.

b. Ms. Humphrey was never made aware of any ongoing investigation into her overall performance.

c. She did not receive any formal performance appraisals.

d. On December 24, 2018, Mr. Sebag sent Ms. Humphrey the following email which is inconsistent with the performance issues which he now says existed from the outset of her position as COO in July 2018:

> Jac, I want you to know that I have great respect for you both as an individual and my team mate. I know how hard you work and how much you care about your work ethic which by extension means this company. What we have done over the last two years has been extremely difficult and it has assuredly taken a toll on me. It would be expected that it also took its toll on you. But you charge on! And that's what I love.
>
> I want to take this moment to remind you of this respect I have for you and even beyond that, friendship. Thank you for everything. I know I have pushed you hard and I know that I am very erratic. It's been a touch [*sic*] year for me, please know that (on multiple fronts

> [*sic*]). I will try and continue to improve my work process but at the same time, I think you know that I never mean you any harm or disrespect.
>
> Let's look forward to a fantastic 2019 and lets [*sic*] remain flexible about how we do things. The goal is to build a great jewelry brand and how we get from here to there may require a lot of enhancements.

e. As noted above, Ms. Humphrey requested a salary review on January 22, 2019. In response, Mr. Sebag questioned her commitment and suggested that raising the issue would have consequences:

> While I certainly agree that much has been achieved, I have to disagree with you that we did not address your compensation since the outset of Men[ē] two years or so ago. As you may or may not recall, we had a specific conversation about this in the weeks and months leading up to the spinoff.
>
> It hasn't even been a few months and you are asking for a doubling + of your compensation. That's surprising and is not commensurate with the financial performance [*sic*] of the business.
>
> I am surprised because I thought you felt passionate about this business and were looking to build it, recognizing the opportunity which was provided to you by the Board of Directors and myself. Being overly focused on your own personal compensation at this juncture is in my view premature and confabulates your incentives with where we are in the long journey of building this business into a viable enterprise.
>
> Have you lost your passion for the business? Do you feel you are working too hard? I need to know if that's the case.
>
> At the salary level you indicate below, Men[ē] Inc. and its Board of Directors in its Compensation Committee would be required to stress test for comparable hires in that bracket and breadth of interdisciplinary experience they bring. That is to say beyond a communication background. This would be before any subsequent testing for quarterly and annual performance which I assure you would be nothing like what is presently being carried out.
>
> If you want me to proceed with a discussion on this matter with the Comp Committee [*sic*], I will at the next board meeting. I just feel it will bring up a lot more negatives than positives for your role.

f. Ms. Humphrey was suspended shortly afterwards by way of the Suspension Letter dated February 16, 2019. This letter is dated the same day that Ms. Humphrey followed up with Mr. Sebag in respect of her request for a salary review.

g. The Board Memo criticized Ms. Humphrey for having retained counsel and indicated that this action made it clear that she was no longer a "good fit" and accordingly would be terminated immediately.

h. The tone of the Termination Memo is angry in some places. With respect to her request for a raise, oddly the Memo discusses how absurd Ms. Humphrey's position is that she was terminated because she asked for a raise, but then expressed indignation over her "chutzpah" for having done so:

> The idea that the company or the board would decide to terminate a key employee because they asked for additional compensation is ridiculous and provably false. If anything, the coincidence here, from the perspective of Men[ē] Inc is that Jacqueline had the chutzpah to request an increase in her salary just a few weeks after negotiating and signing a revised employment agreement. If anything, a more plausible conspiracy theory would be that Jacquelyn hoped to be fired once she recognizes the substantial amount of deficiencies we will be detailing below were piling up against her. Perhaps she realized by mid-January that her greatest battle was not in keeping her job but in introducing a narrative that she was terminated without cause under some delusion of obtaining a golden parachute.

j. The Board Memo also states "it is clear that Jacquelyn Humphrey's compensation was beyond market and extraordinarily generous. For this reason, the Board of Directors of Menē Inc, and the senior executives feel strongly that Jacquelyn is not entitled to any further compensation or golden paracute [*sic*]"

[66] Ms. Humphrey also argues that the contents of the Board Memo and its stated reasons for termination are not credible or reliable for a variety of reasons.

[67] In his affidavit, Mr. Sebag says that performance issues began when Ms. Humphrey was promoted to the position of COO, which Menē argues was on July 30, 2018. There are significant discrepancies in the materials supporting Mr. Sebag's assertion in this regard, as well as Menē's

position that it had been having discussions about Ms. Humphrey for two months prior to the Suspension Letter and the Board Memo:

a. Menē has not produced contemporaneous documents which support the assertion in the Board Memo that there had been ongoing discussions among Thomas Kennedy, Roy Sebag, Steve Fray, Sunjoo Moon, Diana Picasso and other members of the executive team over a two-month period about Ms. Humphrey prior to her termination.

b. The Board Memo refers to "investigation of the myriad claims against her performance", "information which the board and the management team wrestled with over the course of the last few months", and "extensive employee affidavits, complaints, and other concerns shared by the Board", as well as "additional materials" that it would "provide in any court process to further solidify [its] position that this termination is with cause significant." With the exception of one signed statement dated February 22, 2019 from Matthew Borins and an email from Sunjoo Moon dated February 21, 2019 (both dated after Ms. Humphrey's suspension), Menē has been unable to produce these materials and relies on its document management system pursuant to which these materials were deleted. The only document retention policy Menē has produced is Goldmoney's. Critically – and as Mr. Sebag acknowledged on cross-examination – that policy *does not call for* the automatic deletion or destruction of any type of document other than instant messaging communications (such as Slack). In fact, the policy calls for the suspension of any record disposal where the company becomes aware of litigation. There is no satisfactory explanation as to what happened to these alleged documents.

c. Menē has not produced any Board Minutes documenting that these discussions were ongoing or that a formal investigation was taking place.

d. Menē has not produced any evidence from any IT expert or from anyone at Menē who attempted unsuccessfully to locate this missing evidence. Mr. Sebag makes a vague reference to working with Menē's IT service provider to recover documents, without indicating who that was, what they did and why that material was unrecoverable. And yet, Menē has been able to produce many other documents including substantial texts and Slack messages which I refer

to below. There is no explanation as to why Menē has some documents, but not the crucial documents referred to in the Board Memo. The issue of the missing documents has been a live issue between the parties throughout. I am drawing an adverse inference from Menē's failure to provide any evidence from an IT expert regarding the alleged loss of such documents.

e. With respect to the existence or non-existence of this "extensive" material referenced in the Board Memo, if these alleged documents had truly existed and been mistakenly deleted, all Menē had to do to prove their existence was send an email to all employees requesting that they confirm that they provided the Board with information/statements/affidavits or emails concerning Ms. Humphrey in or around late fall 2018 or early 2019. Even if the actual documents had been deleted, a statement from employees/directors that they had provided such information and a general description of what those statements said would have definitively proved that there was an ongoing investigation into allegedly longstanding performance issues and that Menē had evidence to back it up at the time which was mistakenly deleted. There is no evidence of this nature before me (apart from the affidavits which I will address below) and I am also drawing an adverse inference pursuant to r. 20.01(1).

f. I also find it puzzling and not credible that Mr. Sebag, or someone at Menē, would not have at least remembered who provided all of this extensive material, even if the actual documents had been destroyed and then at least set that information out. I am drawing an adverse inference that either these documents do not exist or that they would not be favourable to Mene.

g. Mr. Sebag's written response to Ms. Humphrey's request for a salary review on January 22, 2019 (set out above in full) notably omits any reference to any ongoing Board investigation or ongoing discussions. He complains that she is asking for a doubling of her compensation which "is not commensurate with the financial performance of the business." Notably, Mr. Sebag does not say that her request is not consistent with her performance. As well, I will repeat one portion of his response here:

> At the salary level you indicate below, Menē Inc. and its Board of Directors in its Compensation Committee would be required to stress test for comparable hires in that

> bracket and breadth of interdisciplinary experience they bring. That is to say beyond a communication background. This would be before any subsequent testing for quarterly and annual performance which I assure you would be nothing like what is presently being carried out.

This suggests that Ms. Humphrey's request for a salary increase would result in Menē doing investigations about what salary someone with her background would usually get in this position and would result in further consideration of her "quarterly and annual performance which …is nothing like what is presently being carried out" (emphasis added). On their face, these words mean that there was nothing significant being considered about her performance as of January 22, 2019, but if she requested a raise, there would be greater scrutiny of her performance. All of the communications before me from Mr. Sebag demonstrate that he is not the sort of person who would hold back negative information. It is difficult to accept that he would not have notified her of this significant investigation or discussions at this time if they had in fact been ongoing.

[68] There are also discrepancies in the evidence given by Mr. Sebag which support the conclusion that he may not be a reliable or credible witness. There are many examples of inconsistencies throughout these reasons, but these are a few important examples:

[69] First, the incorrect evidence about what Menē's document destruction policy requires is sworn evidence provided by Mr. Sebag.

[70] Second, in his affidavit, Mr. Sebag swears that Ms. Humphrey did not fulfill the usual functions of senior operations directors or officers at other businesses with different business models and for this reason he was comfortable giving her the role of COO despite her lack of experience or expertise in business administration. He says that "although she was permitted to make minor decisions pertaining to the Company's operations, Humphrey was not considered to be a significant intellectual capital." Menē then argues in its factum that the "undisputed evidence is that the true nature of Humphrey's role with Menē fell short of the type of duties and obligations typically entrusted to a COO of a company" and it relies upon this as part of its reasons for a shorter notice period. However, the Amending Agreement whereby she was initially appointed

COO stated that she would "oversee operations and manage personnel in operations, design, marketing and customer service roles, work with and oversee external vendors and agencies, including but not limited to manufacturing, Brink's and PR matters, along with **other duties and responsibilities customary for the position of Chief Operating Officer**" (emphasis added). It is a reasonable inference that Mr. Sebag has reconstructed what Ms. Humphrey's position entailed to enable Menē to advance arguments which would reduce the notice period.

[71] Third, in paragraph 13 of his affidavit Mr. Sebag says that he purchased a new cell phone around the time Ms. Humphrey was terminated. He says he does not back up his phone and so "no longer had access to our text messages or communications on Whatsapp." He confirms in paragraph 75 that he has lost the bulk of his electronic communications with Humphrey. However, he has appended approximately 38 pages of text messages/electronic communications between him and Ms. Humphrey in support of his various propositions in his affidavit. These texts are dated as far back as 2017 even though he says he lost access to his texts when Ms. Humphrey left in February 2019. There is no explanation as to why he has access to such texts given his above evidence.

[72] Some of these texts are offered in support of Mr. Sebag's evidence that he "repeatedly advised Humphrey of [his] doubts of her ability to continue in such senior positions."

[73] The first tranche of texts is dated 2017 and not relevant to the issues in this case since Menē says performance issues related to its honest belief in cause began in July 2018 after her promotion.

[74] The second tranche of texts come from 20 days between September 2018 and January 2019. These texts do not support the existence of the performance issues set out in the Board Memo like Ms. Humphrey's alleged irregular hours, inappropriate attendance at photoshoots, her management style or judgment; nor do they support that anyone was concerned about her overall performance. It is simply not credible that there would be all these ongoing crucial performance issues without Mr. Sebag referring to them in the hundreds of text messages that he references. Nor can these texts be reasonably interpreted in the manner which Mr. Sebag has.

[75] The following is a summary of these text messages.

[76] There are text exchanges on September 11, 13, 15, 16, 17, 19, 20, 26, 29, November 16, 17, 20 and December 31, 2018 where there are no issues raised and the discussion is quite ordinary and/or positive in parts. For example, Ms. Humphrey sends something to Mr. Sebag on September 14 (which is not apparent in the text) and he says, "I love it." There are texts on November 15, 2018 where Mr. Sebag praises Ms. Humphrey saying, "you and me and Diana built a company that is now valued at more than what me and josh and James built."

[77] In the text exchange on September 12, 2018, Mr. Sebag references some issue regarding a package that he was waiting for that he never received, although the bulk of the texts exchanged on this date are quite positive. At one point, Mr. Sebag says, "Great! We did so good."

[78] In the string of texts sent by him on September 14, 2018, Mr. Sebag makes various threats without any reference to why he was upset:

> 10:50:07: I will fire you on a dime.
>
> 10:50:15: If you disrespect me again like that
>
> 10:50:20: I won't even think twice about it.
>
> 10:50:23: you're out of line
>
> 10:50:30: And extremely disrespectful

[79] Either Mr. Sebag has selectively produced these text messages out of context, not setting out other texts exchanged that day for some reason, or these text messages were delivered to Ms. Humphrey without any context at all. In either case, this evidence is problematic.

[80] There is a string of texts on November 21, 2018 beginning at 9:35 a.m. where Mr. Sebag begins by complaining that "I just want to put on the record that its [sic] been 12 hours since I've tried to reach you." He then proceeds to complain that "people are not working hard enough" that it is "all on you", that "to be honest I don't get the feeling that you're putting in 10 hour days even", that her approach was "nonchalant and would not work in 2019", that she "need[ed] to

improve [her] efficiency when communicating", that "apparently nobody is around after 5 pm". A lot of the text exchange was about other employees and the complaints about Ms. Humphrey do not appear to be tied to anything specific which Ms. Humphrey had or had not done apart from Mr. Sebag's inability to contact her during one 12-hour period. Ms. Humphrey responds to these texts at the time saying that he kept "prefacing these messages with opinions that are not based on fact" and that she was only inaccessible between the hours of 10 p.m. and 10 a.m. on that occasion because she was busy and then sleeping.

[81] Menē's counsel makes much of the fact that in the November 21, 2018 texts Ms. Humphrey says, "After telling me a few weeks ago you want me to keep a 9-5 professional schedule and relationship." She argues this is confirmation that Ms. Humphrey was told she was regularly not keeping a 9-5 schedule. I disagree. This statement follows almost immediately after Ms. Humphrey saying that she was only inaccessible between 10 p.m. and 10 a.m. and in my view, she was pointing out that he had told her previously to keep a 9-5 schedule as a defence to Mr. Sebag's criticism that he could not reach her that evening. When she was cross-examined on this specific statement she said it related to one specific situation where he could not reach her. I note that the thirty eight pages of text messages appended to Mr. Sebag's affidavit show that Ms. Humphrey responded very quickly and professionally to Mr. Sebag's texts and that the communications which they had were throughout the day often into the evening. There are approximately 140 text messages exchanged after 7 p.m., with most of those being after 9 p.m.

[82] As well, in the November 21, 2018 texts, Ms. Humphrey also offered to set up regular times to speak to ensure regular communication, but Mr. Sebag advised that this did not work for him.

[83] There is another exchange on December 27, 2018 where Mr. Sebag expresses unhappiness about Ms. Humphrey's failure to respond to someone on Instagram because she did not have a password. Mr. Sebag wrote: "Send him a new fucking ring and some credit" and "The fact that you didn't think to respond via our Instagram (which I just did) claiming you don't have a fucking password?"

[84] There are also three texts from Mr. Sebag on January 17, 2019 where he states, "What kind of response is that?" followed by "Youre [*sic*] job is to handle things not create drama for me." There are no other texts displayed from this date and it is impossible to know what his complaint is.

[85] Mr. Sebag obviously has access to significant text messages exchanged with Ms. Humphrey over the last several years despite the alleged automatic destruction policy. I am inferring that he has attached the text messages that are most helpful to Mene's position that there were extensive performance issues and that these issues were communicated to Ms. Humphrey. However, for the most part, these texts appear to be ordinary daily communications about work issues, interspersed with unprofessional and overly aggressive communications from Mr. Sebag about things which are unclear or on issues which do not appear that significant. It is important to his credibility that Mr. Sebag thinks these texts are examples of appropriate feedback and warnings to Ms. Humphrey and that they support his sworn evidence that he "repeatedly advised Humphrey of [his] doubts of her ability to continue in such senior positions." They do not.

[86] As well, when Mr. Sebag was cross-examined out of court, he was evasive and inconsistent. For example, although he initially conceded that Mene did not seek Ms. Humphrey's input into the investigation it was allegedly doing of all performance issues, he then continued to say that it did:

> Q. There's no document that shows that Ms. Humphrey was aware she was being investigated is there?
>
> A. Investigation means to seek out the truth. So an event takes place, and someone is responsible, and we're trying to seek out the truth.
>
> So at the executive level, this was taking place, I guess you could say, formally at the executive level. But informally at the board level—hadn't made its way up to the board just yet. But by the time all the evidence was gathered and we sought the truth, we obtained the truth which was Jacqueline was responsible for the matter.

> Q. Mr. Sebag, that was not my question. My question is there's no document that shows Ms. Humphrey was aware she was being investigated. I believe you've already agreed with me that there's no document in which she was told she was being investigated; is that right?
>
> A. So I am really happy to agree with you on things where I agree, but in this case, I just can't agree with you because she clearly received emails and communications from me and other executives that were seeking out the truth to what happened. Thus they were investigating what took place.
>
> So I don't see how she couldn't have known that she was under this exploration for the truth of events. She was clearly under investigation. She wasn't—she didn't know she was under investigation by the board. I agree with you there. But she was clearly under investigation by the executive team.

[87] He was also evasive over the destruction of documents saying that although he understood Mr. Goldblatt's letter of February 21, 2020 to keep all relevant documents, Mene "was aware they would have to provide materials but not specific materials", "Well, we received the letter which didn't refer to specific documents. It said 'relevant documents.'" There is a much lengthier discussion than just these two statements related to this issue which is evasive. And despite the fact that the only two written statements produced were those of Ms. Moon dated February 21, 2019 and Mr. Borins, dated February 22, 2019, he insisted "After receiving the letter, we preserved the documents that were relevant to the matter, but we did not go out of our way to somehow fish out her personal communications on Slack", suggesting that the only missing information is Ms. Humphrey's Slack messages. And then despite this statement, during the cross-examination he continued to assert that documents supporting the investigation were mistakenly deleted by the document destruction policy.

[88] For all of the above reasons, I find that Mr. Sebag is not a reliable or credible witness.

[89] In contrast, I found Ms. Humphrey's cross-examination answers more direct and forthright, responsive to questions asked and consistent with her affidavit evidence.

[90] Because Menē says that it lost the relevant documents in the possession of the Board, what it has sought to do in this motion is provide evidence from three witnesses sworn in February 2020, well over a year after Ms. Humphrey was terminated. One of these witnesses is Sunjoo Moon, who provided the email to Menē dated February 21, 2019 referenced above and the other is Matthew Borins who provided the statement dated February 22, 2019.

[91] Although Ms. Humphrey did not cross-examine these witnesses, the court must still weigh and assess their evidence. These affidavits are problematic and unpersuasive for a number of reasons:

a. All three affidavits reference alleged performance issues prior to Ms. Humphrey being appointed COO. These could not have been that significant given her subsequent promotion. Nor could they have been the basis for Mene's honest belief it had cause since Mene references the time period as after she was appointed COO as when performance issues began;

b. Two of these affiants state that they were on the Board and yet neither of them confirms that there were extensive ongoing discussions about Ms. Humphrey by the Board for two months prior to termination or that it was doing a general investigation of her. What they say is that they provided statements in February 2019;

c. Ms. Moon's and Mr. Borins both set out alleged performance issues that were not referenced in their statements made to the Board at the time of termination. The issue in this case is not whether Mene had cause but whether it had an honest belief that it did; what is relevant is the issues of which the Board was made aware of at the time, not what the witnesses have later remembered or reconstructed;

d. These witnesses hold Ms. Humphrey responsible for significant business operations issues like addressing long standing quality control problems. This is inconsistent with Mr. Sebag's evidence that Ms. Humphrey was only permitted to make "minor decisions" and had only a "limited role and authority". Mene cannot have it both ways.

e. There are very few contemporaneous documents supporting what these witnesses say and the documents they do attach are in many instances unsupportive of what they have sworn to.

[92] It is important to review and weigh this evidence in detail.

[93] Steve Fray, the interim Chief Financial Officer and former Board Member of Menē says that he began raising concerns with the Board in October 2018. The main issues in his affidavit are as follows:

a. **Failure to establish transition measures.** Mr. Fray says Ms. Humphrey failed to establish transition measures for departing employees. The first example he cites is from April 2018 when Ms. Humphrey had not yet even been promoted to the position of COO.

A second incident occurred in September 2018 when a Menē employee left and an invoice sent to that employee was not paid because this employee's emails were not being forwarded to other staff at Menē. The contemporaneous documents Mr. Fray attaches to his affidavit do not support that anyone at the time thought this occurred because of any failing on the part of Ms. Humphrey. His initial email to her simply states, "Hi Jac, This email was sent to CS this afternoon, from john@retail-is-detail.coam regarding payment owing for the Geneva project." Then, Ms. Humphrey immediately contacted the customer who thanked her for her quick response. Mr. Sebag was copied and says "We will review this and pay whatever we owe. It's unfortunate but someone on both sides should have recognized the project was being managed towards a budget which defies any logic for a 300 square foot store." Mr. Fray then emailed Ms. Humphrey and said, "Please review all of Nate's emails to ensure we do not have any of these matters and report back to us. The baseline test is any pending matter that already have costs accrued/outstanding [*sic*]."

After this incident, there is no evidence of any subsequent written (or other) direction to Ms. Humphrey from anyone informing her that she had failed in her duties and needed to ensure that she set up this system this to avoid any future issues. And clearly, Mr. Fray has access to

emails on this issue which makes little sense given Menē's position about all documents being destroyed by its document management system.

Mene's counsel makes much of the fact that Ms. Humphrey admitted that she discussed some of these issues with Mr. Fray but reading the entire exchange on this issue, Ms. Humphrey simply agrees that he raised some issues with her that they worked on together but she did not consider these to be performance issues. She was not asked what those conversations were specifically about.

b. **Absences from work.** Mr. Fray complains Ms. Humphrey was absent from work because of her frequent travels to bring jewellery to photoshoots. Mr. Fray says he approached Mr. Sebag about this issue in April 2018. Again, this was before Ms. Humphrey was promoted. In any event, another affidavit which Menē has provided – that of Sunjoo Moon who is a Director – specifically says it was Menē's practice until January 2019 that Ms. Humphrey would travel to photoshoots with the jewellery. At least until that time, her travelling was a company decision and she cannot be criticized for that and certainly not in April 2018. As well, there is a specific section in the 2018 Employment Agreement requiring her to be available for travel. Again, I find it difficult to accept that her travelling was such a significant issue and yet her recent contract made reference to it as something she was required to do.

c. **Quality Control issues.** Even though Mr. Fray says that Ms. Humphrey had to obtain instructions for all major operations matters and did not have authority to make important decisions, he holds her responsible for failing to address ongoing quality control issues. He references a time period between September 2017 and the summer of 2018 when he was raising these issues with her even though Mene says performance issues began when she was promoted in July 2018. Mr. Fray says Ms. Humphrey failed to hire a full-time quality management consultant and a full-time quality control supervisor to assist with ongoing quality control problems at Menē's factory. There are no contemporaneous documents on this issue and frankly, that she was solely responsible for doing this is inconsistent with Mr. Sebag's

evidence that she was only permitted to make minor decisions pertaining to the Company's operations.

[94] Matthew Borins, Senior Manager of Customer Service, gave evidence that he raised concerns to the Board in February 2019 and provided a statement to the Board dated February 22, 2019. The main issues in his affidavit are as follows:

a. **Failure to approve requested credits**: Mr. Sebag had approved a policy allowing Mr. Borins to issue store credits to aggrieved customers; but in June 2018 Ms. Humphrey put in place a policy which required her approval for store credits or discounts which Mr. Borins saw as interfering with his ability to do his job. Again, I note this occurred before Mene says Ms. Humphrey was promoted in July 2018. As well, Mr. Borins says that Mr. Fray, the CFO, was present when Ms. Humphrey advised him of this change; therefore this could not have been something she did on her own without consulting the executive team.

   Mr. Borins then sites two examples from the fall of 2018 where customers requested credits that he feels Ms. Humphrey improperly denied in violation of Menē's "white glove service". Mr. Borins attaches to his affidavit the customer complaints which are contemporaneous documents, but he does not appear to have forwarded these to Ms. Humphrey at the time. Instead, he sent her an email on November 2, 2018 which detailed the substance of these customer complaints and his view of how they should be handling these requests for credits. The email does not allege that Ms. Humphrey's customer service is bad or criticize her performance. Mr. Borins is simply expressing to her how he thinks store credits should be handled. And he even says:

   > The approval of compensation credits is with you now, and **while I agree that the changes we have made to giving out credits to customers has been effectiv**e, I am troubled by the recent examples of credits being denied. I feel that "white glove" customer service is about balancing the need to make customers happy with the financial needs of our company. [Emphasis added.]

   In his affidavit, Mr. Borins then says that what he meant by this statement was that Mr. Sebag's policy of issuing credits has been effective and the changes that Ms. Humphrey had made were

not. Frankly, this stretches credulity. Even if that is true, anyone reading this email (including Ms. Humphrey) would reasonably conclude Mr. Borins was telling Ms. Humphrey that overall her changes had been good and that he was raising some concern over two credits she did not approve. At the conclusion of his email, Mr. Borins requested some more discretion to issuing credits without approval to her. Ms. Humphrey responded on November 8, 2018, agreeing to give him discretion to issue credits for five percent or less. (I note that his statement dated February 22, 2019 provides additional examples of customer service issues from early 2019 as well as his opinion that decisions regarding store credits should have been left with him.)

Again, Mene's counsel makes much of the fact that Ms. Humphrey agreed that she had discussed customer service issues with Mr. Borins, but this is obvious from the above email in any event. Nothing about her cross-examination supports that she concedes that this was raised with her as a performance issue on her part. In fact, she states that there were compliance issues with Mr. Borins' conduct related to these credits.

b. **Difficult manager**. Mr. Borins says Ms. Humphrey was uncommunicative and rarely gave feedback or praise and was harsh in criticism and that he almost quit because of her. This general criticism is not included in the actual statement which he provided the Board dated February 22, 2019. I note as well that there is evidence before me that Ms. Humphrey was expressing performance issues about Mr. Borins at the time.

   He refers to one incident in January 2019 where a customer received two deliveries that were incorrect. Mr. Borins says Ms. Humphrey sent multiple harsh messages to him on a public Slack channel where four or five individuals were present. He was unable to find it and did not produce any written communications showing that Ms. Humphrey was difficult even though he was able to produce other text messaging.

c. **Difficult to get ahold of**. Mr. Borins says that because Ms. Humphrey was often travelling, she was hard to contact. In support of this, he attaches one string of Slack messages where he contacted her at 8:44 a.m. asking if he could meet with her that day. He followed up at 11:44 a.m. Ms. Humphrey responded immediately afterwards at 11:45 a.m. saying she was busy that

day but could meet later and he agrees to meet the following day. There is nothing else about this issue, so I assume they did meet the following day. I fail to see how these contemporaneous documents support his evidence. As well, none of this is included in the actual statement which he provided to the Board dated February 22, 2019.

[95] Sunjoo Moon, the Chief Creative Officer and a Director of Menē, says in her affidavit that she emailed the Board on February 21, 2019 outlining certain issues with Ms. Humphrey. The main issues in her affidavit are as follows:.

a. **Ms. Humphrey began communicating less in early 2019.** Ms. Sunjoo says that she "worked quite closely with Ms. Humphrey until her departure at the end of 2019…up until shortly before her departure, I thought that Humphrey and I generally worked well together and enjoyed a good working relationship. However, in early 2019, following the events described below, I noticed that Humphrey began communicating with me less." I fail to see how this is a performance issue. Frankly, this evidence contradicts Mr. Borins' evidence that she was difficult to work with.

b. **Photoshoots.** In her affidavit, Ms. Sunjoo says that Ms. Humphrey began attending photoshoots at Ms. Humphrey's request in 2018 and that Ms. Humphrey was supposed to assist her with a multitude of tasks related to these photoshoots. She states that Ms. Humphrey attended ten photoshoots from 2018 to 2019. She complains that Ms. Humphrey was often late and gives two examples. One of them took place on May 19, 2018—again before she was made COO when Menē says all the performance issues began. In early 2019, she told Ms. Humphrey that her attendance at these photoshoots would no longer be necessary.

   Ms. Sunjoo states that she learned in February 2019 that Ms. Humphrey was travelling to New York on one of the days a photoshoot was scheduled. Ms. Sunjoo was concerned that Ms. Humphrey would be attending the photoshoot, so contacted her to discuss. She attaches Slack messages where she told Ms. Humphrey that Mr. Sebag did not want her to go to photoshoots anymore. (Once again, I note a Slack message was found despite Mene's document destruction policy.) Ms. Humphrey responded that she had not heard from him but that in any event she

had to go to New York to deal with other company issues and had a potential meeting with Brinks set up. Ms. Sunjoo then says "ok, maybe Roy didn't know about that then". This message concludes the evidence before me on the issue. I fail to understand the significance of this exchange in respect of Ms. Humphrey's performance.

c. **All communications had to go through Ms. Humphrey.** Ms. Sunjoo complains that Ms. Humphrey insisted that all communications with anyone at the office go through her. This complaint is not contained in Ms. Moon's February 21, 2019 email to the Board and frankly I am uncertain as to why this is a performance issue.

d. **Ms. Humphrey's attitude to factory partners.** Ms. Moon says that since Ms. Humphrey's departure she has heard from contacts at factories that Ms. Humphrey had a condescending attitude towards them. This complaint is not contained in her February 21, 2019 complaint to the Board and furthermore, it occurred after the Board had already terminated her therefore could not have been relevant to its honest good faith belief at the time.

[96] So to summarize, at the time Menē terminated Ms. Humphrey on February 26, 2019, it had one written statement from Mr. Borins dated February 22, 2019, one report on the Insurance Issue dated February 22, 2019, one email from Ms. Sunjoo dated February 21, 2019, and Mr. Fray says he had advised the Board of his concerns in October 2018, but there is no written record of this even though Mene said it had extensive materials.

[97] Regarding the nature of the problems, (even taking into account issues not contained in the contemporaneous statements these witnesses delivered to the Board, as well as issues that predated her appointment as COO), there are a few examples of store credits that Ms. Humphrey refused to grant but no explanation as to why the exercise of her discretion was improper; two specific instances of being late for photoshoots; an alleged failure to establish transition measures which no one ever documented; an alleged failure to address quality control issues which no one ever documented and which seems inconsistent with her allegedly "minor" roles and responsibilities; her allegedly wasting money travelling to New York for photoshoots when Ms. Sunjoo, the Creative Director, specifically concedes that this was a role assigned to Ms. Humphrey until

January 2019, and her employment agreement specifies that she would be required to travel; very weak evidence from Mr. Borins that Ms. Humphrey was hard to get ahold of; and vague and unsupported allegations from Mr. Borins that she was difficult to work with which is inconsistent with Ms. Moon's evidence that she had a good working relationship with Ms. Humphrey.

[98] Regarding the bald allegations of Ms. Humphrey being difficult to work with, I have a record before me which contains hundreds of contemporaneous work communications from Ms. Humphrey to many different employees, which does not support that she was difficult to work with or overly harsh and critical. Her concurrent communications are positive, professional, prompt, civil courteous and helpful.

[99] Menē had a full year to reconstruct what happened and this is all it could produce.

[100] When cross-examined, Mr. Sebag admitted that Mene did not seek Ms. Humphrey's input into any of the issues raised by these witnesses above (apart from the Working Capital and Insurance Issue). Without seeking her side, or one performance appraisal or one written document advising Ms. Humphrey of these issues in a constructive manner, Menē terminated Ms. Humphrey. And I emphasize that the statements from Ms. Moon and Mr. Fray are dated after Ms. Humphrey's suspension and only four and five days before her termination.

[101] It is important to note that when cross-examined, Ms. Humphrey candidly conceded that the Working Capital Issue and Insurance Issue were raised with her and that she was given an opportunity to address these particular issues. Her complaint is that she did not realize as she was working to address the Working Capital and Insurance Issues, there was a concurrent investigation into her overall performance where her job was at risk.

[102] She also conceded that Mr. Sebag did provide her with verbal performance feedback in real time "positive, encouraging feedback as well as communication of his, I guess, opinion of issues that had arisen." The difficulty is that this admission of hers is vague and counsel did not follow up to ascertain specifically the extent of this feedback and what it covered apart from the Working Capital and Insurance Issue. I would expect that most employees get some feedback good

and bad and that even excellent employees need to address issues as they arise. Without knowing what he said to her, what it was about, and the way he delivered the feedback, this evidence is unhelpful. And frankly, most of the examples of "feedback" I have before me are inappropriate in any event.

[103] It is also important to put the current criticisms and the contents of the Board Memo into context. Menē hired and promoted Ms. Humphrey knowing that she was very young. She was only 32 years old when she was promoted to the position of COO. Menē knew that Ms. Humphrey had a marketing background and no experience in finance or management or as a senior executive. It did not provide her with a job description, formal training or any formal performance evaluations. Instead, Ms. Humphrey was subjected to what I have found is a toxic work environment and then summarily terminated only months after a promotion. In my view, she was set up to fail.

[104] Given Ms. Humphrey's known background, and Menē's assertion in this litigation that it was beneficently giving her a chance to grow beyond her on-paper credentials, it was implicit that she would need training and time to grow into and learn the role. If there were any performance issues, these should have resulted in advising Ms. Humphrey clearly of what the issues were, progressive discipline and perhaps some training if required. I do not consider Mr. Sebag's unprofessional and abusive outbursts to constitute any legitimate warnings to Ms. Humphrey that her job was in jeopardy, or any sincere attempt to assist her with any performance issues. Indeed, that kind of belittling and punitive conduct cannot be expected to improve an employee's performance; a toxic environment is more likely to cause fear and shame, and overall have an adverse impact on an employee's performance.

[105] And when an employee is subjected to this kind of abusive language over time and then consistently promoted, how would that employee ever be able to identify or understand when an issue raised was actually a legitimate and important performance issue that could result in termination.

[106] In my view, based upon the documentary record before me, Menē had no serious concerns with Ms. Humphrey's performance as of December 31, 2018. It is simply not born out by the

contemporaneous documents. However, in mid-February 2019, Menē discovered the Working Capital Issue and the Insurance Issue and held Ms. Humphrey responsible for these.

[107] Ms. Humphrey's request for a salary review in the midst of these issues triggered a larger conversation of whether she was the right person for the job. Indeed, that is exactly what Mr. Sebag's Slack message said to other employees: "ultimately, as we scale and enter a new chapter of growth, the board has weighed a few recent events and decided she is not the right person to serve as COO within the organization." It is also exactly what he said when he was cross-examined. "So at this stage, when the insurance—when the theft took place and we had no insurance and when the Brink's issue took place, the board decided to engage in a formal investigation by collating information from senior management and employees."

[108] All of the other matters raised in the Board Memo, if they existed, were never significant before (as evidenced by Mr. Sebag's failure to ever address them with Ms. Humphrey in any of the contemporaneous documents before me).

[109] With the exception of the Working Capital Issue and the Insurance Issue which I find were legitimate issues brought to her attention, I find that all of the other alleged concerns in the Board Memo are bald allegations unsupported by the contemporaneous documents. Further, the Working Capital and Insurance Issue were not significant enough on their own to constitute cause for immediate termination and I am not making any findings on whether she was actually responsible for these.

[110] In my view, Menē was not interested in doing a fair performance appraisal; it was looking for evidence to support a "for cause" termination and all of the other issues in the Board Memo were exaggerated and included to buttress and justify Menē's decision to terminate her for cause, and frankly to penalize her for having had the nerve to ask for a raise after the Working Capital and Insurance Issue arose. This is consistent with the punitive and abusive manner with which Mr. Sebag treated Ms. Humphrey. The fact that Menē exaggerated so significantly the material which they had in support of a "for cause" termination is objective evidence that they knew that the true facts could not support a "for cause" termination. I also find that they exaggerated the material

they had to bully her into not bringing a legal claim. The Board Memo specifically references all of this evidence that Mene would "provide in any court process to further solidify [its] position that this termination is with cause significant."

[111] If Menē felt it had made a mistake in promoting Ms. Humphrey, or that she was not the right person for the job because of her skillset, all Menē had to do was immediately exercise its right to terminate without cause in a professional manner pursuant to the Without Cause Termination Provision and pay only Ms. Humphrey her ESA entitlements in the approximate amount of $2,283. In para. 16 of its Statement of Defence, Menē pleads that the Without Cause Termination Provision was reasonable because "Humphrey had no experience as an Executive" and "Menē took a considerable risk hiring Humphrey, which it would not have done without limiting her entitlements on termination." It appears that from Menē's perspective, the whole purpose of the Without Cause Termination Provision was to allow Menē to terminate easily if the risk it says it took did not pan out. For reasons I cannot fathom, instead of invoking this provision immediately, it chose to embark on the described course of conduct instead.

[112] Menē asks that I draw an adverse inference from Ms. Humphrey's refusal to answer certain limited questions related to her performance. Based upon the list in the Joint Document Brief there are 13 such questions. I note that she did answer multiple questions about what happened factually in respect of the Working Capital Issue and the Insurance Issue. Ms. Humphrey agreed that Mr. Sebag/Menē thought that she was responsible for these issues but then her counsel refused to let her answer questions related to whether these issues were actually her fault or responsibility. Ms. Humphrey's counsel took the position that such questions were not relevant because the cause allegation had been dropped. Given that the issue before me involves Menē's honest belief and I am not assessing whether Menē actually had cause, the questions refused had minimal relevance. I have found that Menē had an honest belief that Ms. Humphrey was responsible for the Working Capital Issue and the Insurance Issue and none of the questions refused were required for me to reach that conclusion.

[113] Three of the refusals related to Ms. Humphrey's alleged lateness for photoshoots. I agree that she should have answered these questions because they were relevant to Menē's allegation that it had an honest good faith belief that it had cause. However, these refused questions were not significant in the overall scheme of this case.

[114] One refusal was to the question "to advise if, if Ms. Humphrey was not available to answer inquiries or questions or concerns from employees at the Toronto office that she supervised, that would not have been an obvious performance issue." This question does not relate to the facts but requests her opinion in the event the facts are established and I do not find this question terribly relevant. One refusal related to the phrasing of a question about her handling of customer service complaints which her counsel felt misstated the evidence which I also do not feel was improperly refused.

[115] .Further, I gave Menē an opportunity to conduct further cross-examination before me and it declined to do so. Had Menē chosen to cross-examine, it might have obtained not only answers to these few refused questions but additional evidence which could have supported the existence of the issues in the Board Memo. Having refused to conduct these cross-examinations, I am not prepared to make any such adverse inference.

In law, do my findings regarding Menē's termination of Ms. Humphrey impact the enforceability of the Without Cause Termination Provision?

[116] The burden on the issue of whether the employment agreement was repudiated is on Ms. Humphrey. I have found that the factual inferences which Ms. Humphrey has asked me to draw from uncontradicted facts about the reason why Menē terminated her are more reliable, compelling, credible, probable and more consistent with the contemporaneous documents, than the direct evidence which Menē has put before me which is fraught with problems and inconsistencies.

[117] Ms. Humphrey argues as a matter of law, Menē's conduct constituted repudiation of the employment relationship which disentitles Menē from invoking the Without Cause Termination Provision.

[118] There is a dearth of appellate case law which directly addresses her argument, and so in this section I review the case law provided to me to determine the applicable principles and framework for the analysis.

[119] As noted by Dunphy J. in *Oudin v. Centre Francophone de Toronto*, 2015 ONSC 6494 ("*Oudin*"), at para. 27, aff'd 2016 ONCA 514:

> 27 The test for repudiation of contracts in general and employment agreements in particular is neither new nor particularly controversial. Parties will be held to have repudiated an employment agreement if by their conduct they have demonstrated their "clear intentions to no longer be bound by the terms of the employment agreement".

[120] Constructive dismissal is an example of repudiation. In *Matthews*, the Supreme Court restored the trial court decision, which had concluded that the employer had repudiated the employment agreement when it constructively dismissed Mr. Matthews. The Court specifically referenced the trial court's holding that because the employer had engaged in a course of conduct designed to push Matthews out of his operations, a reasonable person would have felt that the employer "had engaged in a course of conduct which evinced an intention to no longer be bound by the contract": *Matthews*, at para. 22. Therefore, at least in the employment context, conduct that constitutes repudiation can fall well short of an explicit statement from the employer that he or she no longer intends to be bound by the contract and may be determined based upon a reasonable person's determination which can be inferred from the defendant's course of conduct.

[121] However, merely terminating an employment agreement or constructively dismissing an employee is not necessarily a repudiation which disentitles an employer from relying a negotiated without cause termination provision. Indeed, the whole point of having a termination provision is to set out the rights and obligations of the parties upon termination: *Simpson v. Global Warranty Management Corp.*, 2014 ONSC 6916 (Ont. Div. Ct.) ("*Simpson*"), at paras. 3-4, and at para. 8 citing *Roden v. Toronto Humane Society* (2005), 259 D.L.R. (4th) 89 (Ont. C.A.) ("*Roden*").

[122] In *Moore v. Apollo Health & Beauty Care*, 2017 ONCA 383 ("*Moore*"), at para. 23, the Court, in assessing an employee's claim that the without cause termination provision did not apply because she was constructively dismissed stated:

> […] Provisions respecting notice of termination of employment can limit the pay applicable on constructive dismissal: *Simpson v. Global Warranty Management Corp.*, 2014 ONSC 6916 (Div Ct.) at paras 3-4 Howard Levitt. *The Law of Dismissal in Canada*, loose-leaf (February 2017—Rel. 51), 3d ed. (Aurora: Canada Law Book, 2003), at para 11:40.10.
>
> In the present case, the terms of the employment contract specifically address the calculation of notice upon constructive dismissal. Section 10 provides:
>
> > If Apollo terminates your employment, you shall be entitled to receive only such notice of termination, termination pay, benefit continuation and/or severance pay, if any, as are required by the [*Employment Standards Act, 2000*] in the circumstances of the termination. This paragraph defines and limits your full entitlement to notice of termination, pay in lieu of notice, benefit continuation and severance pay upon termination of employment, and **shall apply regardless of any changes to the terms and conditions of your employment (including changes in position, duties and responsibilities, reporting relationships, and compensation**). Please read it carefully.
>
> Accordingly, I see no error in the trial judge's findings that Apollo gave Ms. Moore notice of its intent to terminate "that was well within the contractual requirements" and that Ms. Moore "received what she was entitled to."
>
> [Emphasis added.]

[123] In *Moore*, the constructive dismissal alleged was demotion which was specifically encompassed by the wording of the without cause termination provision.

[124] Similarly, in *Gordon v. Altus Group*, 2015 ONSC 5663, the employee argued that the employer's conduct was mean-spirited enough to constitute a rejection of the contract thereby releasing the employee from the limitations imposed by the without cause termination provision. The Court disagreed and concluded, at para. 34, that if there was no cause to dismiss him "the provisions of the contract continue to apply when calculating how much [the employee] is entitled to be compensated."

[125] Ms. Humphrey relies primarily upon *Dixon v. British Columbia Transit*, [1995] B.C.J. No. 2465 ("*Dixon*") for the proposition that there are some acts of repudiation which disentitle the employer from relying upon a without cause termination provision. In *Dixon*, the defendant terminated the plaintiff's employment for cause and maintained that position until a month before

trial. At trial, the employer testified that at the time of termination, it believed it had business cause to terminate the employee but did not know if it had legal cause: *Dixon*, at para. 58. The B.C. Supreme Court found the employee was not limited, in terms of what he was owed, to the without cause provision of the contract. First, the Court specifically construed the termination provision and held that it required the employer to make a decision at the time of dismissal as to whether it would terminate with or without cause. Second, the Court specifically found that the employer had committed the tort of deceit by representing to the employee that it had cause when the defendant knew there was none and that it had also defamed the employee. For that reason, as well, the employer could not rely on the without cause termination provision.

[126] There is only one case referred to me which has considered *Dixon.*

[127] In *Simpson*, the employee was "laid off" by his employer. The employer paid the employee's entitlements under the ESA in accordance a without cause termination provision in the employment agreement shortly after termination. The employee argued constructive dismissal, sued, and in response, the employer asserted cause.

[128] The Divisional Court concluded that the employer, having asserted but failed to prove cause, was nevertheless entitled to rely on the without cause provisions of the contract. The Divisional Court distinguished *Dixon* on the basis that in *Dixon*, the employer terminated the contract for cause when it knew at the time that there was none, thus repudiating the contract. The Divisional Court also held that although the employer had breached the employment agreement by not paying him what he was owed immediately upon termination "that breach is not of an order of magnitude, in the circumstances of this case, as to disentitle the respondent from the benefit of the termination provision": *Dixon*, at para. 4. The Court addressed the failed allegation of cause in the following manner, at para. 8:

> The appellant submits that having made an unsubstantiated allegation of just cause, the respondent is precluded from relying on the termination provision. We do not agree. All that the failed defence of just cause resulted in was a finding that the termination of employment was without case. The provision in the employment agreement directly addresses what payments the appellant will be entitled to, if the employment is terminated

> without cause. The fact that the respondent alleged cause, and failed, does not preclude it from invoking the termination provision. *Roden v. Toronto Society,* [2005] O.J. No. 3995.

[129] In *Roden*, an employer terminated employees who had refused to follow the employer's instructions and the employer paid these employees two weeks termination pay with benefits. The employees commenced actions for wrongful dismissal and in response the employer alleged cause. The employees argued that the employer could not allege cause since it had already terminated without cause pursuant to the contract in question. The Court disagreed and held, at para. 39, that "the fact that the [employer] initially treated the [employees'] dismissals on the basis that they were without cause is not determinative of the parties' respective legal rights and obligations."

[130] In *Ebert v. Atoma International*, [1997] O.J. No. 1823 (Ont. C.J.), the Court held that the employer's conduct in hiring a replacement and attempting to demote the employee constituted constructive dismissal and a fundamental breach of the agreement. There was a termination provision with two options. The Court concluded that the contract required the employer to make an election; having made one, it could not thereafter elect to terminate on the second basis.

[131] In *Amberer v. IBM Canada Ltd*., 2017 ONSC 6470 ("*Amberer*"), rev'd on other grounds 2018 ONCA 571, the employee argued that the employer's failure to pay the correct amount of reasonable notice damages pursuant to the without cause termination provision was a breach that disentitled it from relying on the without cause termination provision; the employer had miscalculated by two weeks. The Court concluded that although the employer had breached the agreement, it was only a technical and not intentional breach. Therefore, relying upon *Simpson*, the employer could still rely upon the without cause termination provision.

[132] A similar situation occurred in *Oudin*, where the employer received only 20.25 weeks of severance pay when he was entitled to 21 weeks, with the employer receiving the remainder when it discovered the mistake. Again, the Court held at para. 29 that this failure was an honest and "single fact which does not come close to the standard of a deliberate and clear repudiation of an entire legal relationship." With respect to the employee's argument that the employer's failure to pay commissions owing the Court stated, at para. 32:

> even if the plaintiff's position on the means of calculating commission were upheld, there is not a hint of evidence to suggest that the defendant's position on the question represented anything beyond a good faith, if (in the plaintiff's view) mistaken view of the true interpretation of the employment agreement. A mere mistake of law cannot be construed as an expression of a clear intention not to be bound by the agreement. Contractual disputes between parties are commonplace—they do not rise to the level of repudiation by that reason alone.

[133] In my view, the recent *Matthews* decision is also relevant to the question before me. At para. 66, the Court held that a provision which limited the employee's common law entitlements could not be relied upon to exclude or reduce bonus payments because it did not unambiguously state that it applied in circumstances of constructive dismissal:

> Similarly, where a clause purports to remove an employee's common law right to damages upon termination "with or without cause", such as clause 2.03, this language will not suffice. Here, Mr. Matthews suffered an *unlawful* termination since he was constructively dismissed without notice. As this Court held in *Bauer v. Bank of Montreal*, [1980] 2 S.C.R. 102 at p. 10, "exclusion clauses" must clearly cover the exact circumstances which have arisen." So, in Mr. Matthews' case, the trial judge properly recognized that "[t]termination without cause does not imply termination without notice") (para. 399, see also *Veer v. Dover (Canada) Ltd.* (1999), 120 O.A.C.394, at para 14; *Lin* at para 91).

[134] I referred the parties to this section of *Matthews* and requested submissions. They both asserted that this statement by the Supreme Court is not relevant to the issues in this action. I disagree. I see no reason why the Supreme Court's direction regarding how to interpret clauses limiting common law bonus entitlements should not also apply to the way courts should interpret provisions limiting an employee's common law right to reasonable notice damages. In both cases, the employee has agreed to limit common law entitlements and courts should strive to ensure that they interpret such provisions in a manner that reflects the exact circumstances which the employee agreed to. This is also consistent with the extensive case law before me regarding the considerations relevant to the interpretation and enforcement of termination clauses which include:

a. When employment agreements are made, usually employees have less bargaining power than employers and rarely have enough information or leverage to bargain with employers on an equal footing: *Machtinger*, p. 1003 cited in *Amberer*, at para. 29.

b. Faced with a termination clause that could reasonably be interpreted in more than one way, courts should prefer the interpretation that gives the greater benefit to the employee: *Ceoccol v. Ontario Gymnastic Federation* (2001), 55 O.R. (3d) 614, 204 D.L.R. (4th) 688 (Ont. C.A.); *Christensen v. Family Counselling Centre of Sault St. Marie and District*, 2001 CanLII 4698 (Ont. C.A.) (2001), cited in *Amberer* at para 29.

[135] I do not read any of the cases before me as laying down the proposition that in all cases where an employer asserts cause and fails it may nevertheless rely upon a without cause termination provision afterwards. The law of wrongful dismissal is based in contract. In all of the above cases, the courts had before them specific agreements with specific clauses which the courts construed. If the parties specifically agreed that the without cause termination provision required an election at the time of termination or that it expressly covered only certain acts of constructive dismissal, I see no reason why a court should not enforce that.

[136] In my view, the following principles emerge from the above cases:

a. Where an employer alleges cause and fails, or withdraws its cause allegation, or repudiates an employment agreement through acts which constitute constructive dismissal, the employer is not precluded from subsequently invoking a without cause termination provision for the purpose of calculating the employee's damages: *Roden*, *Moore*, *Simpson*;

b. However, in all cases, it is a question of construction of the without cause termination provision before the Court as to whether, properly construed, the without cause termination provision applies. Such clauses are subject to strict construction: *Ebert*, *Matthews.*

c. Even if the contract, properly construed, permits an employer to terminate without cause after a failed for cause termination, there are some breaches or acts of repudiation which are so significant, or of such an order of magnitude, that they render a without cause termination provision unenforceable: *Dixon*. Although *Dixon* has not specifically been considered and accepted by appellate courts I find the reasoning compelling. All employment agreements are negotiated and agreed to on the basis of certain implied minimum expectations as to how the

employer will conduct itself, the duty of good faith being one. An employee's agreement to accept terms which significantly impact on the employee's common law rights must be taken to be made in the expectation that the employer will comply with these minimum implied expectations. Where the employer significantly departs from such expectations, in my view, the employee should not be held to extremely disadvantageous provisions which he, she or they agreed to. This is not rewriting the contract but giving effect to what the parties must reasonably have intended.

d. However, minor or technical mistakes made in good faith by the employer will not constitute a repudiation sufficient to prevent the employer from relying upon the without cause termination provision: *Amberer*, *Oudin.*

[137] I am satisfied that in the circumstances of this case outlined above, Ms. Humphrey has established on a balance of probabilities that Menē's conduct, objectively viewed, demonstrates an intention to no longer be bound by the December 2018 Employment Agreement, thus repudiating it. The conduct which I have found includes setting her up to fail, subjecting her to a toxic workplace, embarrassing and humiliating her before co-workers and clients after her suspension, significantly exaggerating performance issues and the evidence it had in support of these at the time of termination, and alleging cause when it knew or should have known it did not have it. These are not mere technical breaches made in good faith. Menē's conduct in this case goes to the heart of the employment relationship.

[138] I also find that these many acts of repudiation are of such a magnitude that Menē is disentitled from relying on the Without Cause Termination Provision.

[139] I would add that Menē was aware in August 2019 that it had lost the alleged documents it relied upon for its for-cause termination, but on the record before me, it did not advise Ms. Humphrey of this or abandon its for cause position until January 2020. And it did not pay her ESA entitlements until February 6, 2020. (They paid $3,342 on the basis of a 3-week entitlement which they say they miscalculated in that she is only entitled to 2 weeks under the ESA).

[140] In my view, continuing along this path and subjecting Ms. Humphrey to ongoing cause allegations which were no longer tenable, is a further repudiation of the employment agreement. Menē should not be permitted to exercise the Without Cause Termination Provision after sitting on this information for more than five months.

[141] Finally, although it is a minor point, in my view the Without Cause Termination Provision does not expressly apply to all of the acts of constructive dismissal which I have found. While it specifies that it applies regardless of her position within the organization and as such would apply if the sole act of constructive dismissal were her demotion, it does not say that it applies if she is constructively dismissed because of a toxic workplace, or because she is embarrassed and humiliated before Menē's clients and her co-workers as I have found.

[142] Following a strict construction of the Without Cause Termination Provision as well as the direction in *Matthews* that clauses which limit an employee's common law entitlements must cover the exact situation which has arisen, I find that the Without Cause Termination Provision does not apply even if not void for want of consideration and even if the repudiation does not rise to the level required. I note that I requested submissions from both parties on this issue and they both disagreed with me, but I still think it is the correct interpretation of the Without Cause Termination Provision given the decision in *Matthews.*

Reasonable notice period

[143] Ms. Humphrey requests a notice period of 18 months whereas Menē says that reasonable notice in this case should be four months and certainly could not be greater than seven months.

[144] At its foundation, reasonable notice is the period of time it should reasonably take the terminated employee to find comparable employment: *Schamborzki v. BC North Shore Health Region*, 2000 BCSC 1573 ("*Schamborzki*"), at para. 29, citing *Ahmad v. Procter & Gamble Inc.* (1991), 1 O.R. (3d) 491 (Ont. C.A.), at p. 496. See also *Lin v. Ontario Teachers' Pension Plan*, 2016 ONCA 619, 402 D.L.R. (4th) 325, at para. 54.

[145] Both parties refer to the *Bardal* factors to determine reasonable notice, factors which include age, length of service, character of employment, and availability of similar employment having regard to the experience training and qualifications of the employee: *Bardal v. The Globe & Mail Ltd*. (1960), 24 D.L.R. (2d) 140, at para. 21; *Bain v. UBS Securities Canada Inc*., 2016 ONSC 5362 ("*Bain*"), aff'd 2018 ONCA 19. In my view the following factors are relevant to the notice period.

[146] Age: Ms. Humphrey was 32 years old when terminated and holds two bachelor's degrees, one in marketing and communications and the other in sociology and no other professional qualifications.

[147] Length of service: Ms. Humphrey worked with the defendant for approximately three years and she was earning $90,000 when terminated. This suggests a lower notice period; however, she was terminated for cause six months after her promotion to COO. It would be more difficult for Ms. Humphrey to have obtained comparable employment because she would have to explain to prospective employers why she was terminated so soon after her recent appointment.

[148] Character of employment: Ms. Humphrey was promoted to the position of COO of a publicly traded company at a very young age. She argues, and I accept, that it is much more difficult for women to obtain senior executive positions, particularly someone as young as her. Menē argues that although Ms. Humphrey was called a COO, her job function was at a lower level than a traditional COO and that I should take into account her actual job functions, and not her title. Menē cites no authority for this position and as I have noted above, the Amending Agreement specifically stated that Ms. Humphrey was to fulfill the usual role of a COO.

[149] In *Cronk*, at para. 39, the Court of Appeal stated that "character of employment" refers to the employee's "level of employment" or "position in the hierarchy of a company as opposed to simply meaning the kind of work the person does." Courts award managerial employees longer notice because it is accepted that executives have more difficulty finding other comparable employment. I see no reason to depart from this principal.

[150] Availability of similar employment: Menē says the notice period should be based upon the availability of "full-time positions in Toronto offering a salary of at least $90,000 whose job description contained relevant key words. (i.e. consultant, management, director, operations and marketing)", not on how long it would take her to find a position as COO or something comparable. Like much of the evidence and argument tendered by Menē, I find this troubling. Mr. Sebag and Menē promoted Ms. Humphrey to the position of COO and called her its COO for reasons which it must surely understand. It represented to her and to the world that she was its COO and never gave her a job description suggesting her role was anything less. It said that she had the usual functions of a COO in the Amending Agreement. It cannot resile from this after the fact with bald, self-serving statements.

[151] The parties referred to the following cases as precedents, but as courts have acknowledged each case is fact specific:

Plaintiff's cases

a. In *McKee v. Reid's Heritage Homes Ltd.*, 2008 CarswellOnt 9356 (Ont. S.C.) ("*McKee*"), aff'd on appeal, 2009 ONCA 916, a 64-year-old employee with the title of "Executive Sales Manager", who had helped make the company highly successful and held an "exalted" position there, received 18 months.

b. In *Bain*, a 46-year-old employee with the title of "Managing Director, Head of Canadian M&A" received 18 months.

c. In *Schamborzki*, a 46-year-old employee who held the title of CEO received 18 months.

d. Finally, in *Makhija v. Lakefield Research of Canada Ltd.*, 1983 CarswellOnt 748 (H. Ct. J.), aff'd, 1986 CarswellOnt 2983 (Ont. C.A.), a 42-year-old employee who had only worked as head chemist with the defendant for just over a year received 15 months.

Defendant's cases

e. In *Sewell v. Provincial Fruit Co. Limited*, 2020 ONSC 4406, an employee who was older than Ms. Humphrey (45 years old) was awarded four months-notice in circumstances where she earned more money than Ms. Humphrey ($126,000 base salary plus 10-15% bonus) in a senior position with long-term growth potential;
f. In *Fraser v. Canerector Inc.*, 2015 ONSC 2138 87, this Court awarded 4.5 months to a senior executive who was older than Ms. Humphrey (46 years old); earned more money than Ms. Humphrey ($205,000); and was terminated after a comparable period of employment (2.9 years).

[152] Taking into account all of the factors, and case law, in my view the reasonable notice period is 12 months. I recognize that this is a significant notice period given Ms. Humphrey's age and length of service. However, it must be borne in mind that damages for wrongful dismissal are based in contract and reflect the reasonable expectations of the parties. Menē has taken the position in this lawsuit that although it contractually agreed to employ Ms. Humphrey as COO, she does not have the necessary skills, expertise, background or paper credentials for this position.

[153] Mr. Seabag refers to Ms. Humphrey as not being "considered a significant intellectual capital asset of the business", as having a "dearth of relevant experience in senior business management operations" and says that Menē offered her the opportunity to "reach beyond her on-paper credentials." Mr. Sebag goes so far as to append job postings for senior business operations positions to show that Ms. Humphrey does not have the minimum requirements for senior operations positions such as business or industry related degrees and at least five years of experience in senior business management operations roles. Menē's factum pleads that Menē "offered her opportunities for professional growth outside her experience and expertise that she did not have elsewhere."

[154] It appears to be Menē's position that Ms. Humphrey will likely never be able to obtain a comparable position, as COO or in senior business administration. I do not accept Menē's position, given that she was impressive enough that Menē/Goldmoney offered her several roles and

ultimately promoted her to COO. However, Menē's position is an admission that it will be more difficult for Ms. Humphrey to obtain a comparable position because of her on-paper credentials.

[155] Menē hired and promoted Ms. Humphrey with its eyes wide open as to her background and experience and potential for similar employment elsewhere. It represented to the world, its shareholders and Ms. Humphrey that she was the COO. This is the bargain which it made and damages for its breach in calculating the reasonable notice period should reflect the actual bargain it made, not the one it is attempting to re-imagine.

[156] I emphasize that I am not extending the period of notice because of any findings I have made about Menē's conduct which are not relevant to the calculation of reasonable notice damages. I have calculated the notice period strictly on the basis of the how long it would take her to find a comparable position because of the unique circumstances of this case.

Mitigation

[157] Employees have a duty to make reasonable efforts to obtain comparable alternate employment and this duty involves a "constant and assiduous application for alternate employment and exploration of what is available through all means." *Bowes v. Goss Power Products Ltd*., 2012 ONCA 425, at para. 24.

[158] The onus is on the employer to establish that the plaintiff failed to make reasonable efforts to mitigate and that comparable work could have been found: *Michaels v. Red Deer College*, [1976] 2 S.C.R. 324, 57 D.L.R. (3d) 386 ("*Red Deer College*"), cited in *McKee*, at para. 85.

[159] As noted by the Supreme Court of Canada in *Red Deer College*, at p. 332, citing Cheshire & Fifoot's *The Law of Contract*, 8th. ed. (London: Butterworths, 1972): "the burden which lies on the defendant of proving that the plaintiff has failed in his duty of mitigation is by no means a light one, for this is a case where a party already in breach of contract demands positive action from one who is often innocent of blame." See also *Ata v. Carter Pontiac Buick Ltd.*, 2002 BCSC 531 ("*Ata*"), at para. 37.

[160] Ms. Humphrey was still unemployed at the date of the motion.

[161] Ms. Humphrey produced a Mitigation Journal which set out her efforts beginning in March 2019.

[162] Menē complains that Ms. Humphrey did not pursue an inquiry from a company who contacted her on March 14, 2019, just two weeks after her dismissal in respect of a possible global marketing/strategy position. Menē further complains that Ms. Humphrey's job seeking efforts during the first six months of her unemployment were insufficient as they consisted of networking meetings or communications with members of her network and signing up for a LinkedIn Premium membership. Ms. Humphrey did not apply for any positions for six months after terminated

[163] In *Ata*, at para. 46, the Court held that it was not reasonable to assume that the day after an employee has gone through the trauma of being fired that he or she must immediately seek alternate employment and that it is appropriate to give the employee a period of adjustment and recovery. In this case, given the way in which Ms. Humphrey was treated, I find it difficult to fault her for not starting her job search immediately although I agree that waiting to send in applications until October 14, 2019 was too long.

[164] As well, there is a significant dispute between the parties about the type of mitigation which Ms. Humphrey must do. Menē criticizes Ms. Humphrey for applying for positions such as COO or other C-Suite positions or senior business leadership positions.

[165] Mene complains that Ms. Humphrey did not accept an offer of VP E-Commerce made in or around October 2019 which it argues was financially similar to her position at COO. However, when cross-examined, Ms. Humphrey explained that her initial conversations with this potential employer contemplated a broader role in senior management. The nature and title of the role changed to be focused within a specific business unit (E-Commerce) and was not a broad-based senior leadership role, like the one she had at Mene, and as such she declined it. In any event, Mene has not provided the Court with persuasive evidence or analysis on whether this position

was comparable in terms of role, as well as in terms of all aspects of the remuneration including stock options, bonuses etc.

[166] Menē cites the case *Gingerich v. Kobe Sportswear Inc*., 2008 CanLII 2749 (Ont. S.C.) ("*Gingerich*"), at para. 17, when Low J. stated that mitigation "extends to seeking out reasonably comparable work for which [the employee] is qualified." The Court in *Gingerich* was not saying that comparable work is not the standard. In that case, the issue was that the employee had management and sales skills which could be transferred to another industry and so the Court was saying that work in another industry could or should be pursued where the employee was qualified.

[167] It must be remembered that she helped to found Mene, take it public and held a senior C-suite position. In this case, Ms. Humphrey has been prepared to consider other industries and other types of jobs, and even in other cities like London Ontario and California, but she has sought senior leadership roles consistent with the position which she had at Menē. She cannot be faulted for this. I find that she is qualified for the positions for which she has applied.

[168] The Supreme Court has repeatedly recognized the value of employment to one's sense of worth which goes beyond earning an income: *Matthews*, at para. 87, citing *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313, at p. 368. The fact that Ms. Humphrey could have made the same or even more money in a position with much less seniority or prestige than the one she held does not minimize or change the analysis of the mitigation efforts she is required to take, which are to find comparable employment. The prestige, seniority and breadth of her former position are all relevant to her mitigation efforts.

[169] Menē also complains that as of January 16, 2020, Ms. Humphrey had only applied for a total of 18 positions. As noted above, it conducted various searches for positions involving "full-time postings with a salary of at least $90,000 with one or more of the keywords 'consultant', 'management' 'director', 'operations' and 'marketing'" which showed there were many jobs which Ms. Humphrey did not apply for. This job search conducted by Menē resulted in the following types of positions: area sales manager, associate general manager, business consultant, business manager, in sales and advertising, corporate sales manager, director of stewardship and

operations, director of sales and marketing, general manager, financial communications and other business services, general manager, financial communications and other business services, general manager, holiday service manager, management consulting service manager, managing director with some duties as management consultant, sales and marketing director. In my view, given that the burden is on Menē to demonstrate a lack of mitigation, it is not enough for it to simply search and produce listings of available business jobs and have Ms. Humphrey confirm she did not apply for them—it must demonstrate that they are comparable to the position which Ms. Humphrey had, and Menē has not done this.

[170] In all the circumstances, I am reducing the notice period by one month to reflect some of the mitigation issues raised by Menē. Therefore, the notice period taking into account mitigation is 11 months.

Aggravated /Compensatory damages

[171] Ms. Humphrey argued that she was entitled to $100,000 in aggravated damages as well as $100,000 in compensatory damages for mental suffering. I accept Mene's argument that in wrongful dismissal cases, there is only one "bucket" of potential damages for the employer's breach of the duty of good faith in the manner of dismissal and they are compensatory in nature. and must be a reasonably foreseeable consequence of a breach of contract: *Vorvis v. Insurance Corp. of British Columbia*, [1989] 1 S.C.R. 1085, 58 D.L.R. (4th) 193, at p. 96.

[172] The Supreme Court has noted that this can include conduct that is "unfair or is in bad faith by being, for example, untruthful, misleading or unduly insensitive": *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701 ("*Wallace*"), at para. 98; see also *Honda Canada Inc. v. Keays*, 2008 SCC 39, [2008] 2 S.C.R. 362 ("*Keays*"), at para. 57. Further, the duty of good faith includes ensuring that employees are safeguarded from bullying, intimidation and harassment from managers: *Matthews*, at para. 82.

[173] Depending upon the circumstances of the case, this can include compensation for injuries such as "humiliation, embarrassment, and damage to one's sense of self-worth and self-esteem":

Blondeau v. Holiday Ford Sales, 2005 CanLII 8672 (Ont. C.A.), at para. 27. There must be something more than hurt feelings caused by the termination alone as termination is always contemplated by the parties at the time of contracting: *Keays*, at paras. 56-59. In *Keays*, the Court stated at para. 59:

> Examples of conduct in dismissal resulting in compensable damages are attacking the employee's reputation by declarations made at the time of dismissal, misrepresentation regarding the reason for the decision, or dismissal meant to deprive the employee of a pension benefit or other right, permanent status for instance

[174] In *Matthews*, the Supreme Court held that where a party alleges breach of the duty of good faith in the manner of termination, the Court "may examine a period of conduct that is not confined to the exact moment of termination itself": *Matthews*, at paras. 40, 81. Indeed, pre-termination and post-termination conduct may both be considered to an award of aggravated damages as long as they are "a component of the manner of dismissal": *Doyle v. Zochem*, 2017 ONCA 130, cited in *Galea v. Wal-Mart Canada Corp*, 2017 ONSC 245 ("*Galea*"), at para. 256.

[175] While the burden is on Ms. Humphrey to prove that Menē's manner of dismissal led to mental distress, medical evidence is not always required: *Ruston v. Keddco Mfg.*, 2018 ONSC 2919 ("*Ruston*"), at para. 148, aff'd 2019 ONCA 125; *Galea*, at paras. 265-271; *Saadati v. Moorhead*, 2017 SCC 28, [2017] 1 S.C.R. 543, at paras. 2, 38.

[176] Menē relies upon *Mastrogiuseppe v. Bank of Nova Scotia*, 2007 ONCA 726 ("*Mastrogiuseppe*"), at para. 4, where the Court of Appeal stated that there is no bad faith in pursuing allegations of termination for cause even if those allegations are not proven in the end. All of the facts relevant to Ms. Humphrey's entitlement to aggravated damages have already been reviewed above with respect to Menē's repudiatory conduct and I will not repeat them. The facts that I have found go well beyond mere mistaken good faith for cause allegations. Suffice it to say that Menē's conduct in this case (setting her up to fail, the manner she was treated throughout her employment, the manner of dismissal which included being untruthful about the reasons for dismissal and exaggerating those reasons, communicating with other employees and clients about

her before she was terminated) entitles Ms. Humphrey to aggravated damages if she can prove them.

[177] I am satisfied that Ms. Humphrey has suffered compensable and reasonably foreseeable damages for mental distress caused by Menē's breach of its duty of good faith during the employment as well as in the manner of dismissal. She has suffered embarrassment and humiliation from the public nature of the dismissal and her reputation has been harmed by the allegations made by Mene. She described what happened to her as traumatic. Her sense of self-worth and confidence have been damaged. She has trouble sleeping and does not feel like going out. She feels powerless. She has been seeing a psychotherapist since February 2019 and, as of May 2020 was continuing to speak to him twice a week. She produced receipts for psychotherapy totaling $6,610.

[178] Ms. Humphrey is a young woman embarking on the early stages of her career in business. Mene knew how important her position was to her, in particular the faith that Mene had in her. In an email to Mr. Sebag in December 22, 2018 she stated:

> This year has been a wild and crazy ride and I want to start by thanking you in trusting me to help build and run what I believe is a very special and unique business.
>
> I frequently think about how lucky I am to have someone in my life (you) who saw potential in me—specifically the ability to do something much bigger and outside of my then-experience-and believe in my ability to deliver—and essentially take ideas on paper and dreams discussed and make both realities.
>
> This has come to be something I cherish, and a skill I don't frequently see in others. I'm humbled and so happy you saw this in me, and for this I will be forever grateful.
>
> I view Mene as my baby as much—or perhaps quite close to nearly as much—as you do.

[179] This is not merely about her losing a job, but the unfair way she was terminated from a company which she loved and was instrumental in creating. Regardless of how he treated her, it is clear that Ms. Humphrey was loyal to Mr. Sebag and cherished his faith in her. I have no doubt that this experience at Mene, and the way in which she was terminated, was devastating to her

sense of self and will be with her for a long time. Mr. Sebag, in particular would have been acutely aware of this.

[180] The parties provided me with a number of cases regarding the range of damages awarded which include: $250,000 in *Galea*; $70,000 in *Strudwick v. Applied Consumer & Clinical Evaluations*, 2016 ONCA 520 ("*Strudwick*"); $25,000 in *Ruston*, at para. 148. All of these cases are fact specific. In this case, the employment period is shorter than the cases at the high end of the range. I am satisfied that Ms. Humphrey has suffered mental distress and that aggravated damages in the amount of $50,000 (inclusive of her claim for actual counselling services) are appropriate based upon the duration of the abuse which I have found was ongoing throughout her employment, and which is directly related to the manner of her dismissal.

Punitive damages

[181] Ms. Humphrey seeks $100,000 in punitive damages.

[182] Punitive damages may be recovered in an action for wrongful dismissal but they are rare. The purpose of punitive damages is punishment for harsh, reprehensible and malicious conduct and to dissuade the defendant and others from committing the same acts. Per *Whiten v. Pilot Insurance Co.*, 2002 SCC 18, [2002] 1 S.C.R. 595, at para. 69, "punitive damages should be resorted to only in exceptional cases and with restraint." As well, "punitive damages are restricted to advertent wrongful acts that are so malicious and outrageous that they are deserving of punishment on their own": *Keays*, at para. 62. There is no need to show any loss to the plaintiff. They are awarded where compensatory damages (including aggravated damages) are insufficient to respond to the conduct being addressed: *Strudwick*, at para. 113. While there cannot be any double compensation as between aggravated damages and punitive damages, both can be awarded: *Strudwick*, at para. 86; *Keays*, at para 60; *Galea*, at para. 301.

[183] Further, there must be an independent actionable wrong which can include breach of a contractual duty of good faith: *Keays*, at para. 62; *Morison*, at paras. 43, 52.

[184] In my view, compensatory damages are insufficient in this case and punitive damages are warranted for a number of reasons.

[185] First, in this motion, Menē has continued to raise performance issues even though it has abandoned its cause claim. It says that this is because it needs to address Ms. Humphrey's argument that it terminated her in bad faith because she had asked for a raise. In my view, as I noted above, the simple way to address this would be to produce Board Minutes (or something contemporaneous) that documents that the investigation was already underway before Ms. Humphrey asked for a raise, e.g. affidavits from all the many people Mene says who provided statements to the Board which have allegedly been deleted, simply saying that they provided this information at the time. Menē has been unable to do this apart from the two statements referenced above.

[186] Instead, Menē has provided the affidavits referenced. All these affidavits include significant references to alleged performance issues prior to Ms. Humphrey being promoted to the position of COO. Paragraph 40 of Menē's Statement of Defence pleads that the "performance issues and instances of misconduct began after she was promoted to COO." Why would alleged performance issues prior to that time be relevant in this proceeding? Why would Menē have promoted Ms. Humphrey in July 2018 if there were such significant performance issues throughout her employment? These affidavits also reference issues never raised in the Board Memo or in the two statements which the Board had at the time of termination. The issue in this case is not whether Menē had cause—it is whether it had an honest belief that it did. Information that it never had or considered at the time of termination or after acquired evidence of performance issues is not relevant and yet this record is replete with that.

[187] It appears that Menē has dredged the waters looking for anything and everything it can say which will make Ms. Humphrey look bad—even things that its own pleading shows are irrelevant and in my view it rises to the level of malice.

[188] As well, Menē has never formally amended its pleading to withdraw the for-cause allegation; accordingly, as far as the public record is concerned, this is what Menē continues to represent to the world.

[189] Further, either Mene has been untruthful about the existence of extensive material in support of the Board Memo or it failed to preserve these documents. Either is reprehensible.

[190] Ms. Humphrey's counsel made two specific written requests for the preservation of such documents. Ms. Humphrey has had to labour under unspecified allegations that she has never been given full disclosure of and never will. Menē's conduct relating to this issue has been less than forthright.

[191] On or around August 30, 2019, Menē delivered an unsworn affidavit of documents in this matter with a total of 17 tabs, only three of which appeared to relate to allegations regarding Ms. Humphrey's performance as COO, and none of which were identified as having been before the Board when it reached its termination decision.

[192] On October 29, 2019, Menē consented to a court order obliging it to produce a sworn affidavit of documents by December 13, 2019. It then breached that order and did not produce a sworn affidavit until March 2020.

[193] Over the course of 2019, Menē gave shifting explanations for why it did not have, or had not produced, its documents. As set out above, although Menē knew in August 2019 that it could not find these alleged documents supporting its for cause allegation, it was not until January 16, 2020 that Menē advised it was withdrawing its for cause allegation because it was unable to recover many of the documents that supported its for cause allegation. And then, it was not until February 21, 2020 that Menē's counsel confirmed Menē's position that the documents had been destroyed in accordance with a document retention policy that was supposedly in effect at the time of, and implemented following, Ms. Humphrey's departure. As noted above, the document retention policy does not explain what happened.

[194] Menē then breached a second court order (to which it had consented) by failing to produce a responding motion record by February 14, 2020.

[195] In his affidavit, Mr. Sebag asserts that Menē is simply inexperienced with litigation processes or legalese and did not understand their production obligations. With respect, Menē is a sophisticated public corporation and has been represented by competent counsel at a minimum since June 3, 2019 when it delivered its Statement of Defence and likely before then. It is simply incredulous that in the face of letters from Ms. Humphrey's counsel requesting preservation of its documents that Menē did not understand its obligations or seek to do so.

[196] Finally, as part of its record, Menē has made inappropriate and irrelevant references to Ms. Humphrey's personal life. Ms. Moon's affidavit states:

> Picasso and I started to get worried for Humphrey's safety. Humphrey used to tell us that, when in New York for business trips, she would often meet up with people she had met over online dating applications. As a mother, I grew concerned that perhaps she had gone on a date with a stranger the night prior and something had happened.

[197] Ms. Humphrey allegedly going on dates with people she met on-line is also referenced in Schedule "A" to Mene's factum. Particularly, in the context of the manner in which Mr. Sebag treated Ms. Humphrey, I find Menē's need to refer to Ms. Humphrey's personal life very troubling. Who and how Ms. Humphrey dates is no business of Mene's or this Court's.

[198] Ms. Humphrey argues that Menē's conduct is consistent with a litigant who sees itself as above the rules and I agree. The case law provided to me shows the following ranges: $50,000 in *Strudwick*; $50,000 in *Morison*; $500,000 in *Galea*; $100,000 in *Ruston*; and $25,000 in *Mastrogiuseppe*, although all cases are fact specific.

[199] I am satisfied that Ms. Humphrey is entitled to punitive damages which I assess as $25,000 based upon the above range and comparison to the facts in the above cases. I am mindful that there should be no double recovery as between aggravated and punitive damages and I have calculated the damages with this in mind.

[200] In conclusion, I award Ms. Humphrey damages as follows:

a. Damages for breach of the duty to provide reasonable notice on the basis of 11 months taking into account the reduction for mitigation. I would ask the parties to provide me with the exact number which this represents;
b. Aggravated damages in the amount of $50,000; and
c. Punitive damages in the amount of $25,000.

[201] If the parties cannot agree on costs and interest, they may make brief written submissions, no longer than five pages as follows:

Plaintiff within 15 days after the receipt of these reasons.

Defendant within 15 days thereafter.

Papageorgiou J.

Released: May 4, 2021

CITATION: Humphrey v. Mene, 2021 ONSC 2539

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

JACQUELYN HUMPHREY

Plaintiff

– and –

MENE INC.

Defendant

REASONS FOR JUDGMENT

Papageorgiou J.

Released: May 4, 2021