

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Klyn v. Pentax Canada Inc.*,  
2024 BCSC 372

Date: 20240304  
Docket: S227929  
Registry: Vancouver

Between:

**Brad Klyn**

Plaintiff

And

**Pentax Canada Inc.**

Defendant

Before: The Honourable Justice Edlmann

## Reasons for Judgment

Counsel for the Plaintiff:

P.M. Pulver

Counsel for the Defendant:

E. Rip

Place and Dates of Hearing:

Vancouver, B.C.  
February 6-7, 2024

Place and Date of Judgment:

Vancouver, B.C.  
March 4, 2024

**Overview**

[1] This is an action for damages arising from the termination of Mr. Klyn's employment with Pentax. The application before me seeks judgment under Rule 9-7. The parties agree that the matter is suitable for summary trial and I am satisfied I am able to make the necessary findings on the evidence before me. I will begin by addressing whether Pentax repudiated its employment contract with Mr. Klyn through its conduct following the termination before turning to the issue of damages.

**Employment Contract**

[2] Mr. Klyn began working with Pentax in June 2001 as an independent contractor. He became an employee starting in January 2007 when he was appointed as a territory manager responsible for developing sales of Pentax's medical equipment, endoscopic devices, and related products in British Columbia.

[3] The parties entered into an employment contract dated November 29, 2006, in which Mr. Klyn's compensation was 100% commission based, subject to the minimums under the *Employment Standards Act*, RSBC 1996, c. 113, in addition to various benefits. The contract provided a biweekly draw against commissions earned until such time as the total commission surpassed the annual draw amount. The contract contained the following in relation to termination without cause:

TERMINATION ON NOTICE

In the event that the Company must terminate your employment for reasons other than Just Cause, the Company may do so upon providing you with, (in addition to payments pursuant to this Agreement that are owed to you up to and including the date of termination) working notice or payment in lieu of notice, (and statutory severance pay if applicable), limited to the greater of:

- a) Your minimum entitlements pursuant to the Employment Standards Act only or;
- b) 4 weeks per completed year of service prior to the signing of this Agreement, plus 4 weeks under this Agreement as an employee of Pentax Canada Inc. to a maximum of 18 months. The Company will continue only your Compensation during the applicable notice period hereunder in equal regular payroll instalments, or provide to you the equivalent pay in lieu of notice as a "salary continuation" and subject to your duty to mitigate.

For the purpose of this Termination on Notice section only, Compensation is defined as: the average of the commission payments paid or payable to you in the two (2) fiscal years completed (or part fiscal years) immediately before the date that your employment is terminated.

[4] In February 2014, Pentax advised Mr. Klyn in writing of pending changes to his compensation program. Effective September 1, 2014, the compensation structure was changed from 100% commission to a base salary of \$100,000, and imposing new commission rates. Mr. Klein was required to sign an acknowledgement and was paid a “signing bonus” of \$1000.00.

[5] On April 4, 2022, Pentax terminated Mr. Klyn’s employment in writing on a without cause basis. The termination letter purported to place a number of conditions on payments, including a duty to report mitigation efforts monthly with the disclosure of the details of all job offers received. On April 29, 2022, Pentax sent a further email warning that failure to comply with the reporting requirements could result in payments ceasing. From the time of termination, Pentax paid only the salary portion of Mr. Klyn’s pay until July 8, 2022, when it ceased payments altogether.

### **Repudiation**

[6] The parties agree on the applicable law. Repudiation is a breach of contract by one party giving rise to the right of the other party to terminate the contract and pursue the available remedies for the breach. A breach is a repudiation of the contract if it is a breach of a contractual condition or of some other sufficiently important term of the contract so that there is a substantial failure of performance (see *Potter v. New Brunswick (Legal Aid Services Commission)*, 2015 SCC 10 at paras. 144-145).

[7] Mr. Klyn alleges a number of breaches of the contract upon his termination. Although Pentax made some payments to him between April and July, the payments only included salary and not commissions as required by the contract. Pentax has not provided a satisfactory explanation for the failure to pay commissions during that period, simply making a rather vague statement that there was a disagreement about the amount owed. I fail to understand why Pentax wouldn’t have at least paid

the amount it considered to be required under the contract, in compliance with its understanding of its own obligations. The failure to comply with its own understanding of its obligations appears to me to be a clear breach of the contract.

[8] In any event, the payments ceased completely in July 2022, presumably because Mr. Klyn did not comply with the demand to report mitigation efforts to Pentax. In submissions, counsel for Pentax conceded that although a duty to mitigate was part of the employment contract, the reporting requirement imposed by Pentax was not. Pentax does not take issue with Mr. Klyn’s efforts to mitigate. He found alternate employment, in what is a rather specialized field, starting in February 2023. I find the failure to make the payments required under the termination clause to be a clear and unequivocal breach of a central term of the contract. I find the employment contract was repudiated by Pentax.

[9] The damages owed to Mr. Klyn will therefore be calculated based on the common law.

**Damages**

[10] The parties agree a reasonable notice period, given Mr. Klyn’s personal circumstances as well as the nature and length of his employment is 18 months. In *Hawes v. Dell Canada Inc.*, 2021 BCSC 1149, Justice Iyer discussed the approach to be taken in assessing pay in lieu of notice:

[27] It is clear from the authorities that, where an employee’s earnings are variable, there is no set formula. The court must award what is fair in the circumstances to approximate what the employee would have earned during the notice period. Sometimes courts have used the average of the past five years of commission earnings: *Veach v. Diversey Inc.*, [1993] B.C.J. No. 2420. Where an employee’s commission earnings have been on an increasing or declining trend in the years prior to dismissal, it may be preferable to use only the last year’s earnings: *O’Reilly*, at para 43. Where the past is not a reliable indicator, the court has made an estimate based on the whole evidentiary record: *TCF Ventures* at para 43.

[11] The following table sets out Mr. Klyn’s T4 earnings since 2010:

<b>Year</b>	<b>Employment Income</b>
2010	\$269,750.56

2011	\$427,543.08
2012	\$234,385.83
2013	\$370,424.04
2014	\$196,861.46
2015	\$234,519.63
2016	\$281,477.21
2017	\$264,955.67
2018	\$215,662.39
2019	\$783,100.32
2020	\$285,440.71
2021	\$340,114.11

[12] There are two challenges in using past earnings to assess what Mr. Klyn would have earned in the 18 months following termination. First, as can be seen from the above table, the income in 2019 was a significant deviation from the rest of Mr. Klyn’s earnings history. It would appear the majority of his 2019 commissions were the result of a large sale to nine hospitals in a regional health authority.

[13] Secondly, in the period leading up to Mr. Klyn’s termination, Pentax faced some significant challenges selling colonoscopes in British Columbia. Starting around May 2019, an issue with blurring on the lenses of one of the models had made a number of hospitals reluctant to purchase or continue using the equipment. Mr. Klyn attributes the issue to significant decline in his earnings during that period.

[14] Pentax argues that under the termination provisions of the employment contract, pay in lieu of notice upon termination was to be calculated using an average of compensation paid or payable over the two fiscal years immediately before the date that Mr. Klyn’s employment was terminated. Mr. Klyn’s average annual compensation over the last two fiscal years of his employment, inclusive of the value of benefits, was \$270,570.20. I note that Pentax terminated Mr. Klyn on the first day of the new fiscal year, at the very time his 2019 income would no longer be used to calculate his pay on termination under the contract. Having found the contract to have been repudiated, I give limited weight to its terms.

[15] On the other hand, the challenge for Mr. Klyn is that there is no indication the issue with the lenses was resolved in the months following his termination, or that the marketing environment in British Columbia substantially improved in that period.

[16] In my view, an average of the past two years of T4 income (\$312,777.41) provides an estimate of the amount that Mr. Klyn would have been earning in the 18 months following his termination that is fair to both parties. It reflects the situation going into the relevant period without being out of step with Mr. Klyn's longer term average earnings. While Mr. Klyn had clearly demonstrated his ability as an exceptional salesperson, I am not satisfied his income in 2019 is reflective of what he would have earned in the relevant period given the exceptional nature of the sales in that year and market conditions he was facing. That being said, I do not find that the two fiscal years selected by Pentax provide a fair projection as they give undue weight to a period in which the problems with blurry lenses were occupying much of Mr. Klyn's time and energy. I therefore find that an appropriate payment in lieu of notice would be \$469,166.12 ( $\$312,777.41 \times 1.5$ ).

[17] The parties agree that Mr. Klyn is entitled to a payment of \$7,000 for the value of a "Winner's Circle" trip he was awarded and never received.

[18] Mr. Klyn mitigated his loss by finding employment during the last eight months of the relevant period. During that time, he was compensated a total of \$150,070.34. This includes \$124,070.34 in earnings, a \$10,000 signing bonus and the equivalent of approximately \$16,000 in stock options.

[19] I will therefore award \$326,095.78 ( $\$469,166.12 + \$7,000 - \$150,070.34$ ), which would be reduced by the amount paid by Pentax between the date of termination and July 2022.

### **Vacation Entitlement**

[20] The 2007 contract set out vacation entitlement in the following terms:

Vacation: Your entitlements to vacation time and vacation pay will be in accordance with the Company policy and will reflect your seniority with

Pentax. To start you will receive 3 weeks. Each following years vacation will be accrued and utilized as per company policies.

[21] By 2015, Mr. Klyn was entitled to five weeks of paid vacation per year. On June 11, 2015, Mr. Klyn requested confirmation of the quantity of his accrued vacation days and was advised that his total accrued vacation at that time was 65 days (or 487.5 hours), of which 40 days (or 300 hours) were carried over from previous years.

[22] In September 2019, Pentax amended its vacation policy, purporting to limit any carryover vacation to five days per year and requiring employees with any outstanding balance of carryover vacation days to use a minimum of five days per year, in addition to their annual allowance.

[23] Pentax takes the position that at the time of his termination, Mr. Klyn had depleted the majority, if not all, of his historic accrued vacation balance. Between the operation of the 2015 and 2019 Vacation Policies and the actual use of his annual vacation, he could not have had any more than five days left.

[24] The fundamental problem with the position taken by Pentax is that it requires a very selective application of the vacation policy. The policy does not only purport to limit accrued vacation, but states that managers are responsible to ensure employees do not have more than five unused vacation days at the end of the year. There is no indication that Pentax or its managers sought to ensure Mr. Klyn took vacation. To the contrary, I was taken to communications with senior management where Mr. Klyn said he was working 70-hour weeks trying to contain damage from the blurry lens issue. The tone of the communications would not indicate that ensuring Mr. Klyn was taking his vacations was a priority, much less taking vacation accrued in past years.

[25] More importantly, the policy states that employees will be notified of the number of annual vacation days available to be taken during the coming year. There is no indication any such notification was ever sent to Mr. Klyn under the policy. I do not accept that Pentax can selectively apply a policy it unilaterally imposed while

completely disregarding its own obligations under the same policy. Whether or not Pentax was entitled to unilaterally eliminate accrued vacation, it at the very least had an obligation to notify Mr. Klyn it was doing so on an annual basis as required in the policy. I do not accept that a unilaterally imposed policy should be selectively applied to Mr. Klyn's detriment.

[26] Setting aside the policy, as of April 4, 2022, Mr. Klyn attests that he would have had a total of 78 days of accrued vacation, with 40 days of vacation accrued prior to June 2015 and an additional 38 days of unused vacation accrued in 2016, 2017, 2018 and 2022. Pentax does not challenge those assertions and I therefore find that Mr. Klyn should be compensated for 78 days of unused vacation time. I expect the parties will be able to agree on the value of those days.

**Punitive Damages**

[27] In addition to the deliberate failure to pay him as he was entitled upon termination, Mr. Klyn makes a number of allegations about the conduct of Pentax in the course of his termination that he says cumulatively warrant an award in punitive damages.

[28] An employer has an overriding duty of good faith and honest performance of the terms of employment. This duty includes the manner in which the employer terminates an employee. (*Bhasin v. Hrynew*, 2014 SCC 71). Punitive damages are an exceptional remedy. The objective of punitive damages is to punish, deter, and denounce misconduct that is, among other things, malicious, oppressive, harsh, vindictive, and reprehensible such that it undermines the notion of decency within the justice system. (*Whiten v. Pilot Insurance Co*, 2002 SCC 18 at paras. 43, 62, 87, 94)

[29] Mr. Klyn alleges that Pentax failed to provide him with timely access to his Canada Life Deferred Profit Sharing Plan ("DPSP"), preventing him from accessing \$181,710.00 of earned profit share. Mr. Klyn was dismissed on April 4, 2020. By sometime in May, Pentax had taken the necessary steps to allow Canada Life, the plan administrator, to transfer the funds to him. On June 4, 2020, Mr. Klyn received



correspondence from Canada Life discussing the next steps, which would appear to have been completed within three weeks or so.

[30] While Mr. Klyn might have preferred a more expeditious processing of access to his DPSP, I have not been taken to any evidence the delay was deliberate, nor do I find it to be inordinate. I accept that the impact of the delay was significant for Mr. Klyn as a result of the failure of Pentax to fulfill its other obligations upon his termination. However, I do not find the timing of access to the DPSP funds to be particularly troubling on its own.

[31] The termination letter of April 4, 2022, set out Mr. Klyn's entitlements and purported to impose a number of additional conditions. I have addressed the detailed reporting requirements earlier in these reasons. The letter reminded Mr. Klyn of the non-solicitation clause in his employment contract and purported to impose a condition that the termination letter itself would remain confidential.

[32] The most troubling aspect of the termination letter was a requirement to sign a "Full and Final Release Agreement" within seven days "in order to accept the above offer". While the language is indirect, it clearly implies that entitlements under the contract were contingent on the signing of the release. The release itself was stunningly broad and included an assertion that all monies owed "have or will have been paid", presumably waiving any right to pursue funds that were already owed.

[33] Pentax did not seek to defend the wording of the release, but simply asserts that it did not cease payments as a result of Mr. Klyn's failure to sign it. In my view, the sending of a termination letter with terms so transparently in the employer's interest couched in language that, at the very least, seeks to give the terminated employee the impression their entitlements depend on the acceptance of those terms is oppressive. The termination of a long-term employee without notice would almost invariably present a significant change to their financial situation. I find the letter was clearly designed to leverage the uncertainty an employee would feel in the circumstances in an attempt to extract concessions to the sole benefit of the

employer. In those circumstances, I find the implicit threat to withhold payments to which the employee was legally entitled is not only oppressive but reprehensible.

[34] Moreover, I find that Pentax’s conduct in deliberately failing to compensate a terminated employee according to even its own understanding of the terms of the contract warrants rebuke. I have taken into consideration that this is the same conduct which led to the repudiation of the contract, to Pentax’s detriment.

[35] Considering the overall circumstances, I find that \$25,000 in punitive damages is warranted given the rather egregious failures to the obligations of good faith and honest performance in the termination of a long-term employee.

**Costs**

[36] In my view, the Plaintiff has been substantially successful and is presumptively entitled to costs. However, should either party wish to make submissions on the issue they may arrange to do so within 30 days of the release of these reasons.

“The Honourable Justice Edelman”