MANAGEMENT COUNSEL
Employment and Labour Law Update

SHERRARD KUZZ LLP
Employment & Labour Lawyers

Proudly Canadian

An employee who sues their employer, while still employed, may have **repudiated** the employment agreement.

Does suing one's current employer repudiate the employment agreement? (maybe…)

In a recent decision of the Supreme Court of British Columbia,[1] the court held an employee's decision to sue her employer for wrongful dismissal during the working notice period repudiated the employment agreement. This allowed her employer to treat the employment as ended, saving the employer roughly $150,000 in wrongful dismissal damages.

Jim Molos
416.603.6958
jmolos@sherrardkuzz.com

What is repudiation?

Repudiation arises when a party to an agreement indicates through words or actions that they do not intend to remain bound by the agreement. In the context of an employment agreement, this usually involves a significant breach of a core term that cuts to the heart of the relationship. The test is objective – how would a reasonable person interpret the repudiating party's actions – not what the repudiating party may have subjectively intended.

Repudiation gives the non-breaching party (in this case the employer) the option to treat the agreement as ended. This is important because, as we see in this BC decision, repudiation significantly reduced the amount of wrongful dismissal damages the employer would otherwise have owed the employee.

What happened in the BC case?

The facts were essentially not in dispute:

- Larraine Adrain worked for Agricom for approximately three decades.
- Agricom's owner was contemplating retirement and offered to sell the business to Adrain for one dollar. If Adrain was not interested in purchasing the business, Agricom would wrap up operations.

January 2026 Vol. XXV No. 1

continued inside...

...continued from front

- Adrain did not wish to purchase the business and Agricom provided her with 13 months' working notice. Agricom continued to pay Adrain for 4.5 months after giving her notice of termination.
- Roughly six weeks into the working notice, Adrain sent a demand letter for 24 months' notice (~ $200,000).
- The parties could not reach agreement and Adrain sued Agricom for wrongful dismissal. At the time, Adrain was still working through her notice period.
- Agricom took the position that Adrain's lawsuit was both a repudiatory breach and just cause for dismissal.

The trial

At trial, the parties agreed Adrain was entitled to 24 months' notice. However, the court awarded only seven months' notice, primarily on account of Adrain's repudiation of the agreement. How did the court get there?

Did Adrain's lawsuit = just cause?

No. Suing an employer is not automatically just cause. However, just cause may exist if a lawsuit fundamentally and irreparably damages the employment relationship.

According to the court, sending two demand letters and filing a lawsuit did not irreparably damage the employment relationship because it was not objectively reasonable for Agricom to be shocked by the letters or claim, and "the pleading itself is brief and relatively straightforward [and] does not contain any scandalous or inflammatory allegations."

Had Adrain repudiated the employment agreement?

Yes. Even though Agricom did not have just cause to terminate Adrain's employment, the timing of Adrain's lawsuit was significant because in British Columbia suing one's employer for wrongful dismissal, while continuing to work for the employer, repudiates the employment agreement.

13-month notice was insufficient; therefore wrongful dismissal

The court's ruling that Adrain repudiated the employment agreement did not foreclose the possibility that Agricom had wrongfully dismissed Adrain prior to the repudiation, by providing insufficient notice of dismissal. At trial, Agricom conceded Adrain was entitled to 24 months' notice. However, Agricom had provided only 13 months' notice, thus the court found Adrain had been wrongfully dismissed prior to the repudiation.

Award reduced to seven months

Starting at 24 months' reasonable notice, the court deducted 11.5 months for the unworked portion of the 13-month working notice due to Adrain's repudiation, and a further 4.5 months for the period Agricom continued to pay Adrain after giving her notice (plus another month for contingency).

Takeaways for employers

First and foremost, the law of repudiation is not uniformly applied across Canada. The Court of Appeal for Ontario has held that *"commencing legal action can, but does not necessarily, constitute repudiation"* because the proper inquiry is *"whether the party bringing legal action evinces an intention, in all the circumstances, to repudiate the agreement."*[2] The Supreme Court of Nova Scotia has described the central question as *"has the filing of the action given rise to a breakdown in the employment relationship to the extent that continued employment has become untenable?"*[3] The Supreme Court of Canada has indicated that commencing a legal action might not render the employment relationship untenable.[4]

Despite these differing approaches, this decision offers three important reminders for employers:

1. An employee who sues their employer, while still employed, **may** have **repudiated** the employment agreement. The test is objective, the analysis is contextual, and the question is whether the employee's conduct demonstrates an intention not to be bound by the agreement.
2. If there is repudiation, an employer's swift action to accept it may result in a significant reduction in wrongful dismissal damages.
3. In some cases, suing an employer while employed will be **just cause.** The test is contextual and the question is whether the lawsuit fundamentally and irreparably damaged the employment relationship such that it could not reasonably continue.

Bottom line: The waters are murky and even experienced human resources professionals can get this wrong. Best practice is to seek the assistance of skilled employment counsel who can spot the issues and help minimize potential exposure before, during and after dismissal.

To learn more or for assistance, contact your Sherrard Kuzz LLP lawyer or info@sherrardkuzz.com.

[1] *Adrain v Agricom International Inc.*, 2025 BCSC 1842.

[2] *Remedy Drug Store Co. Inc. v Farnham,* 2015 ONCA 576 at para 58. [emphasis added]

[3] *Garner v Bank of Nova Scotia*, 2015 NSSC 122 at para 195. [emphasis added]

[4] *Potter v New Brunswick Legal Aid Services Commission,* 2015 SCC 10 at paras 108-111.

DID YOU KNOW?

The upper limit for Small Claims Court in Ontario increased from $35,000 to $50,000 on October 1, 2025. The small claims upper limit varies across Canada, from $15,000 in Quebec to $100,000 in Alberta. To learn more or for assistance, contact Sherrard Kuzz LLP or info@sherrardkuzz.com.

Alyssa Gillespie Muzyk
Law Student
416.603.6780
agmuzyk@sherrardkuzz.com

Does an employee have a duty to mitigate under a fixed term employment contract?

The law across Canada is inconsistent.

In British Columbia, an employee on a fixed term employment contract *(i.e.*, a contract that ends after a set period) has a duty to mitigate their damages if the contract comes to a pre-mature end.[1] This means a dismissed employee has a duty to take reasonable, prompt steps to seek new, replacement employment to minimize their damages and prevent the employer from being held responsible for losses that could have been avoided.

Not so in Ontario,[2] where courts have increasingly held that if an employer terminates a fixed term employment contract before it runs its course, absent an enforceable early termination clause, the employee does not have a duty to mitigate, and the employer may be responsible for paying out the remainder of the fixed term – with no deduction for mitigation. That means, for example, an employee dismissed one month into a one-year fixed term contract could be entitled to eleven months of pay as damages, even if the employee secures a replacement job shortly after being dismissed.[3]

The Ontario approach appears to stray from long-held principles of contract law, and courts in other provinces have generally not followed suit. For example, courts in New Brunswick[4] Saskatchewan,[5] and Alberta[6] have not been explicit about whether there is a duty to mitigate. However, when presented with evidence of actual mitigation, courts in these jurisdictions have found mitigation earnings to be deductible.

One thing's for sure – these various lines of analysis have created confusion, inconsistency, and risk for employers across Canada. As one New Brunswick judge noted *"Whether there is a duty to mitigate fixed term contracts is a bit more muddled across the country."*[7]

A recent British Columbia decision

A group of migrant workers came to Canada under the Temporary Foreign Worker Program. Each worker signed a fixed term employment contract to work for Mac's Convenience Stores Inc. ("Mac's") in Western Canada. However, when the workers arrived in Canada, their jobs either did not exist or were inconsistent with the terms of their contracts. The workers commenced a class action against both Mac's and the immigration firm that had introduced the employees to Mac's, seeking payout of their employment contracts.

A key, preliminary issue was whether a fixed term worker has a duty to mitigate their losses. The Supreme Court of British Columbia answered that question – yes – a worker on a fixed term contract has a duty to mitigate unless the contract provides otherwise:

> *…the weight of the British Columbia law is that* ***if a fixed term contract does not provide for early termination through a liquidated damages clause or otherwise, then there is a duty to mitigate.*** *However, a term addressing whether there is a duty to mitigate can be inferred or implied based on the circumstances including the regulatory and statutory context which the case was made.*[8]
>
> **[emphasis added]**

The next question was whether there was an express or implied term in the workers' contracts that ousted the duty to mitigate. The court found the vulnerability of the workers created practical barriers to mitigation which amounted to an implied contractual term: *"the context requires these contracts to be interpreted to oust the duty to mitigate."*[9] As such, the workers did not have a duty to mitigate.[10]

Mac's appealed.

BC Court of Appeal decision

The British Columbia Court of Appeal agreed with the Supreme Court that, generally, a worker on a fixed term contract has a duty to mitigate. However, it disagreed that the contracts at issue contained an implied term ousting that duty. As such, it allowed Mac's appeal.

According to the court, while there may have been practical barriers to mitigation, making it less likely the workers would find alternative employment, this practical reality did not amount to an implied contractual term ousting the duty to mitigate: "*Terms cannot be implied into a contract merely because it seems fair or convenient. The terms must be necessary to give efficacy to the contract, or to avoid incoherence.*"[11]

Lessons for employers

As rightly noted by the New Brunswick court, the law across Canada is muddled exposing employers to unpredictable financial risk.

Fortunately, we know courts in British Columbia, Alberta, Saskatchewan, and New Brunswick lean toward a duty to mitigate, whereas Ontario courts do not. Even more fortunately, there is a tool employers can use to mitigate this financial risk. In every employment contract – fixed or indefinite – it is critical to have a **clear, enforceable, (early) termination provision.**

A small investment into a well-drafted employment agreement, today, can help avoid a much larger payout, tomorrow.

For more information, or assistance, contact your Sherrard Kuzz LLP lawyer or, if you are not yet a client, at info@sherrardkuzz.com.

[1] *Mac's Convenience Stores Inc. v. Basyal,* 2025 BCCA 284
[2] *Howard v Benson Group Inc.*, 2016 ONCA 256 at para 44.
[3] For this reason, we encourage Ontario employers to exercise caution when using a fixed term employment contract.
[4] *New Brunswick v Dornan,* 2023 NBKB 225.
[5] *Crook v Duxbury,* 2020 SKCA 43.
[6] *Rice v Shell Global Solutions Canada Inc*, 2019 ABQB 977.
[7] *Dornan*, *supra* note 4 at para 67.
[8] 2024 BCSC 2007 at para 201.
[9] *Ibid* at para 211.
[10] *Supra* note 8 at para 213.
[11] *Ibid* at para 73.

MANAGEMENT COUNSEL

HReview Seminar Series

Please join us at our next HReview Seminar:

Employment Standards Act ~ Common Pitfalls and Best Practices

(it ain't sexy, but it's important)

Given its broad application to employers and employees, one might expect employment standards legislation to be relatively straight-forward and easy to apply. Sadly, it's not. Join us for a deep dive into the Ontario *Employment Standards Act* ("ESA") (and a sprinkle of other provinces), including common pitfalls, and best practices to minimize risk. Topics include:

1. Employee Misclassification

- Independent contractors? Volunteers? Interns? Students? Does the ESA apply?

2. Overtime and Hours of Work

- Who is (and is not) entitled to overtime pay
- Strategies to manage overtime costs
- Tracking and managing remote employees
- The "three-hour" rule and when it applies

3. Termination for "Wilful Misconduct" (ESA) versus "Just Cause" (common law)

- How these different standards can be costly (unless you draft carefully)

4. Vacation Time and Pay

- Distinguishing between "time" and "pay" (and why it matters)
- Calculating vacation pay (not as simple as it seems)
- "Greater right or benefit" (don't give more than you bargained for)
- Vacation scheduling and carry-over

5. Why an Employee's Remote Work Location Matters

- When the ESA applies to an employee temporarily out of the province

DATE: **Wednesday, March 4, 2026: 9:00 a.m. – 10:30 a.m. EST**
WEBINAR: **Via Zoom** (registrants will receive a Zoom link the day before the webinar)
COST: Complimentary
REGISTER: By Monday, February 23, 2026 here

To subscribe to or unsubscribe from *Management Counsel* and/or invitations to our *HR*eview Seminar Series visit our website at www.sherrardkuzz.com

SHERRARD KUZZ LLP
Employment & Labour Lawyers

250 Yonge Street, Suite 3300
Toronto, Ontario, Canada M5B 2L7
Tel 416.603.0700
24 Hour 416.420.0738
www.sherrardkuzz.com
@SherrardKuzz

Canadian Lawyer 2024-25 TOP Labour & Employment Boutique

LEXPERT RANKED

Chambers and Partners

ELA Employment Law Alliance