Divisional Court File No. 333/19
(Ontario Superior Court File No. 17-71659)

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

B E T W E E N:

DAVID PARKER

Plaintiff

and

BLACKBERRY LIMITED

Defendant

Proceeding Under the *Class Proceedings Act, 1992*

FACTUM OF THE RESPONDING PARTY

(motion for leave to appeal)

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Overview

1. Employees cannot resign their employment if their employer has already terminated them. If a court finds that an employer terminated an employee, the analysis ends, and the employer owes that employee severance obligations. This is the issue at the heart of this Leave to Appeal Motion.

2. The Respondent, David Parker ("Parker"), is a former employee of the Moving Party, BlackBerry Ltd ("BlackBerry"). Parker successfully certified this class proceeding on behalf of just under 300 former BlackBerry employees, seeking their statutory, common law, and/or contractual entitlements on termination ("Certification Decision"). He is also seeking general and punitive damages, claiming that BlackBerry orchestrated a scheme (the "BlackBerry Scheme") with the Ford Motor Company ("Ford") to disguise the terminations to evade BlackBerry's statutory, common law and contractual obligations to its employees.

3. BlackBerry needed to significantly reduce its headcount, but either could not afford or did not want to pay its employees their termination entitlements. Ford was interested in inheriting these employees from BlackBerry; however, it did not want to inherit their years of service (and possible severance obligations tied to those years). As such, BlackBerry signed an agreement with Ford (the "Ford-BlackBerry Agreement") that allowed Ford to present these employees with "new" offers of employment and required BlackBerry to take "*reasonable commercial efforts*" to support Ford hiring the employees and refrain from "*taking any action, directly or indirectly, that may dissuade any Designated Employee from accepting employment*" with Ford.

4. Pursuant to an explicit term of the Ford-BlackBerry Agreement, BlackBerry refused to tell any employee who received an offer of employment from Ford that they would continue to have a specific job with BlackBerry if they turned down this offer. While BlackBerry made vague statements that it would attempt to "*re-employ*" these employees if they turned down the offer,[1] BlackBerry did not tell any employee what job, if any, they would have until after they had accepted or declined the Ford offer. In fact, employees were consistently warned that there may not be a position for them if they refused the offer, and that they may be laid off.

5. Parker's theory of the case is simple: the BlackBerry Scheme constituted a mass termination of the employees' employment at BlackBerry. In this Action, Parker is asking the Court to assess the BlackBerry Scheme, common to all employees, to determine whether it is in fact a disguised termination of their employment.

6. BlackBerry's theory of the case is that it can rely on evidence, much of which arose after these employees were offered and accepted employment by Ford, to suggest that the BlackBerry Scheme somehow constituted a mass resignation of employment, where nearly 300 employees all agreed to waive any right they had to severance or their years of service.

7. After a hard fought, two-year Certification Motion, that included BlackBerry filing 15 affidavits, requiring Parker to (successfully) bring a productions and refusals motion to seek key documents for certification,[2] and conceding nothing (other than that Parker had a cause of action), Parker certified this Class Proceeding. After 2.5 days of argument that included an exhaustive review of all of the available evidence and jurisprudence, including that which

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[1] Cross-Examination of Jennifer Mascarin ["Mascarin Cross"] at Q 166: **Motion Record of the Defendant for Leave to Appeal ["DMR"], Tab 31, pp. 1045-1046**

[2] *Parker v BlackBerry,* 2018 ONSC 3630: **Book of Authorities of the Responding Party ["Parker BOA"], Tab 1**

BlackBerry cites in this Motion for Leave, the Motions Judge determined that, quite simply, this Action is about one thing: whether the BlackBerry Scheme is a disguised termination. As such, he concluded that a class proceeding is the appropriate procedural vehicle to deal with this claim and certified the claim on behalf of:

> All persons in Canada who were employees and/or dependent contractors of BlackBerry Limited ("BlackBerry"), who worked for BlackBerry in Canada, and who were offered and accepted employment with the Ford Motor Company of Canada ("Ford") between January 1, 2017 and April 30, 2017, while excluding BlackBerry employees who filed a complaint pursuant to section 96 of the *Employment Standards Act, 2000* seeking termination pay and/or severance pay and did not withdraw that complaint within two weeks. [the "Class Employees" and the "Class Definition"]

8. BlackBerry is now seeking leave to appeal the Certification Decision to further avoid a Court analyzing and ruling on its scheme with Ford. As such, the Divisional Court ought to see this for what it is – BlackBerry's attempt to shield its transaction with Ford from judicial scrutiny – and dismiss BlackBerry's Motion for Leave, with costs payable forthwith to Parker.

Facts

The Ford-BlackBerry Agreement

9. Since 2010, BlackBerry has had a history of laying off a significant number of employees. In 2016, it decided to stop developing smartphone hardware and outsource that function to a business partner. As early as June 2016, BlackBerry management began discussing the potential need to lay off more employees. In the Fall of 2016, it made public statements that it would need to reduce its workforce and eliminate jobs.[3]

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[3] David Parker's Affidavit, sworn June 9, 2017 ("First Parker Affidavit") at paras 5-7: **DMR, Tab 6, p. 49.**
Rebecca Graham answer 8 following refusals motion: **DMR, Tab 35-B, p. 1180**.
Zoltan Racz answer to refusal 79: **DMR, Tab 35-B, p. 1185**.

10. In or about June 2016, Ford and BlackBerry began discussing an arrangement whereby BlackBerry would provide engineering services for Ford.[4]

11. On October 24, 2016, Ford and BlackBerry came to a written agreement that allowed Ford to make offers of employment to select BlackBerry employees (the "Ford-BlackBerry Agreement"). In its Leave to Appeal Factum, BlackBerry excluded any reference to the terms of the Ford-BlackBerry Agreement, despite its clear relevance to Certification. Parker had to bring a Productions Motion to obtain this Agreement because BlackBerry refused to produce it.[5]

12. The Ford-BlackBerry Agreement outlined the uniform way that BlackBerry contractually agreed to treat all Class Employees. BlackBerry agreed to "*fully cooperate*" and make "*reasonable commercial efforts*" to support Ford in hiring its employees. BlackBerry determined which employees Ford could make offers of employment to and then Ford chose employees from that list that it would hire. Other relevant sections placed further obligations on BlackBerry:

    i. Making "*reasonable commercial efforts*" to support Ford hiring the employees and "*not taking any action, directly or indirectly, that may dissuade any Designated Employee from accepting employment*" with Ford (which would likely include offering a Class Employee an alternate role with BlackBerry);

    ii. Updating the list of employees Ford could make offers to if any listed employee departed BlackBerry;

    iii. Providing Ford with "*full access to the employment files of the employees*", including names, organizational charts, compensation, employment history (including any legal claims the employee had made against BlackBerry), training, evaluations, and terms and conditions of employment;

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[4] Affidavit of Rebecca Graham sworn October 2, 2017 ("First Graham Affidavit") at para 9: **DMR, Tab 7, p. 150.** Zoltan Racz answer to refusal 79: **DMR, Tab 35-B, p. 1186.**

[5] *Parker v BlackBerry,* 2018 ONSC 3630: **Parker BOA, Tab 1.**

iv. Taking "*commercially reasonable steps*" to ensure those individuals' employment continued with BlackBerry and not terminating their employment or materially changing their terms and conditions of employment without Ford's consent prior to the agreed-upon hire date with Ford;

v. Assisting Ford to implement a "*communication and transition plan*" acceptable to Ford;

vi. Not prohibiting or dissuading any employee from accepting employment with Ford by asserting a non-competition or similar provision in an employment agreement;

vii. Not making or promising any amendment or improvement to any employee's compensation, without Ford's consent (unless it was required because a third party attempted to hire the employee); and,

viii. Agreeing not to solicit an employee who accepted employment with Ford for one year.[6]

13. Parker claims that the Ford-BlackBerry Agreement was in fact a scheme designed so that BlackBerry could avoid paying statutory and other entitlements on termination and Ford would obtain knowledgeable employees, without being required to honour those employees' years of service with BlackBerry.[7]

14. Sandeep Chennakeshu signed the Ford-BlackBerry Agreement on behalf of BlackBerry. BlackBerry did not provide evidence from Mr. Chennakeshu or any witness who was involved in negotiating the Ford-BlackBerry Agreement during the Certification Motion.[8]

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[6] Ford-BlackBerry Agreement pp 2-3: **DMR, Tab 35-B, pp. 1189-1190.**
First Graham Affidavit at para 9: **DMR, Tab 7, p. 150.**
Cross-examination of Zoltan Racz ["Racz Cross"]: pp 23, 33-34, Q 133, 193-195: **DMR, Tab 32, pp. 1078, 1088-1089.**
Ford-BlackBerry Agreement pp 2-3: **DMR, Tab 35-B, pp. 1189-1190.**
[7] First Parker Affidavit at paras 5-9, 14-18, 20-21, 24: **DMR, Tab 6, pp. 49-52.**
First Graham Affidavit at para 11: **DMR, Tab 7, p. 150.**
First Parker Affidavit at paras 10-11: **DMR, Tab 6, p. 50.**
[8] Ford-BlackBerry Agreement at p 10: **DMR, Tab 35-B, p. 1197.**
Cross-Examination of Amber Jessup ["Jessup Cross"], p 24, Q 125 (BlackBerry counsel refusing her to answer): **DMR, Tab 29, p. 869.**
Racz Cross, p 35, Q 198 (BlackBerry counsel refusing his answer and stating that those negotiations are irrelevant to the issues on certification): **DMR, Tab 32, p. 1090.**
Cross-Examination of Colin Ho ["Ho Cross"], pp 24-25, Q 125-128 (Mr. Ho confirms that Vilok Kusumaker told him about the project, and Vilok was not an affiant): **DMR, Tab 33, pp. 1125-1126.**

15. Approximately 299 BlackBerry employees (less some managerial-level individuals) were offered and accepted employment with Ford in January 2017.[9]

BlackBerry's actions prior to the Class Employees' accepting Ford offers

16. In the Fall of 2016, BlackBerry transferred nearly all the Class Employees to the "Silver Team", which worked exclusively on an engineering services contract for Ford, pursuant to the Ford-BlackBerry Agreement.[10]

17. In December 2016, Ford extended offers of employment to certain BlackBerry managers that it referred to as the "*core managers*" (the "Core Managers"). There were nine Canadian Core Managers, whom Ford took to dinner prior to providing them with offers. The Core Managers accepted employment with Ford in December 2016 but did not start work until March 1, 2017. Those managers assisted Ford and BlackBerry in their efforts to have Class Employees accept employment with Ford. The Core Managers are excluded from the Class Definition.[11]

18. BlackBerry led or facilitated two Town Hall meetings on its premises. BlackBerry led the first meeting on December 8, 2016. It announced to Class Employees that it had "*signed an agreement*" with Ford to perform engineering services. Ford led the second Town Hall meeting on December 9, 2016. It announced to the Class Employees that it intended to make

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Ho Cross, pp 26-27, Q 140-145 (Mr. Ho states how he expects that people at Zoltan's level would have been involved with working out the scope of the project): **DMR, Tab 33, pp. 1127-1128.**

[9] First Graham Affidavit at para 13: **DMR, Tab 7, p. 151.**
Affidavit of David Parker, sworn November 17, 2017 ["Second Parker Affidavit"] at para 27: **DMR, Tab 16, p. 411.**

[10] First Parker Affidavit at para 9: **DMR, Tab 6, p. 49.**

[11] First Graham Affidavit at paras 32, 34: **DMR, Tab 7, pp. 156, 157.**
Second Parker Affidavit at para 27: **DMR, Tab 16, p. 411.**

offers of employment to many of them in January and presented information about "*the benefits of working at Ford.*"[12]

The HR Team

19. Following the Town Hall meetings, Class Employees asked various questions about the Ford-BlackBerry Agreement to BlackBerry representatives. These questions were largely directed to BlackBerry's Human Resources Team ("HR Team"), which consisted of four of BlackBerry's Affiants for the Certification Motion: Amber Jessup, Lisa Carswell, and Jennifer Mascarin, who were all HR representatives at the time and reported to Rebecca Graham. Ms. Graham reported to and was instructed by Nita White-Ivy (who did not provide evidence for the Certification Motion). Zolton Racz, who was formerly the Vice-President, Platform Software at BlackBerry, also worked with Ms. Graham throughout this time and responded to Class Employee questions.[13]

20. The HR Team did not make decisions with respect to how and what to communicate to Class Employees. Rather, these decisions were made at BlackBerry's upper management level. During the Certification Motion, BlackBerry did not produce any evidence from upper management. However, on cross-examination, the HR Team confirmed upper management instructed them and others to answer employee questions consistently. The HR Team was provided with an "FAQ" that informed how they would answer employee questions (which BlackBerry also refused to produce, but Parker successfully obtained it through a

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[12] First Graham Affidavit at paras 22-23: **DMR, Tab 7, p. 154.**
BlackBerry Production: Slides from December 8, 2016 Town Hall: **DMR, Tab 35-A, p. 1174.**
First Graham Affidavit at para 23: **DMR, Tab 7, p. 154.**
Ford PowerPoint presentation from December 9, 2016 Town Hall: **DMR, Tab 35-C, p. 1399.**
[13] First Graham Affidavit at paras 26-28: **DMR, Tab 7, p. 155.**
Affidavit of Zoltan Racz at paras 1 and 9-12: **DMR, Tab 11, pp. 376-378.**

Productions Motion). The HR Team even copied and pasted sections of the FAQ into their responses to Class Employees' email questions.[14]

Employee questions

21. Specific questions Class Employees asked included whether their years of service would transfer over to Ford if they accepted employment with Ford, whether BlackBerry would provide severance payments to individuals who accepted employment with Ford, and whether Class Employees would continue to be employed at BlackBerry if they declined employment with Ford.[15]

22. On cross-examination and in their Affidavits, the HR Team all confirmed that it answered the above three questions consistently:

    i. The Class Employees' service would not transfer over to Ford (meaning they would lose their seniority);

    ii. BlackBerry would not pay severance; and

    iii. If Class Employees declined the Ford offer, they would remain employed with BlackBerry and BlackBerry would place them on another project or team within Mobility Solutions or elsewhere within BlackBerry, depending on a number of factors. If BlackBerry could not find a role, the individual would be laid off and would receive severance in accordance with their employment agreement. The HR Team would not tell Class Employees what specific role they would occupy should they turn down the Ford offer or guarantee them continued employment. [16]

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[14] Cross-examination of Rebecca Graham ["Graham Cross"]: pp 76, 78-79, 83-86, 115, 121-122, 132, 204-205, Q 284-285, 290-298, 315-326, 439-440, 468-471, 521-523, 844-845: **DMR, Tab 28, pp. 695, 697-698, 702-705, 734, 740-741, 751, 823-824.**
Jessup Cross: pp 57, 62-64, 85-86, Q 285-286, 317-328, 444-449: **DMR, Tab 29, pp. 902, 907-909, 930-931.**
Mascarin Cross: p 24, Q 138-141: **DMR, Tab 31, p. 1041.**
Cross-examination of Lisa Carswell ["Carswell Cross"]: pp 13-14 and 16-17, Q 61-64 84-91: **DMR, Tab 30, pp. 1004-1005, 1007-1008.**
FAQ – Questions and Answers following Mobility Solutions Announcements: **DMR, Tab 35-B, p. 1394.**
Email chain ending January 16, 2017: **DMR, Tab 35-B, p. 1353.**

[15] Mascarin Cross: pp 19-20, Q 104-107: **DMR, Tab 31, pp. 1036-1037.**
First Graham Affidavit at paras 17, 30, 57: **DMR, Tab 7, pp. 153, 156 and 163.**

[16] Jessup Cross: pp 62-63, Q 317-320: **DMR, Tab 29, pp. 907-908.**
Graham Cross: pp 76-79, Q 284-296: **DMR, Tab 28, pp.695-698**
Mascarin Cross: pp 19-22, Q 104-121: **DMR, Tab 31, pp. 1036-1039.**

In fact, the HR Team could not provide employees with any details about their continued employment with BlackBerry because the Ford-BlackBerry Agreement prohibited BlackBerry from doing anything to dissuade the employees from rejecting the Ford offer.[17]

BlackBerry's concern that not enough Class Employees would accept Ford offers

23. Internal BlackBerry emails indicate concern that not enough Class Employees would accept employment with Ford. On December 12, 2016, Rob Maurice, one of the Core Managers, wrote to Ms. Graham that he had "*concerns that numbers expecting to move over will not be met.*" He also wrote to Mr. Racz that he had a concern that "*critical mass may not be achieved for people moving over.*"[18]

24. There is also evidence that the Core Managers had a financial incentive to ensure Class Employees accepted employment with Ford. Specifically, in an email dated December 13, 2016, Mr. Maurice wrote the following to Mr. Racz:

> ...I have a general concern that critical mass may not be achieved for people moving over (some people are not quite sold on it) or there may be some other reason that Ford may decide to cancel the effort. In that case, I stand to lose quite a bit (even any initial bonuses). I realize Ford is a huge company, but the resources in the offices here are small (to start).

BlackBerry did not provide an Affidavit from Mr. Maurice to explain this statement; however, it appears that the Core Managers had a financial incentive, and possibly a bonus, tied to Class Employees moving to Ford. [19]

Carswell Cross: pp 16-17, Q 84-88: **DMR, Tab 30, pp. 1007-1008.**
Affidavit of Lisa Carswell at para 10: **DMR, Tab 9, p. 361.**
[17] Ford-BlackBerry Agreement pp 2-3: **DMR, Tab 35-B, pp. 1189-1190.**
[18] Email dated December 12, 2016: **DMR, Tab 35-B, p. 1212.**
Email dated December 13, 2016: **DMR, Tab 35-B, p. 1291.**

[19] On written cross-examination, Ms. Graham denied that BlackBerry provided financial incentives; however, she did not answer Parker's question as to whether Ford had provided any incentives to managers to induce Class Employees to leave BlackBerry.
Email chain ending December 14, 2016: **DMR, Tab 35-B, p. 1290.**
Written cross-examination, Refusal 31: **DMR, Tab 35-D, pp. 1471-1472.**

The John Chen email

25. On January 6, 2017, John Chen, the CEO of BlackBerry, emailed all Mobility Solutions employees, stating that BlackBerry was reducing its headcount. The email encouraged Class Employees to accept employment with Ford. None of BlackBerry's affiants were involved in drafting the email and could not speak to its purpose. However, the email stated:

    - "*I had to make the difficult and emotional decision to outsource hardware design and development…*" which "*…requires a reduced headcount in the Mobility Solutions* [Business Unit]"
    - "*The management team have worked very hard in negotiating agreements with Ford and TCL. I have very mixed emotions about the employment deals with Ford and TCL. On one hand I am pleased that we were able to secure an alternative employment option for most of the impacted team, on the other hand I am sorry to have to lose great talent and loyal colleagues…* [*emphasis added*]"
    - "*I know that some in-scope employees have asked about staying with BlackBerry and moving to another group, such as BTS to support the Autonomous Vehicle Innovation Center (AVIC). While the AVIC has been announced, the project is still developing and the timeline is undetermined. The Ford and TCL deals are in-hand and my priority has been to ensure that as many impacted employees as possible have a good home…Ford and TCL will work closely with BlackBerry in the future therefore, transferred employees will continue to contribute to BlackBerry's future* [*emphasis added*]."

    This email, sent to all Class Employees, indicates that BlackBerry communicated to employees that they should not attempt to stay with BlackBerry.[20]

Offers of employment

26. In January 2017, following Mr. Chen's email, BlackBerry arranged for Ford to attend its offices to offer employment to Class Employees. BlackBerry provided meeting rooms to Ford to meet with the Class Employees and provide them with offers of employment.[21]

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[20] First Parker Affidavit at para 14 and Exhibit E: **DMR, Tab 6 and 6-E, pp. 50 and 110.**
Graham Cross: pp 127-129, Q 496-503: **DMR, Tab 28, pp. 746.748.**
[21] First Parker Affidavit at para 15: **DMR, Tab 6, p. 50.**
Graham Cross: pp 141-142, Q 571-578: **DMR, Tab 28, pp. 760-761.**

27. After receiving the offers, Class Employees continued to ask their managers and the HR Team similar questions to those referenced in paragraph 21 above. BlackBerry continued to provide the same responses to the same questions, including that BlackBerry could not guarantee any Class Employees a position with BlackBerry if they declined the offer. Internal emails and the FAQ indicate that BlackBerry asked the HR Team to "*encourage* [Class Employees] *to strongly consider*" employment with Ford.[22]

28. After the offers were given, Ford updated BlackBerry daily on which Class Employees had accepted employment and which were still pending by way of a shared list between Ford and Ms. Graham.[23]

29. BlackBerry put the Class Employees in a tenuous position: they had to decide whether to accept the Ford offer without knowing whether they would still have a position with BlackBerry if they turned down the offer. The Ford-BlackBerry Agreement contractually prohibited BlackBerry from assuring the Class Employees that they would continue to be employed at BlackBerry. BlackBerry provided no evidence that any Class Employee was told where they would work, or even that they would have a job, if they stayed with BlackBerry prior to the employee accepting or rejecting the Ford offer.[24]

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[22] Jessup Cross: pp 33-34, Q 173-177: **DMR, Tab 29, pp. 878-879.**
First Graham Affidavit at paras 51-52, 54-57 and Exhibit B: **DMR, Tab 7 and 7B, pp. 163-164 and 193.**
Ho Cross: pp 20-22, Q 103-113: **DMR, Tab 33, pp. 1121-1123.**
Graham Cross: p 207, Q 855: **DMR, Tab 28, p. 826.**
Affidavit of Nick Landry at para 9: **DMR, Tab 14, p. 394.**
Affidavit of Zoltan Racz at para 12: **DMR, Tab 11, p. 378.**
[23] Graham Cross: pp 161-162, Q 674-682: **DMR, Tab 28, pp. 780-781.**
[24] First Parker Affidavit at paras 16, 23: **DMR, Tab 6, pp. 50-52.**
Ford-BlackBerry Agreement: **DMR, Tab 35-B, p 1188.**
Graham Cross: pp 77-79, Q 288-298 and pp 88-94, Q 333-361 and p 96, Q 366-368: **DMR, Tab 28, pp. 696-698, 707-713 and 715.**
First Graham Affidavit at para 19: **DMR, Tab 7, p. 153**

Request for resignation letters

30. On February 2, 2017, Ms. Jessup sent a communication to all Class Employees who had accepted employment with Ford, which included a draft resignation letter for the Class Employees to sign. Many Class Employees refused to provide resignation letters, withdrew the resignation letters they had sent, or were silent on the request for same. On February 27, 2017, Ms. Jessup sent a further communication to the Ottawa Class Employees (regardless of whether they provided a written resignation letter): "*This letter acknowledges your acceptance of employment with Ford starting on March 1, 2018, confirms the February 28, 2017 effective date of your resignation from BlackBerry...*"[25]

31. By the end of February 2017, approximately 287 Class Employees accepted employment with Ford and started working for Ford on March 1, 2017. Only seven individuals that received offers declined employment with Ford.[26]

Parker's theory of the case

32. Parker commenced the Class proceedings against BlackBerry on February 15, 2017. Parker's theory of this case is that BlackBerry orchestrated the BlackBerry Scheme to transfer the Class Employees to Ford as part of the Agreement that it designed to evade its statutory, contractual and/or common law obligations. Specifically, BlackBerry orchestrated the BlackBerry Scheme to deprive the Class Employees of two fundamental employment rights:

Jessup Cross: pp 28-34, Q 150-177 and p 64, Q 324-328 and p 83-85, Q 434-443: **DMR, Tab 29, pp. 873-879, 909 and 928-930.**
Mascarin Cross: pp 28-29, Q 162-172: **DMR, Tab 31, pp. 1045-1046.**
Carswell Cross: pp 14-15, Q 65-76 and p 19-20, Q 106-110: **DMR, Tab 30, pp. 1005-1006 and 1010-1011.**
[25] First Parker Affidavit, Exhibit K: **DMR, Tab 6-K, p. 129.**
First Graham Affidavit, Exhibit KK: **DMR, Tab 7-KK, p. 283.**
Redacted Spreadsheet provided in response to Refusal #46: **DMR, Tab 35-B, p. 1392.**
[26] First Graham Affidavit at para 83: **DMR, Tab 7, p. 169.**
Affidavit of John Veniot at paras 25-26: **DMR, Tab 18, p. 429.**

a. ***Rights on termination:*** BlackBerry disguised this termination to avoid triggering the termination pay and severance pay sections of the *Employment Standards Act, 2000*, which have no reduction for mitigation earnings.[27] Some of the Class Employees also had an additional entitlement to severance in their employment contract, which would similarly trigger no reduction for mitigation earnings.[28] Technically, some employees may have an additional entitlement to common law reasonable notice; however, these amounts would be reduced by mitigation earnings from Ford, and as such, it is unlikely any Class Employee has a significant claim to common law reasonable notice.

b. ***Sale of business rights:*** BlackBerry and Ford have maintained that they did not engage in a sale of business. As such, the statutory protections that would otherwise transfer the employees' years of service to Ford were not engaged.[29]

33. Parker also claims that BlackBerry's conduct is a breach of its obligation to treat its employees in good faith in the manner of dismissal because it was "*untruthful, misleading or unduly insensitive*."[30] Specifically, orchestrating a scheme, with the purpose of evading these employees' rights, is bad faith conduct warranting an award of general and punitive damages.

BlackBerry's Leave to Appeal Factum

34. In BlackBerry's leave to appeal factum ("BlackBerry's Factum"), the Factual Overview contains several inaccurate or incomplete statements about the evidence at the Certification Motion. BlackBerry's Factum ignores the significant time spent during the Certification Motion that led the Motions Judge to conclude that there was considerable evidence to

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[27] *Employment Standards Act, 2000*, SO 2000, c 41, ss 54-66 [*ESA*]: **Schedule B.**
[28] *Bowes v Goss Power Products Ltd.*, 2012 ONCA 425 at paras 60-62: **Parker BOA, Tab 2.**
[29] *ESA, supra*, s 9: **Schedule B.**
[30] *Keays v Honda*, 2008 SCC 39 at para 57: **Parker BOA, Tab 3.**

support "*the elaborate control of the message to the affected group of individuals*" and "*elaborate written agreement between Ford and BlackBerry showing extensive planning and coordination.*"[31] The following is a non-exhaustive list of factual assertions that require correction or context, and which assisted the Motions Judge in making these findings:

i. BlackBerry ignored the significant evidence that senior management heavily controlled the information the HR Team communicated to employees. For example, BlackBerry made no reference to:

   - the terms of the Ford-BlackBerry Agreement;
   - the FAQ telling the HR Team to "*strongly*" encourage employees to consider the Ford offer and members of the HR Team echoing that statement to Class Employees;
   - all members of the HR Team confirming on cross-examination that senior management and, in Ms. Graham's case, internal/external counsel, instructed them on how to respond;
   - that the HR Team was not privy to discussions between Ford and BlackBerry, or aware of the terms of the Ford-BlackBerry Agreement;[32]
   - that it was "*absolutely*" important that the HR Team provide consistent information to employees;[33] and
   - the regular meetings the HR Team held to discuss how to communicate with employees about the Scheme.[34]

ii. Throughout its materials, BlackBerry suggests that the HR Team communicated that employees would have continued employment with BlackBerry if they rejected the Ford offer and the employees could "*remain a BlackBerry employee with all of their existing contractual and employment rights preserved.*" BlackBerry's best evidence of this is that it consistently told employees that some groups within BlackBerry may have opportunities; however, it could only assess this after the BlackBerry Scheme was concluded and it would depend on how many individuals accepted the Ford offers.

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[31] Reasons for Decision in Certification Motion (*Parker v BlackBerry,* 2019 ONSC 3185) at para 15: **DMR, Tab 3, pp. 15-16.**

[32] Graham Cross, Q 220-221, 263-269, 280 at pp. 62, 72-75: **DMR, Tab 28, pp. 681, 691-694.**
Jessup Cross, Q 143-147 at p. 27: **DMR, Tab 29, p. 872.**

[33] Graham Cross, Q. 288-298, 315-322 and at pp. 77-79, 83-84 and 86: **DMR, Tab 28, pp. 696-698, 702-703 and 705.**

[34] Graham Cross, Q 282, p 76: **DMR, Tab. 28, p. 695.**

BlackBerry made no guarantee of re-employment to anyone, could not provide details about what jobs would remain, and the Record is littered with references (including in an email from its CEO) of BlackBerry dissuading employees from staying with BlackBerry.[35]

iii. At paragraph 11 of BlackBerry's Factum, BlackBerry seems to be relying on a typographical error to assert the Motions Judge misunderstood its position on the choice employees were given, because the judge stated employees could "*either resign from BlackBerry or accept the [Ford] offer*," when BlackBerry's position was that employees could either *stay* with BlackBerry (as opposed to resign) or accept the Ford offer. Throughout the decision (including in the next sentence) the Motions Judge acknowledges that he understood BlackBerry's position: it alleges it gave the choice of either staying with BlackBerry or accepting the Ford offer.[36]

iv. At paragraph 18 of BlackBerry's Factum, BlackBerry asserts that Parker highlighted a "*small number of common communications or meetings*" to show common treatment. Despite not yet having a Discovery or full productions, these communications took approximately a half-day of argument during the Certification Motion and, as is set out throughout this factum, there was such a volume of consistent communications that the Motions Judge described it as an "*elaborate control of the message to the affected group of individuals*."[37]

v. At paragraph 19 of BlackBerry's Factum, BlackBerry asserts that employee questions necessarily "*differed from employee to employee*." Yet, BlackBerry has pointed to no meaningful examples of a difference in the information it communicated to the Class Employees.

vi. At paragraph 23 of BlackBerry's Factum, BlackBerry asserts "*Ford decided in its sole discretion which Project Silver employees it would make offers to and what the terms of those offers were*." This is an accurate, but incomplete, statement. BlackBerry provided Ford with a list of employees that Ford could use to exercise its discretion about whom to offer employment to. BlackBerry also gave Ford those employees' full HR files to allow Ford to craft the terms of those offers.[38]

vii. The fact that some employees reacted positively to offers from Ford is largely based on the HR Team's perception of employee email correspondence that they were not a party

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[35] Jessup Cross: pp 62-63, Q 317-320: **DMR, Tab 29, pp. 907-908.**
Graham Cross: pp 76-79, Q 284-296: **DMR, Tab 28, pp. 695-698.**
Mascarin Cross: pp 19-22, Q 104-121: **DMR, Tab 31, pp. 1035-1039.**
Carswell Cross: pp 16-17, Q 84-88: **DMR, Tab 30, pp. 1007-1008.**
Affidavit of Lisa Carswell at para 10: **DMR, Tab 9, p. 361..**

[36] Reasons for Decision in Certification Motion (*Parker v BlackBerry Limited*, 2019 ONSC 3185) at para. 12: **DMR, Tab 3, p. 15.**

[37] Reasons for Decision in Certification Motion (*Parker v BlackBerry Limited*, 2019 ONSC 3185) at para 15: **DMR, Tab 3, pp. 15-16.**

[38] Ford-BlackBerry Agreement: **DMR, Tab 35-B, p. 1188.**

to, after BlackBerry conducted a document search for the purposes of this litigation, and in any event, is irrelevant.[39]

viii. At paragraphs 28 and 36 of BlackBerry's Factum, BlackBerry points to four Class Employees who provided evidence of "*differing communications*" they had through the process and showing they made a "*voluntary decision*" to leave BlackBerry. Their evidence was actually the same as Parker's and all other Class Employees', with the exception of Mr. van Hoeckel, whose evidence is not relevant:

- *Adrienne Lee*: at paragraph 6 of her Affidavit, she confirms identical information was communicated to her as to other employees: BlackBerry would "*try to place her on another project*", with no guarantee of a role, and that if one could not be found, she would be made "*redundant*" and "*laid off*."

- While she asserts that she understood she was "*resigning*" from BlackBerry, she does not communicate that she understood her employment rights or what legal entitlements she may be waiving; only that she could not hold two jobs at once. Moreover, as is set out below, an employee cannot waive their statutory employment rights.

- Andrew Mackie and Lee Watson: both individuals accepted the Ford offer, but then returned to BlackBerry later and were BlackBerry employees at the time they provided evidence. Paragraph 6 of Mr. Watson's Affidavit (regarding the "different" communications he received) is nearly identical to paragraph 6 of Ms. Lee's. In paragraph 6 of Mr. Mackie's Affidavit, he also confirms that at the time he was considering the Ford offer, BlackBerry "did not at that point know the specifics of which team or project it would be" if he stayed. In other words, as with every other Class Employee, neither of these individuals were told what their role would be, or even if they would have a role, if they declined the offer and, as such, they accepted employment with Ford.[40]

- *Martin van Hoeckel:* Mr. van Hoeckel's evidence is not relevant because, while he technically falls within the Class Definition, he does not actually have a claim against BlackBerry because he was not targeted by Ford and BlackBerry as part of the BlackBerry Scheme. Rather, after hearing of opportunities at Ford, he approached Ford seeking employment. He is still included in the Class Definition because there is no way to revise the Class Definition without arbitrarily excluding individuals with claims.[41] BlackBerry has not raised the Class Definition as an issue in its Factum.

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[39] Graham Cross, Q 647-661 at pp. 156-159: **DMR, Tab 28, pp. 775-778.**

[40] Affidavit of Lee Watson at para 6: **DMR, Tab 22, p. 466;**
Affidavit of Andrew Mackie Affidavit at paras 5-7: **DMR, Tab 23, p. 470.**

[41] *Ramdath v George Brown College of Applied Arts and Technology*, 2010 ONSC 2019 at paras 94-96 **(Parker BOA, Tab 4)** and *Heward v Eli Lilly*, [2007] OJ No 2709 (ONSC) at paras 16-20 **(Parker BOA, Tab 5).**

ix. At paragraphs 30-32 of BlackBerry's Factum, it points to different conversations it had with some managers who accepted employment at Ford. These are the Core Managers who are not part of the Class Definition. Moreover, BlackBerry has ignored evidence that, unlike the Class Employees, the managers were wined-and-dined, able to negotiate to improve the terms and conditions of their offers with Ford, and part of the process to encourage Class Employees to leave BlackBerry, including possibly receiving a financial incentive to do so.[42]

x. BlackBerry references an employee creating a spreadsheet to assess options at paragraph 32 of BlackBerry's Factum. BlackBerry failed to mention that this employee, Matthew Stephenson, swore an Affidavit on this Motion confirming the uniform treatment of all Class Employees: BlackBerry would not provide him a guaranteed position if he stayed; he looked on BlackBerry's internal job site for postings and most were either for short-term contracts or students; and, when he asked his manager about staying with BlackBerry, his manager told him BlackBerry was looking for a "*different skillset*" than his.[43]

xi. Paragraphs 9 and 41-43 of BlackBerry's Factum highlight Parker's "*individual circumstances*" to suggest his experience was different than other employees' evidence, when in fact, it again confirms that BlackBerry told him the same thing: there was no guarantee of continued employment; when he asked about staying with BlackBerry and specific opportunities, BlackBerry dissuaded him from pursuing them; and only after he started litigation did BlackBerry indicate there were available roles for him, without any information about what those roles might be.[44]

xii. At paragraphs 26 and 45 of BlackBerry's Factum, it suggests that there were "*many roles*" available since the BlackBerry Scheme concluded and, had more employees declined the offers from Ford, there were continuing roles available to them. Ms. Graham was asked on cross-examination, and through undertakings, to produce any evidence that she communicated in writing to any employee that "*many roles*" would be available to them. BlackBerry did not produce any evidence of this communication being made to any employee beyond Ms. Graham's assertions.[45]

Issues

35. BlackBerry has not clearly identified the issues in this Motion for Leave. Specifically,

BlackBerry must establish that:

[42] See paragraphs 17, 23 – 24 above.
[43] Affidavit of Matthew Stephenson at paras 8-12: **DMR, Tab 19, pp. 433-434.**
[44] First Parker Affidavit at para 16: **DMR, Tab 6, p. 50.**
[45] Graham Cross, Q 813, p 196: **DMR, Tab 28, p. 815.**

I. There is a conflicting decision by another judge or court in Ontario or elsewhere on the matter involved in the proposed appeal and it is, in the opinion of the panel hearing the motion, desirable that leave to appeal be granted; or

II. There appears to the panel hearing the motion good reason to doubt the correctness of the order in question and the proposed appeal involves matters of such importance that, in the panel's opinion, leave to appeal should be granted.[46]

36. The leave stage is not a hearing *de novo*, but a narrowly focused opportunity for BlackBerry to establish either of the above two tests,[47] which BlackBerry has failed to do.

Analysis

Leave is not easily granted

37. BlackBerry has not cited any of the well-settled principles governing leave to appeal Certification Orders. For the Court's benefit, Parker has set out the "*rigorous test*" that BlackBerry must satisfy; leave, particularly of Certification Orders, is not easily granted. The reviewing court can only intervene where the motions judge made a palpable and overriding error of fact, or otherwise erred in principle. Substantial deference is owed to the expertise and detailed knowledge of the file that the Certification Motions judge possesses.[48]

I. There are no conflicting decisions and is it not desirable that leave be granted

38. BlackBerry must establish that there is both a conflicting decision on a matter involved in the proposed appeal and that it is desirable that leave be granted. It has done neither.

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[46] *Rules of Civil Procedure,* RRO 1990, Reg 194, R 62.02(4)(a) and (b): **Schedule B.**
[47] *Sankar v Bell Mobility Solutions Inc,* 2013 ONSC 7529 at para 7: **Parker BOA, Tab 6.**
[48] *Griffin v Dell Canada Inc* [2009] OJ No 3438 (Div Ct) at paras 34-35: **Parker BOA, Tab 7.**

39. A decision must conflict on a matter of principle, and not because a different result was reached in respect of particular facts.[49] The plaintiff's burden on a certification motion is not an onerous one and the certification stage is procedural – not the forum where the merits of the action are decided.[50] The Court must also consider the nature of certification motions, being a "*fluid, flexible procedural process*", where the certification order is an interlocutory tool that can be amended, varied or set aside at any time. Certification is not to be treated as an impediment to the action being brought as a class proceeding where it is an appropriate and preferable mechanism for resolving the dispute.[51]

40. Even if there is a conflicting decision (which there is not here), the panel has discretion to deny leave. The Divisional Court has denied leave when certain issues are better determined with a full evidentiary record at a trial, as opposed to a preliminary Certification Motion.[52]

41. In *Omarli v Just Energy Group Inc,* this Court denied leave to appeal a certification order of a claim that an employer misclassified its employees as independent contractors. The Defendant argued that the test for whether a person was an employee is necessarily fact dependent; however, the Certifications Judge concluded that there was sufficient evidence on the record to conclude that the issue could be assessed on a common basis. The Court held that substantial deference was owed to the Motions Judge, who reviewed the full record, and determined the evidence of commonality was "*quite compelling*" and evidence supporting the defendant's position that individual inquiries was "*surprisingly weak.*"[53]

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[49] *Shah v LG Chem Ltd.,* 2016 ONSC 4670 at para 8: **Parker BOA, Tab 8.**
[50] *Shah v LG Chem Ltd., supra,* at para 42: **Parker BOA, Tab 8.**
[51] *Shah v LG Chem Ltd., supra,* at 42-43 and *Sankar v Bell Mobility Solutions Inc, supra,* at paras 11-13: **Parker BOA, Tabs 8 and 6.**
[52] *Griffin v Dell Canada Inc, supra,* at para 10: **Parker BOA, Tab 7 .**
[53] *Omarali v Just Energy Group Inc,* 2016 ONSC 7096 at para 5: **Parker BOA, Tab 9.**

a. The Certification Decision is consistent with the legal test for termination

BlackBerry misstates the test for termination

42. The legal test for termination is: whether a reasonable person, in the Class Employees' circumstances, would understand, through the employer's words and actions, in the situation of that particular industry, workplace, and surrounding circumstances, that their employment was terminated.[54]

43. At paragraphs 55-56 of BlackBerry's Factum, BlackBerry incorrectly submits that a court must consider an employee's subjective state of mind when assessing whether there has been a termination. Both Parker and BlackBerry's authorities confirm that the test for termination is objective and only focused on the employer's conduct.[55]

44. At paragraphs 55-56 of BlackBerry's Factum, it also incorrectly asserts that the individual conversations between BlackBerry and each employee must be considered in the termination analysis. A court need only consider the BlackBerry Scheme to find that a termination of employment occurred on the date the Ford offered the Class Employees employment. The individual discussions that BlackBerry had with the Class Employees are only relevant for (a) proving that BlackBerry carried out its Scheme, and (b) assessing whether BlackBerry breached its obligation to act in good faith in the manner of dismissal.

45. To the extent that the legal test for termination does not fully capture the BlackBerry Scheme, which Parker denies, policy considerations permit flexibility in the definition of a

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[54] *Prinzo v Baycrest Centre for Geriatric Care* (2002), 161 OAC 302 (ONCA) at para 17 **(BlackBerry BOA, Tab 3)**;
Rajput v Menu Foods Ltd. (1984), 5 ACWS (2d) 450 (ONSC) at para 18 **(BlackBerry BOA, Tab 2)**;
Beggs v Westport Foods Ltd., 2011 BCCA 76 at para 36 **(BlackBerry BOA, Tab 5)**;
Gebreselassie v VCR Active Media, 2007 CanLII 45710 (SCJ) at para 41 **(BlackBerry BOA, Tab 4)**

[55] *Ibid.*

termination to ensure that a scheme designed to deprive employees of their statutory and contractual rights is not sanctioned. As the Ontario Court of Appeal stated in *Downtown Eatery (1993) Ltd v Ontario*, "*while an employer is entitled to establish complex corporate structures and relationships, the law should be vigilant to ensure that permissible complexity in corporate arrangements does not work an injustice in the realm of employment law.*"[56]

46. If the individual conversations between BlackBerry and each Class Employee need to be considered, which Parker denies, the Motions Judge's Certification Decision does not contradict the case law. Parker put forth substantial evidence at the Certification Motion (outlined above), which was accepted by the Motions Judge, that BlackBerry took great care to communicate identical information to the Class Employees when administering the BlackBerry Scheme.[57]

47. Similarly, there is no authority for BlackBerry's submission at paragraphs 57-58 that resignation must be considered as part of the termination test. BlackBerry cites various cases as support, but these cases only serve to clarify the different tests for termination and resignation.[58]

48. BlackBerry also cites *Kafka v Allstate Insurance Company of Canada* ("*Kafka*")[59] as support for its submission. However, *Kafka* does not contradict the Motions Judge's Certification Decision – termination was not at issue in that case. Rather, *Kafka* dealt with whether

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[56] *Downtown Eatery (1993) Ltd. v Ontario*, [2001] OJ No 1879 (ONCA) at para 36 [*emphasis added*]: **Parker BOA, Tab 10.**
[57] Reasons for Decision in Certification Motion (*Parker v BlackBerry Limited*, 2019 ONSC 3185) at para 15: **DMR, Tab 3, pp. 15-16.**
[58] *Rajput v Menu Foods Ltd., supra,* at paras 18-19 **(BlackBerry BOA, Tab 2)**.
Beggs v Westport Foods Ltd., supra, at paras 36-37 **(BlackBerry BOA, Tab 5)**.
Gebreselassie v VCR Active Mediation, supra, at paras 41-42 **(BlackBerry BOA, Tab 4)**
[59] *Kafka v AllState Insurance Company of Canada,* 2011 ONSC 2305 at paras 156-162: **BlackBerry BOA, Tab 1.**

constructive dismissal can be dealt with on a common basis, which necessitated a different legal test. This is discussed in more detail in the following section on the commonality requirement at paragraph 61.

Resignation is irrelevant

49. There is no authority stating that a court must consider resignation as part of the termination test because it does not make logical sense to do so. If a court finds that employees were terminated, it cannot go on to find that those same employees also resigned: a person cannot resign from a job that they have already been terminated from.

50. Further, as soon as employees have been terminated, their entitlements on termination, statutory or otherwise, are triggered. BlackBerry's request for resignation letters from the Class Employees amounts to an attempt by BlackBerry to have the Class Employees agree to waive their right to seek their entitlements on termination. BlackBerry is effectively trying to transfigure the resignation letters into releases.

51. However, employees are unable to contract out of employment standards and any such agreement to do so is "*void for all purposes*."[60] Therefore, if a termination is found, BlackBerry cannot rely on any artificial resignation by the Class Employees at trial to challenge Certification.

52. Conversely, if a court finds that the BlackBerry Scheme was not a disguised termination, which Parker expressly denies, Parker's case ends there. Whether there was a termination is a question of fact for the trial judge that must be based on a fulsome evidentiary record.

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[60] *ESA, supra*, s 5(1): **MPBOA Schedule B**.
Machtinger v HOJ Industries Ltd., [1992] 1 SCR 986 at para 28: **Parker BOA, Tab 11**.
Abridean International Inc. v Bidgood, 2017 NSCA 65 at paras 62-63: **Parker BOA, Tab 12.**
Labour Standards Code, RSNS 1989, c 246, s 6: **Schedule B**.

BlackBerry is conflating the tests of termination and resignation to reframe Parker's case to make it less amenable for certification. The Motions Judge's Certification Decision does not contradict the well-settled employment law principles that are applicable on termination.

b. The Certification Decision is consistent with established principles governing the commonality requirement

53. The *Class Proceedings Act* ("*CPA*") defines "common issues" as: (a) common but not necessarily identical issues of fact; or (b) common but not necessarily identical issues of law that arise from common but not necessarily identical facts. The common issues do not need to predominate over non-common issues and the class members need not be identically situated vis-a-vis the opposing party. The Ontario Court of Appeal has described commonality as "*a low bar*."[61]

54. A common issue is one which will move the litigation forward and avoid duplication of fact-finding or legal analysis. Parker need only provide a minimal evidentiary foundation for the proposed common issues in that there must be some factual basis for the claims.[62]

55. In assessing common issues, Ontario courts also apply the following principles:

    i. The claims need not be identical, but must contain a "*substantial common ingredient*";

    ii. The fact that there may be substantial individual issues after the resolution of the common issues does not preclude certification;

    iii. A purposive approach is necessary: will a class proceeding avoid duplication of fact-finding or legal analysis?;

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[61] *Class Proceedings Act, 1992*, SO 1992, c 6, ss 1 and 5(1): **Schedule B.**
Cloud v Canada (Attorney General), [2004] OJ No 4924 at para 52: **Parker BOA, Tab 13.**
Western Canadian Shopping Centres Inc. v Dutton, 2001 SCC 46, at para 39: **BlackBerry BOA, Tab 10.**
Ramdath v George Brown College of Applied Arts and Technology, supra, at para 97: **Parker BOA, Tab 4.**
[62] *Hollick v. Toronto (City),* 2001 SCC 68, at paras 24-25: **BlackBerry BOA, Tab 9 .**
Western Canadian Shopping Centres Inc. v Dutton, supra, at para 39: **BlackBerry BOA, Tab 10.**
Cloud v Canada (Attorney General), supra, at para 50: **Parker BOA, Tab 13.**

iv. An issue is common where its resolution is necessary for the resolution of a part of each class member's claim (even if it does not resolve the claim in its entirety); and

v. There must be a basis in the evidence before the court to establish the existence of common issues.[63]

56. BlackBerry cannot dictate how Parker frames his case: it is trite law that the Plaintiff is entitled to "*advance its case in a way that makes the case more amenable to class proceedings if they choose to do so.*"[64]

57. At the Certification Motion, Parker proposed thirteen common issues, all of which were certified. BlackBerry's position on appeal is only with respect to one of those common issues: whether BlackBerry's conduct amounts to a termination of the Class Employees' employment.

58. With respect to Class Proceedings case law, BlackBerry has not pointed to a single decision that conflicts with the Certification Decision.

59. Rather, in paragraphs 64 and 65 of BlackBerry's Factum – where it attempts to suggest that the Certification Decision conflicts with Class Proceedings principles – it merely repeats its position that the test for termination requires individualized findings of fact and that the record highlights differences among employees. Based on this, BlackBerry argues that the Motions Judge did not give effect to the principle that success for one must mean success for all.

60. Notwithstanding the fact that the record highlights uniformity in treatment, the Motions Judge did not fail to give effect to the principle that success for one employee must mean success for all. The Motions Judge, consistent with Class Proceeding principles, concluded

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[63] *Ramdath v George Brown College of Applied Arts and Technology*, *supra*, at para 97: **Parker BOA, Tab 4.**
[64] *Rumley v British Columbia,* 2001 SCC 69 at para 30: **Parker BOA, Tab 14.**

that Parker is entitled to frame his case to make it amenable to certification, such that a Court can consider whether BlackBerry carried out a Scheme towards all Class Employees amounting to a termination of employment.[65]

61. At paragraph 66 of BlackBerry's Factum, BlackBerry asserts that it found no decision where a Canadian court has certified the issue of whether employees voluntarily resigned or were terminated, because this is an individual and fact specific analysis. BlackBerry relies on a single case, *Kafka,* to suggest individual inquiry is required to find a termination. BlackBerry's position is incorrect for two reasons:

    a. *Kafka* is a constructive dismissal case, where the employer attempted to change the terms of its existing employees' conditions of employment, unlike here, where BlackBerry sought to end the Class Employees' employment; and

    b. The Court found that, in that particular constructive dismissal case, an individual inquiry was required to assess each employees' terms and conditions before and after the employer unilaterally changed them to determine whether each had been constructively dismissed. However, the Court noted that may not be the case for all employment class actions, including constructive dismissal cases, where "*it might be easy to establish a common issue*" because the employer makes a unilateral change "*across the board*" affecting the whole class in a similar way.[66]

While BlackBerry's Scheme was Kafkaesque, this case is nothing like *Kafka*.

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[65] Reasons for Decision in Certification Motion (*Parker v BlackBerry Limited*, 2019 ONSC 3185) at paras 15-16: **DMR, Tab 3, pp. 15-16.**

[66] *Kafka v Allstate Insurance Company of Canada*, 2012 ONSC 1035 (Div Ct) at para 28 and 72: **BlackBerry BOA, Tab 1.**

62. This Court has dismissed leave to appeal applications where employers have attempted to appeal certification orders of schemes directed at groups of employees. In *Baroch v Canada Cartage Diversified GP Inc*, the plaintiff brought a class proceeding alleging its employer had orchestrated a scheme to avoid paying overtime. The Court found that the plaintiff was entitled to frame and advance its case in a manner amenable to certification and that there was some basis in fact of the existence of a class-wide policy or practice of the employer to disregard or avoid its obligations.[67] Similarly here, the Motions Judge found that there is a strong evidentiary record that BlackBerry orchestrated a scheme to avoid its termination obligations on a class wide basis.

c. It is not desirable for leave to appeal to be granted

63. BlackBerry incorrectly asserts that it is important for leave to be granted so that the "*law of termination and the related defence be clarified*" when, in fact, refusing leave is the best opportunity for this Court to clarify what constitutes a termination.

64. To the extent that there is any uncertainty with respect to the law of termination, which Parker expressly denies, now is not the proper time to grant leave to appeal the Motions Judge's Certification Decision.[68] This Court has previously found that issues like these are best decided on the basis of a full factual record at trial, rather than during a procedural, interlocutory motion.

65. Granting leave would also maintain the Class Employees' precarious position. In *Machtinger v HOV Industries Ltd,* the Supreme Court explained that, "*the law governing the termination of employment significantly affects the economic and psychological welfare of*

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[67] *Baroch v Canada Cartage Diversified GP Inc*, 2015 ONSC 3227 at paras 14-15: **Parker BOA, Tab 15.**
[68] *Griffin v Dell Canada Inc., supra*: **Parker BOA, Tab 7.**

employees" and that Ontario's *Employment Standards Act* ("*ESA*") is meant to remedy the unequal bargaining position between employees and employers because "*individual employees on the whole lack both the bargaining power and the information necessary to achieve more favourable contract provisions than those offered by the employer...*".[69]

66. This Action addresses the inequity the Court identified in *Machtinger*. Specifically, BlackBerry and Ford designed a Scheme meant to deprive nearly 300 workers of their *ESA* rights to termination pay, severance pay, and protection on a sale of business. A class proceeding allows the Class Employees to address this wrongdoing and to collectively preserve their fundamental employment rights on a more equal footing. This is especially true for those Class Employees with shorter service records whose claims may not be economically efficient to pursue individually. A class proceeding will also deter other employers from engaging in this type of behaviour.[70]

67. A class proceeding also provides protection to Class Employees against an employer retaliating against them for bringing a claim. In this case, the Class Employees' employment with Ford is new and many are in a precarious position. A class proceeding provides judicial oversight protecting these vulnerable individuals from retaliation.[71]

68. Denying leave will help ensure that a Court will look at BlackBerry's actions towards 300 employees to determine whether it acted to deprive them of their statutory employment rights. If leave is granted, it will allow BlackBerry to hold this action up at the Certification

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[69] *Machtinger v HOJ Industries Ltd., supra,* at para 2 and 31: **Parker BOA, Tab 11.**
[70] First Parker Affidavit of Parker at para 55: **DMR, Tab 6, p. 59.**
Azar v Strada Crush Ltd., 2018 ONSC 4763 at paras 46-47: **Parker BOA, Tab 16.**
[71] *Fulawka v Bank of Nova Scotia,* 2012 ONCA 443 at para 170: **Parker BOA, Tab 17.**
First Parker Affidavit at para 57-58: **DMR, Tab 6, p. 59.**

Stage, delaying this Class Proceeding from advancing to a Discovery and eventual trial on the merits, even though the test for certification is meant to be a low bar.

69. Employment law will be better served if a trier of fact has an opportunity to review a full factual record of BlackBerry's conduct and determine whether it amounted to a termination and whether that conduct is a breach of its common law obligation to treat employees in good faith in the manner of dismissal. Parker has been unable to find a single decision where an employer in Canada has tried to execute a scheme like BlackBerry's to deprive a large group of its workers their statutory rights on termination. However, if the BlackBerry Scheme is permitted to bypass judicial scrutiny, other employers may follow suit.

II. The Certification Decision is correct and leave to appeal should be denied

70. Under the second branch of the Leave to Appeal test, BlackBerry must establish both that there is reason to doubt the correctness of the Motions Judge's Certification Decision and that the case involves matters of such importance that leave should be granted. The Certification Decision need not be wrong – only open to serious debate. However, this on its own is not enough to obtain leave: BlackBerry must also demonstrate that the matters are of such importance that go beyond the immediate parties and involve questions of public importance relevant to the development of the law and administration of justice.[72]

71. Substantial deference is owed to the Motions Judge on appeal of a certification motion when considering whether there is reason to doubt the correctness of the order or if the public interest is engaged.[73]

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[72] *Shah v LG Chem Ltd., supra,* at para 9: **Parker BOA, Tab 8.**
[73] *Shah v LG Chem Ltd., supra,* at para 40: **Parker BOA, Tab 8.**

a. The Certification Decision is correct

72. The Motions Judge's Certification Decision is correct, as it conforms with the applicable employment and class action law, as discussed above at paragraphs 42 – 62. The applicable termination and commonality principles are well-established and there is no debate in the case law. BlackBerry has merely tried to reframe the common issue of termination in such a way as to make it incapable of certification, which it is not entitled to do. Accordingly, there is no reason to doubt the correctness of the Certification Decision, and BlackBerry has failed to satisfy this branch of the test for leave to appeal.

b. The proposed appeal does not contain matters of public importance that would warrant granting leave to appeal

73. BlackBerry asserts that the development of the law is of substantial importance such that leave ought to be granted.

74. The test is not whether the issues are of "substantial importance", but rather whether they are of "general or public importance."[74] In any event, the public interest in this case favours denying leave to appeal. As set out above, leave will merely allow BlackBerry to further hold up this Action and deny employees a procedural vehicle meant to allow them to pursue claims against BlackBerry on a more equal footing.[75]

75. Instead, the public interest is better served if this Action can proceed, so that a trial judge can assess the BlackBerry Scheme to determine whether it constitutes a termination of the Class Employees' employment on a full factual record. This will better allow employment law to develop, and if Parker is successful, ensure employers do not try to replicate the Scheme.

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[74] *Shah v LG Chem, Ltd.*, *supra*, at para 9: **Parker BOA, Tab 8.**
[75] *Azar v Strada Crush Ltd.*, 2018 ONSC 4763 at paras 46-47: **Parker BOA, Tab 16.**

Order Sought

76. Parker requests that this Court dismiss BlackBerry's Leave to Appeal Motion, with costs payable forthwith to Parker.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 12 day of August, 2019.

Counsel for David Parker, Responding Party

Schedule "A": List of Authorities

1.	*Parker v BlackBerry*, 2018 ONSC 3630
2.	*Bowes v. Goss Power Products Ltd.*, 2012 ONCA 425
3.	*Keays v. Honda Canada Inc.*, 2008 SCC 39
4.	Ramdath v George Brown College of Applied Arts and Technology, 2010 ONSC 2019
5.	*Heward v Eli Lilly*, [2007] OJ No 2709 (ONSC)
6.	*Sankar v. Bell Mobility Inc.*, 2013 ONSC 7529
7.	*Griffin v. Dell Canada Inc.* [2009] O.J. No. 3438
8.	*Shah v. LG Chem Ltd.*, 2016 ONSC 4670
9.	*Omarali v. Just Energy Group Inc.*, 2016 ONSC 7096
10.	*Downtown Eatery (1993) Ltd. v. Ontario*, 54 OR (3d) 161
11.	*Machtinger v. HOJ Industries Ltd.* [1992] 1 S.C.R. 986
12.	*Abridean International Inc. v. Bidgood*, 2017 NSCA 65
13.	*Cloud v. Canada (Attorney General)*, [2004] OJ No. 4924
14.	*Rumley v. British Columbia*, 2001 SCC 69
15.	*Baroch v. Canada Cartage Diversified GP Inc.*, 2015 ONSC 3227
16.	*Azar v. Strada Crush Ltd.*, 2018 ONSC 4763
17.	*Fulawka v. Bank of Nova Scotia*, 2012 ONCA 443

Schedule "B": Statutes, Regulations and By-Laws

Class Proceedings Act, 1992, SO 1992, c 6, ss 1 and 5(1)

Employment Standards Act, 2000, SO 2000, c 41, ss 5(1), 9 and 54-66

Labour Standards Code, RSNS 1989, c 246, s 6

Rules of Civil Procedure, R 62.02(4)(a) and (b)

CLASS PROCEEDINGS ACT, 1992

S.O. 1992, CHAPTER 6

1 In this Act,

"common issues" means,

(a) common but not necessarily identical issues of fact, or

(b) common but not necessarily identical issues of law that arise from common but not necessarily identical facts; ("questions communes")

"court" means the Superior Court of Justice but does not include the Small Claims Court; ("tribunal")

"defendant" includes a respondent; ("défendeur")

"plaintiff" includes an applicant. ("demandeur") 1992, c. 6, s. 1; 2006, c. 19, Sched. C, s. 1 (1).

Section Amendments with date in force (d/m/y)
2006, c. 19, Sched. C, s. 1 (1) - 22/06/2006

Certification

5 (1) The court shall certify a class proceeding on a motion under section 2, 3 or 4 if,

(a) the pleadings or the notice of application discloses a cause of action;

(b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;

(c) the claims or defences of the class members raise common issues;

(d) a class proceeding would be the preferable procedure for the resolution of the common issues; and

(e) there is a representative plaintiff or defendant who,

(i) would fairly and adequately represent the interests of the class,

(ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and

(iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members. 1992, c. 6, s. 5 (1).

No contracting out

5 (1) Subject to subsection (2), no employer or agent of an employer and no employee or agent of an employee shall contract out of or waive an employment standard and any such contracting out or waiver is void. 2000, c. 41, s. 5 (1).

PART IV
CONTINUITY OF EMPLOYMENT

Sale, etc., of business

9 (1) If an employer sells a business or a part of a business and the purchaser employs an employee of the seller, the employment of the employee shall be deemed not to have been terminated or severed for the purposes of this Act and his or her employment with the seller shall be deemed to have been employment with the purchaser for the purpose of any subsequent calculation of the employee's length or period of employment. 2000, c. 41, s. 9 (1).

Exception

(2) Subsection (1) does not apply if the day on which the purchaser hires the employee is more than 13 weeks after the earlier of his or her last day of employment with the seller and the day of the sale. 2000, c. 41, s. 9 (2).

Definitions

(3) In this section,

"sells" includes leases, transfers or disposes of in any other manner, and "sale" has a corresponding meaning. 2000, c. 41, s. 9 (3).

Predecessor Acts

(4) For the purposes of subsection (1), employment with the seller includes any employment attributed to the seller under this section or a provision of a predecessor Act dealing with sales of businesses. 2000, c. 41, s. 9 (4).

PART XV
TERMINATION AND SEVERANCE OF EMPLOYMENT

TERMINATION OF EMPLOYMENT

No termination without notice

54 No employer shall terminate the employment of an employee who has been continuously employed for three months or more unless the employer,

(a) has given to the employee written notice of termination in accordance with section 57 or 58 and the notice has expired; or

(b) has complied with section 61. 2000, c. 41, s. 54.

Prescribed employees not entitled

55 Prescribed employees are not entitled to notice of termination or termination pay under this Part. 2000, c. 41, s. 55.

What constitutes termination

56 (1) An employer terminates the employment of an employee for purposes of section 54 if,

(a) the employer dismisses the employee or otherwise refuses or is unable to continue employing him or her;

(b) the employer constructively dismisses the employee and the employee resigns from his or her employment in response to that within a reasonable period; or

(c) the employer lays the employee off for a period longer than the period of a temporary lay-off. 2000, c. 41, s. 56 (1).

Temporary lay-off

(2) For the purpose of clause (1) (c), a temporary layoff is,

(a) a lay-off of not more than 13 weeks in any period of 20 consecutive weeks;

(b) a lay-off of more than 13 weeks in any period of 20 consecutive weeks, if the lay-off is less than 35 weeks in any period of 52 consecutive weeks and,

(i) the employee continues to receive substantial payments from the employer,

(ii) the employer continues to make payments for the benefit of the employee under a legitimate retirement or pension plan or a legitimate group or employee insurance plan,

(iii) the employee receives supplementary unemployment benefits,

(iv) the employee is employed elsewhere during the lay-off and would be entitled to receive supplementary unemployment benefits if that were not so,

(v) the employer recalls the employee within the time approved by the Director, or

(vi) in the case of an employee who is not represented by a trade union, the employer recalls the employee within the time set out in an agreement between the employer and the employee; or

(c) in the case of an employee represented by a trade union, a lay-off longer than a lay-off described in clause (b) where the employer recalls the employee within the time set out in an agreement between the employer and the trade union. 2000, c. 41, s. 56 (2); 2001, c. 9, Sched. I, s. 1 (12).

Definition

(3) In subsections (3.1) to (3.6),

"excluded week" means a week during which, for one or more days, the employee is not able to work, is not available for work, is subject to a disciplinary suspension or is not provided with work because of a strike or lock-out occurring at his or her place of employment or elsewhere. 2002, c. 18, Sched. J, s. 3 (23).

Lay-off, regular work week

(3.1) For the purpose of subsection (2), an employee who has a regular work week is laid off for a week if,

(a) in that week, the employee earns less than one-half the amount he or she would earn at his or her regular rate in a regular work week; and

(b) the week is not an excluded week. 2002, c. 18, Sched. J, s. 3 (23).

Effect of excluded week

(3.2) For the purpose of clauses (2) (a) and (b), an excluded week shall be counted as part of the periods of 20 and 52 weeks. 2002, c. 18, Sched. J, s. 3 (23).

Lay-off, no regular work week

(3.3) For the purposes of clauses (1) (c) and (2) (a), an employee who does not have a regular work week is laid off for a period longer than the period of a temporary lay-off if for more than 13

weeks in any period of 20 consecutive weeks he or she earns less than one-half the average amount he or she earned per week in the period of 12 consecutive weeks that preceded the 20-week period. 2002, c. 18, Sched. J, s. 3 (23).

Effect of excluded week

(3.4) For the purposes of subsection (3.3),

(a) an excluded week shall not be counted as part of the 13 or more weeks but shall be counted as part of the 20-week period; and

(b) if the 12-week period contains an excluded week, the average amount earned shall be calculated based on the earnings in weeks that were not excluded weeks and the number of weeks that were not excluded. 2002, c. 18, Sched. J, s. 3 (23).

Lay-off, no regular work week

(3.5) For the purposes of clauses (1) (c) and (2) (b), an employee who does not have a regular work week is laid off for a period longer than the period of a temporary lay-off if for 35 or more weeks in any period of 52 consecutive weeks he or she earns less than one-half the average amount he or she earned per week in the period of 12 consecutive weeks that preceded the 52-week period. 2002, c. 18, Sched. J, s. 3 (23).

Effect of excluded week

(3.6) For the purposes of subsection (3.5),

(a) an excluded week shall not be counted as part of the 35 or more weeks but shall be counted as part of the 52-week period; and

(b) if the 12-week period contains an excluded week, the average amount earned shall be calculated based on the earnings in weeks that were not excluded weeks and the number of weeks that were not excluded. 2002, c. 18, Sched. J, s. 3 (23).

Temporary lay-off not termination

(4) An employer who lays an employee off without specifying a recall date shall not be considered to terminate the employment of the employee, unless the period of the lay-off exceeds that of a temporary lay-off. 2000, c. 41, s. 56 (4).

Deemed termination date

(5) If an employer terminates the employment of an employee under clause (1) (c), the employment shall be deemed to be terminated on the first day of the lay-off. 2000, c. 41, s. 56 (5).

Section Amendments with date in force (d/m/y)

2001, c. 9, Sched. I, s. 1 (12) - 4/09/2001

2002, c. 18, Sched. J, s. 3 (23) - 26/11/2002

Employer notice period

57 The notice of termination under section 54 shall be given,

(a) at least one week before the termination, if the employee's period of employment is less than one year;

(b) at least two weeks before the termination, if the employee's period of employment is one year or more and fewer than three years;

(c) at least three weeks before the termination, if the employee's period of employment is three years or more and fewer than four years;

(d) at least four weeks before the termination, if the employee's period of employment is four years or more and fewer than five years;

(e) at least five weeks before the termination, if the employee's period of employment is five years or more and fewer than six years;

(f) at least six weeks before the termination, if the employee's period of employment is six years or more and fewer than seven years;

(g) at least seven weeks before the termination, if the employee's period of employment is seven years or more and fewer than eight years; or

(h) at least eight weeks before the termination, if the employee's period of employment is eight years or more. 2000, c. 41, s. 57.

Notice, 50 or more employees

58 (1) Despite section 57, the employer shall give notice of termination in the prescribed manner and for the prescribed period if the employer terminates the employment of 50 or more employees at the employer's establishment in the same four-week period. 2000, c. 41, s. 58 (1).

Information

(2) An employer who is required to give notice under this section,

(a) shall provide to the Director the prescribed information in a form approved by the Director; and

(b) shall, on the first day of the notice period, post in the employer's establishment the prescribed information in a form approved by the Director. 2000, c. 41, s. 58 (2).

Content

(3) The information required under subsection (2) may include,

(a) the economic circumstances surrounding the terminations;

(b) any consultations that have been or are proposed to take place with communities in which the terminations will take place or with the affected employees or their agent in connection with the terminations;

(c) any proposed adjustment measures and the number of employees expected to benefit from each; and

(d) a statistical profile of the affected employees. 2000, c. 41, s. 58 (3).

When notice effective

(4) The notice required under subsection (1) shall be deemed not to have been given until the Director receives the information required under clause (2) (a). 2000, c. 41, s. 58 (4).

Posting

(5) The employer shall post the information required under clause (2) (b) in at least one conspicuous place in the employer's establishment where it is likely to come to the attention of the affected employees and the employer shall keep that information posted throughout the notice period required under this section. 2000, c. 41, s. 58 (5).

Employee notice

(6) An employee to whom notice has been given under this section shall not terminate his or her employment without first giving the employer written notice,

(a) at least one week before doing so, if his or her period of employment is less than two years; or

(b) at least two weeks before doing so, if his or her period of employment is two years or more. 2000, c. 41, s. 58 (6).

Exception

(7) Subsection (6) does not apply if the employer constructively dismisses the employee or breaches a term of the employment contract, whether or not such a breach would constitute a constructive dismissal. 2000, c. 41, s. 58 (7).

Period of employment: included, excluded time

59 (1) Time spent by an employee on leave or other inactive employment is included in determining his or her period of employment. 2000, c. 41, s. 59 (1).

Exception

(2) Despite subsection (1), if an employee's employment was terminated as a result of a lay-off, no part of the lay-off period after the deemed termination date shall be included in determining his or her period of employment. 2000, c. 41, s. 59 (2).

Requirements during notice period

60 (1) During a notice period under section 57 or 58, the employer,

(a) shall not reduce the employee's wage rate or alter any other term or condition of employment;

(b) shall in each week pay the employee the wages the employee is entitled to receive, which in no case shall be less than his or her regular wages for a regular work week; and

(c) shall continue to make whatever benefit plan contributions would be required to be made in order to maintain the employee's benefits under the plan until the end of the notice period. 2000, c. 41, s. 60 (1).

No regular work week

(2) For the purposes of clause (1) (b), if the employee does not have a regular work week or if the employee is paid on a basis other than time, the employer shall pay the employee an amount equal to the average amount of regular wages earned by the employee per week for the weeks in which the employee worked in the period of 12 weeks immediately preceding the day on which notice was given. 2001, c. 9, Sched. I, s. 1 (13).

Benefit plan contributions

(3) If an employer fails to contribute to a benefit plan contrary to clause (1) (c), an amount equal to the amount the employer should have contributed shall be deemed to be unpaid wages for the purpose of section 103. 2000, c. 41, s. 60 (3).

Same

(4) Nothing in subsection (3) precludes the employee from an entitlement that he or she may have under a benefit plan. 2000, c. 41, s. 60 (4).

Section Amendments with date in force (d/m/y)

2001, c. 9, Sched. I, s. 1 (13) - 4/09/2001

Pay instead of notice

61 (1) An employer may terminate the employment of an employee without notice or with less notice than is required under section 57 or 58 if the employer,

(a) pays to the employee termination pay in a lump sum equal to the amount the employee would have been entitled to receive under section 60 had notice been given in accordance with that section; and

(b) continues to make whatever benefit plan contributions would be required to be made in order to maintain the benefits to which the employee would have been entitled had he or she continued to be employed during the period of notice that he or she would otherwise have been entitled to receive. 2000, c. 41, s. 61 (1); 2001, c. 9, Sched. I, s. 1 (14).

No regular work week

(1.1) For the purposes of clause (1) (a), if the employee does not have a regular work week or is paid on a basis other than time, the amount the employee would have been entitled to receive under section 60 shall be calculated as if the period of 12 weeks referred to in subsection 60 (2) were the 12-week period immediately preceding the day of termination. 2001, c. 9, Sched. I, s. 1 (15).

Information to Director

(2) An employer who terminates the employment of employees under this section and would otherwise be required to provide notices of termination under section 58 shall comply with clause 58 (2) (a). 2000, c. 41, s. 61 (2).

Section Amendments with date in force (d/m/y)

2001, c. 9, Sched. I, s. 1 (14, 15) - 4/09/2001

Deemed active employment

62 (1) If an employer terminates the employment of employees without giving them part or all of the period of notice required under this Part, the employees shall be deemed to have been actively employed during the period for which there should have been notice for the purposes of any benefit plan under which entitlement to benefits might be lost or affected if the employees cease to be actively employed. 2000, c. 41, s. 62 (1).

Benefit plan contributions

(2) If an employer fails to contribute to a benefit plan contrary to clause 61 (1) (b), an amount equal to the amount the employer should have contributed shall be deemed to be unpaid wages for the purpose of section 103. 2000, c. 41, s. 62 (2).

Same

(3) Nothing in subsection (2) precludes the employee from an entitlement he or she may have under a benefit plan. 2000, c. 41, s. 62 (3).

SEVERANCE OF EMPLOYMENT

What constitutes severance

63 (1) An employer severs the employment of an employee if,

(a) the employer dismisses the employee or otherwise refuses or is unable to continue employing the employee;

(b) the employer constructively dismisses the employee and the employee resigns from his or her employment in response within a reasonable period;

(c) the employer lays the employee off for 35 weeks or more in any period of 52 consecutive weeks;

(d) the employer lays the employee off because of a permanent discontinuance of all of the employer's business at an establishment; or

(e) the employer gives the employee notice of termination in accordance with section 57 or 58, the employee gives the employer written notice at least two weeks before resigning and the employee's notice of resignation is to take effect during the statutory notice period. 2000, c. 41, s. 63 (1); 2002, c. 18, Sched. J, s. 3 (24).

Definition

(2) In subsections (2.1) to (2.4),

"excluded week" means a week during which, for one or more days, the employee is not able to work, is not available for work, is subject to a disciplinary suspension or is not provided with work because of a strike or lock-out occurring at his or her place of employment or elsewhere. 2002, c. 18, Sched. J, s. 3 (25).

Lay-off, regular work week

(2.1) For the purpose of clause (1) (c), an employee who has a regular work week is laid off for a week if,

(a) in that week, the employee earns less than one-quarter the amount he or she would earn at his or her regular rate in a regular work week; and

(b) the week is not an excluded week. 2002, c. 18, Sched. J, s. 3 (25).

Effect of excluded week

(2.2) For the purposes of clause (1) (c), an excluded week shall be counted as part of the period of 52 weeks. 2002, c. 18, Sched. J, s. 3 (25).

Lay-off, no regular work week

(2.3) For the purpose of clause (1) (c), an employee who does not have a regular work week is laid off for 35 or more weeks in any period of 52 consecutive weeks if for 35 or more weeks in any period of 52 consecutive weeks he or she earns less than one-quarter the average amount he or she earned per week in the period of 12 consecutive weeks that preceded the 52-week period. 2002, c. 18, Sched. J, s. 3 (25).

Effect of excluded week

(2.4) For the purposes of subsection (2.3),

(a) an excluded week shall not be counted as part of the 35 or more weeks, but shall be counted as part of the 52-week period; and

(b) if the 12-week period contains an excluded week, the average amount earned shall be calculated based on the earnings in weeks that were not excluded weeks and the number of weeks that were not excluded. 2002, c. 18, Sched. J, s. 3 (25).

Resignation

(3) An employee's employment that is severed under clause (1) (e) shall be deemed to have been severed on the day the employer's notice of termination would have taken effect if the employee had not resigned. 2000, c. 41, s. 63 (3).

Section Amendments with date in force (d/m/y)

2002, c. 18, Sched. J, s. 3 (24, 25) - 26/11/2002

Entitlement to severance pay

64 (1) An employer who severs an employment relationship with an employee shall pay severance pay to the employee if the employee was employed by the employer for five years or more and,

(a) the severance occurred because of a permanent discontinuance of all or part of the employer's business at an establishment and the employee is one of 50 or more employees who have their employment relationship severed within a six-month period as a result; or

(b) the employer has a payroll of $2.5 million or more. 2000, c. 41, s. 64 (1).

Payroll

(2) For the purposes of subsection (1), an employer shall be considered to have a payroll of $2.5 million or more if,

(a) the total wages earned by all of the employer's employees in the four weeks that ended with the last day of the last pay period completed prior to the severance of an employee's employment, when multiplied by 13, was $2.5 million or more; or

(b) the total wages earned by all of the employer's employees in the last or second-last fiscal year of the employer prior to the severance of an employee's employment was $2.5 million or more. 2000, c. 41, s. 64 (2); 2001, c. 9, Sched. I, s. 1 (16).

Exceptions

(3) Prescribed employees are not entitled to severance pay under this section. 2000, c. 41, s. 64 (3).

Location deemed an establishment

(4) A location shall be deemed to be an establishment under subsection (1) if,

(a) there is a permanent discontinuance of all or part of an employer's business at the location;

(b) the location is part of an establishment consisting of two or more locations; and

(c) the employer severs the employment relationship of 50 or more employees within a six-month period as a result. 2000, c. 41, s. 64 (4).

Section Amendments with date in force (d/m/y)

2001, c. 9, Sched. I, s. 1 (16) - 4/09/2001

Calculating severance pay

65 (1) Severance pay under this section shall be calculated by multiplying the employee's regular wages for a regular work week by the sum of,

(a) the number of years of employment the employee has completed; and

(b) the number of months of employment not included in clause (a) that the employee has completed, divided by 12. 2000, c. 41, s. 65 (1).

Non-continuous employment

(2) All time spent by the employee in the employer's employ, whether or not continuous and whether or not active, shall be included in determining whether he or she is eligible for severance pay under subsection 64 (1) and in calculating his or her severance pay under subsection (1). 2000, c. 41, s. 65 (2).

Exception

(2.1) Despite subsection (2), when an employee in receipt of an actuarially unreduced pension benefit has his or her employment severed by an employer on or after November 6, 2009, time spent in the employer's employ for which the employee received service credits in the calculation of that benefit shall not be included in determining whether he or she is eligible for severance pay under subsection 64 (1) and in calculating his or her severance pay under subsection (1). 2009, c. 33, Sched. 20, s. 1 (1).

Where employee resigns

(3) If an employee's employment is severed under clause 63 (1) (e), the period between the day the employee's notice of resignation took effect and the day the employer's notice of termination would have taken effect shall not be considered in calculating the amount of severance pay to which the employee is entitled. 2000, c. 41, s. 65 (3).

Termination without notice

(4) If an employer terminates the employment of an employee without providing the notice, if any, required under section 57 or 58, the amount of severance pay to which the employee is entitled shall be calculated as if the employee continued to be employed for a period equal to the period of notice that should have been given and was not. 2000, c. 41, s. 65 (4).

Limit

(5) An employee's severance pay entitlement under this section shall not exceed an amount equal to the employee's regular wages for a regular work week for 26 weeks. 2000, c. 41, s. 65 (5).

Where no regular work week

(6) For the purposes of subsections (1) and (5), if the employee does not have a regular work week or if the employee is paid on a basis other than time, the employee's regular wages for a regular work week shall be deemed to be the average amount of regular wages earned by the employee for the weeks in which the employee worked in the period of 12 weeks preceding the date on which,

(a) the employee's employment was severed; or

(b) if the employee's employment was severed under clause 63 (1) (c) or (d), the date on which the lay-off began. 2000, c. 41, s. 65 (6); 2002, c. 18, Sched. J, s. 3 (26).

In addition to other amounts

(7) Subject to subsection (8), severance pay under this section is in addition to any other amount to which an employee is entitled under this Act or his or her employment contract. 2000, c. 41, s. 65 (7).

Set-off, deduction

(8) Only the following set-offs and deductions may be made in calculating severance pay under this section:

1. Supplementary unemployment benefits the employee receives after his or her employment is severed and before the severance pay becomes payable to the employee.
2. An amount paid to an employee for loss of employment under a provision of the employment contract if it is based upon length of employment, length of service or seniority.
3. Severance pay that was previously paid to the employee under this Act, a predecessor of this Act or a contractual provision described in paragraph 2. 2000, c. 41, s. 65 (8).

Section Amendments with date in force (d/m/y)

2002, c. 18, Sched. J, s. 3 (26) - 26/11/2002

2009, c. 33, Sched. 20, s. 1 (1) - 15/12/2009

Instalments

66 (1) An employer may pay severance pay to an employee who is entitled to it in instalments with the agreement of the employee or the approval of the Director. 2001, c. 9, Sched. I, s. 1 (17).

Restriction

(2) The period over which instalments can be paid must not exceed three years. 2000, c. 41, s. 66 (2).

Default

(3) If the employer fails to make an instalment payment, all severance pay not previously paid shall become payable immediately. 2000, c. 41, s. 66 (3).

Section Amendments with date in force (d/m/y)

2001, c. 9, Sched. I, s. 1 (17) - 4/09/2001

LABOUR STANDARDS CODE (NOVA SCOTIA)
CHAPTER 246 OF THE REVISED STATUTES, 1989

Effect of Act

6 This Act applies notwithstanding any other law or any custom, contract or arrangement, whether made before, on or after the first day of February, 1973, but nothing in this Act affects the rights or benefits of an employee under any law, custom, contract or arrangement that are more favourable to him than his rights or benefits under this Act. R.S., c. 246, s. 6.

RULES OF CIVIL PROCEDURE
Courts of Justice Act
R.R.O. 1990, REGULATION 194

MOTION FOR LEAVE TO APPEAL

62.02 (1) Leave to appeal to the Divisional Court from any of the following orders shall be obtained from a panel of that court in accordance with this rule:

1. An interlocutory order of a judge of the Superior Court of Justice, under clause 19 (1) (b) of the *Courts of Justice Act*.
2. A final order of a judge of the Superior Court of Justice for costs, under clauses 19 (1) (a) and 133 (b) of the *Courts of Justice Act*. O. Reg. 536/18, s. 4 (1).

(1.1) REVOKED: O. Reg. 82/17, s. 14 (1).

Motion in Writing

(2) The motion for leave to appeal shall be heard in writing, without the attendance of parties or lawyers. O. Reg. 170/14, s. 22 (2).

Notice of Motion

(3) Subrules 61.03.1 (2) and (3) apply, with necessary modifications, to the notice of motion for leave. O. Reg. 170/14, s. 22 (2).

Grounds on Which Leave May Be Granted

(4) Leave to appeal from an interlocutory order shall not be granted unless,

(a) there is a conflicting decision by another judge or court in Ontario or elsewhere on the matter involved in the proposed appeal and it is, in the opinion of the panel hearing the motion, desirable that leave to appeal be granted; or

(b) there appears to the panel hearing the motion good reason to doubt the correctness of the order in question and the proposed appeal involves matters of such importance that, in the panel's opinion, leave to appeal should be granted. R.R.O. 1990, Reg. 194, r. 62.02 (4); O. Reg. 82/17, s. 14 (2, 3); O. Reg. 536/18, s. 4 (2).

DAVID PARKER

Plaintiff

- and -

BLACKBERRY LIMITED

Defendant

Divisional Court File No. 333/19
(Superior Court File No. 17-17-71659)

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

Proceeding commenced at TORONTO

FACTUM OF THE RESPONDING PARTY, DAVID PARKER
(motion for leave to appeal)

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