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Labour & Employment

Bad faith, just cause: Matters of legal ethics

By **Ryan Wozniak**

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(September 20, 2021, 8:23 AM EDT) -- In *Yanez v. Canac Kitchens* [2004] O.J. No. 5238 (Superior Court of Justice) the late Justice Randy Echlin wrote admonishingly that the "time has now come to express this court's disapproval of routine assertions of [bad faith damages] claims which are not justified by the facts." That was 17 years ago, and yet employment lawyers in Ontario would be hard-pressed to locate a statement of claim that does not include a boilerplate allegation of bad faith conduct, even in cases involving a straightforward without cause termination.

Employer counsel have promulgated an equally opprobrious practice of asserting cause defences in cases where the facts clearly do not support one, or worse, when there are no facts at all, usually with the aim of gaining leverage over a client's former employee.

To borrow the words of another renowned jurist, the late Antonin Scalia, bogus assertions of bad faith conduct and just cause continue to stalk our jurisprudence like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles about, after being repeatedly killed and buried (see *Lamb's Chapel v. Center Moriches Union Free School District* 508 U.S. 384 (1993)). Judge after judge has driven their pen through the heart of this creature, but regrettably, it ambles on.

The recent decision of the Ontario Superior Court of Justice in *Mazanek v. Bill & Son Towing Ltd.* 2021 ONSC 4512 is a prime example of this unfortunate phenomenon. The plaintiff, a tow truck driver, was summarily dismissed for cause (via telephone) after five years of employment. He earned a modest annual income of about $44,000. The cause allegations made by the defendant were very serious; namely, that the plaintiff "stole gas," abandoned his work sites, stole from customers and towed vehicles offsite. The defendant also alleged several one-off incidents, including that the plaintiff allowed non-employees into "employee only" work areas. In addition, the defendant counterclaimed against the plaintiff for $100,000.

Both the defendant's cause defence and its counterclaim were dismissed. The court found that the testimony of the defendant's key witness was not only inconsistent, but also "contrived." The court further found that the defendant failed to adequately investigate the incidents of misconduct in question and did not provide the plaintiff with an opportunity to respond to the serious allegations made against him. In other words, cause should never have been asserted in the first place, let alone pursued at trial.

The case was tried over three days. The plaintiff called one witness. The defendant called three witnesses. The amount recovered by the plaintiff: $19,860.75, plus costs. The court refused to award damages for bad faith conduct.

All in all, three days of extraordinarily valuable court time (which is all the more precious during the pandemic) were consumed trying what was effectively a small claims action; one that ought to have settled long ago with nary a sound.

Cases like *Mazanek* are the bête noire of our civil justice system. In the end, both the plaintiff and the defendant lose. For the plaintiff, justice is needlessly delayed (often with significant financial and emotional consequences). As for the defendant, it will have spent thousands of dollars essentially litigating for the right to pay the plaintiff what he or she was owed all along. It is economic

inefficiency at its worst.

I cannot accept the argument that hollow bad faith claims and porous cause defences simply "come with the territory." As Justice Echlin astutely wrote in *Yanez*, such claims wreak havoc on the administration of justice in that they "seriously impede the potential consensual resolution of disputes which could otherwise be settled well short of trial … consume large amounts of valuable court time; can increase the costs to all concerned; and can generally drive the parties apart."

If we are to give life to the learned observations of Justice Echlin in *Yanez*, then we must be more willing to aggressively stamp out tactical and opportunistic bad faith claims and just cause defences. In my view, there are two immediate ways in which to do this.

First, the problem ought to be framed as a matter of legal ethics. Lawyers who willingly abet claims and defences that they know or ought to know are frivolous, are, at best, bringing the administration of justice into disrepute, and at worst, misleading the court. Moreover, it is not acceptable, in my view, for lawyers to effectively blame their clients when hopeless claims inevitably crumble by citing their duty under Rule 5.1 of the *Rules of Professional Conduct* to raise fearlessly every issue, advance every argument and ask every question, however distasteful, that the lawyer thinks will help their client's case.

This is because subrules 5.1-2(a) and 5.1-2(g) provide an important rejoinder. They state that a lawyer "shall not … abuse the process of the tribunal by instituting or prosecuting proceedings which, although legal in themselves, are clearly motivated by malice on the part of the client … [and shall not] knowingly assert as true a fact when its truth cannot reasonably be supported by the evidence." A baseless claim is not a fearlessly pursued claim; it is a condemnable one.

The sort of negative signalling that emanates from irresponsible allegations of wrongdoing fosters a cynical attitude towards our civil justice system, which also cuts against the grain of our professional ethos. Indeed, rule 5.6-1 of the *Rules of Professional Conduct* expressly states that "A lawyer shall encourage public respect for and try to improve the administration of justice."

Second, and less abstractly, stiffer costs awards should made against those litigants, and their counsel, who elect to take a flyer on a slapdash bad faith damages claim, or a shoddy just cause defence. In this regard, it is important to note that a finding of intentional wrongdoing is not a prerequisite for cost sanctions. Rule 57.01(1) of the *Rules of Civil Procedure* states that in exercising its discretion to award costs, the court may consider, among other things, the conduct of any party that tended to lengthen unnecessarily the duration of the proceeding; whether any step in the proceeding was "improper;" a party's refusal to admit anything that should have been admitted; and "any other matter relevant to the question of costs" (which arguably includes aggressively pursuing a claim of defence that was objectively hopeless).

Lawyers who countenance tactical claims and defences overlook the fact that the words we use and the manoeuvres we make in litigation have tremendous power, especially in the eyes of the uninitiated, and trivialize the significant emotional toll that harsh allegations can take on the parties at whom they are directed. Nobody wants to be called a liar, a thief, a cheat or a scoundrel, whether in life or in litigation.

To be clear, I am not suggesting that every bad faith claim or just cause defence should be seen as a ruse. The case law is replete with examples of employers and employees who have acted poorly. Rather, my point is that if we overwhelm our courts with ill-advised claims of serious wrongdoing, then we drown out the pleas of those who legitimately require their assistance and gum up the system to the point that everyone loses.

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