CITATION: Patel v. ITCAD Tech Inc., 2025 ONSC 1697
COURT FILE NO.: CV-23-00701853-0000
DATE: 2025-06-02

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
KISHAN PATEL Plaintiff	*Jason J. Jagpal*, Lawyers for the Plaintiff/Defendant by Counterclaim, Kishan Patel
– and –	
ITCAD TECH INC. Defendant	*Shane Greaves*, Lawyers for the Defendant/Plaintiff by Counterclaim, ITCAD Tech Inc.
-and-	
A N D B E T W E E N:	
ITCAD TECH INC. Plaintiff by Counterclaim	
-and-	
KISHAN PATEL and TECHSPIRER INC. Defendants by Counterclaim	**HEARD: March 13, 2025**

G. DOW, J.

REASONS FOR DECISION

[1] The parties seek determination of the issues between them. For the plaintiff, Kishan Patel, this is a motion for summary judgment arising from unpaid invoices totalling $31,238.01 rendered by his corporate alter ego, TechSpirer Inc. for work done in February and March, 2023. In this regard, I was advised a consent order had been made on or about March 12, 2025 adding TechSpirer Inc. as a plaintiff. The plaintiffs also sought punitive and aggravated damages, interest and costs.

[2] For the defendant, its materials contained a cross-motion for summary judgment on the amounts it claimed it was entitled to on the basis of the plaintiffs' breach of the non-competition clause contained in the May 21, 2021 Independent Contractor Agreement between ITCAD Tech Inc. and TechSpirer Inc. This contract ended October 31, 2022. A successor contract entitled IT Services Agreement, dated November 24, 2022 continued the agreement to March 31, 2023. The defendant seeks the revenue it lost from March 31, 2023 to March 31, 2024.

BACKGROUND

[3] Since 2010, ITCAD Tech Inc., corporation operated by Lingxiao ("Linda") Zhao has provided information technology services to Ontario's Ministry of Health. Kishan Patel, having a Masters Degree in computer engineering, was capable of performing information technology services.

[4] In 2021, Kishan Patel sought a position with the Ministry of Health and learned it did not hire individuals directly but relied on a list of "Vendor of Record" of which ITCAD Tech Inc. was one.

[5] In March, 2021, through ITCAD Tech Inc., Kishan Patel went on a job interview for an information technology position, specifically with The Public Health I&IT Solutions ("PHS") Branch of the Ontario Ministry of Health, also known as "the client". He was unsuccessful in obtaining the position.

[6] In May, 2021, another position became available in this same branch and Linda Zhao provided some assistance to Kishan Patel before he was interviewed. He succeeded on this occasion in being offered the position but through a Vendor of Record such as ITCAD Tech Inc. This resulted in Kishan Patel creating TechSpirer Inc. which in turn entered into the May 21, 2021 Independent Contractor Agreement (affidavit of Kishan Patel sworn November 15, 2024, Exhibit D). The key terms of that contract were:

a) identifying TechSpirer Inc. as an independent contractor and providing services to The Public Health I&IT Solutions (PHS) Branch of the Ontario Ministry of Health;

b) being able to bill ITCAD Tech Inc. $93 per hour for up to 7.25 billable hours per day;

c) the term of the contract was limited to October 31, 2022;

d) the inclusion of a non-competition clause for 12 months after expiration of the agreement restricted to that Branch of The Ministry of Health; and

e) an entire agreement clause.

[7] The contract was completed and superseded by a second contract, dated November 24, 2022 which was very similar, except it extended the term to March 31, 2023. Kishan Patel

continued working at that Branch of The Ministry of Health. That Branch of The Ministry of Health continued paying ITCad Tech Inc. and ITCAD Tech Inc. continued paying the invoices of TechSpirer Inc. tendered to it on a monthly basis.

[8] In February, 2023, ITCAD Tech and Linda Zhao were added as defendants to an existing Ontario Superior Court of Justice action commenced by on His Majesty the King against Sanjay Madan and others, alleging fraud. As a result, ITCAD Tech Inc.'s status as a Vendor of Record was suspended. That claim was discontinued as against ITCAD Tech Inc. and Linda Zhao on August 27, 2024 and ITCAD Tech Inc. status as a Vendor of Record was resumed.

[9] Subsequent to the February, 2023 suspension of ITCAD Tech Inc. as a Vendor of Record, it took steps to identify and enlist other Vendors of Record to assist it and those individuals it had placed such as Kishan Patel so that they could continue to work. This was accomplished through Vendor Service Agreements such as the one with Sky Software Solutions Ltd. (Affidavit of Linda Zhao sworn December 16, 2024 – Exhibit N).

[10] Kishan Patel, on behalf of TechSpirer Inc., also sought out an alternative Vendor of Record and succeeded, entering into a consulting agreement with SRA Staffing Solutions Ltd. dated March 30, 2023. That agreement has no non-competition clause. It also remitted to TechSpirer Inc. a greater portion of the amount the Branch of The Ministry of Health was paying to the vendor of record ($812 per day verses $674.25 per day).

[11] ITCAD Tech Inc. seeks recovery of the one year of lost revenue based on the breach of the non-competition clause for the period of March 31, 2023 to March 31, 2024. This has been allegedly calculated to be $64,621.88. ITCAD Tech Inc. acknowledges it owes TechSpirer Inc. $31,238.01 and seeks recovery of the difference, that is $32,383.87.

ISSUE – INDEPENDENT CONTRACTOR OR EMPLOYEE

[12] The plaintiffs sought a finding at law that Techspirer Inc./Kishan Patel was an employee of ITCAD Tech Inc on the basis ITCAD Tech Inc was a temporary help agency. It relies on the definition of "temporary help agency" as contained in the *Employment Standards Act*, R.S.O. 2000, c. 41 at Sections 1 and 74 of "an employer that employs persons for the purpose of assigning them to perform work on a temporary basis for clients of the employer". Section 74.8(1) prohibits (at subparagraph 4) "Restricting an assignment employee of the agency from entering into an employment relationship with the client".

[13] The plaintiffs relied on *Carranza Carlos o/a Carlos Farms Services v. Anna Woelke*, 2022 CanLII 12309 (ON LRB) where the Board cited a need to give the words and the statute its "grammatical and ordinary" meaning or one that is "clear" and "unambiguous" (at paragraph 37). I agree with that approach. However, in that matter, the workers were being assigned to perform manual labour on farms. I find this distinguishable from information technology work such as Kishan Patel was performing at this Branch of The Ministry of Health. I prefer the reasoning and similarity this situation has to *Davidson v. T.E.S. Contract Services Inc.,* 2024 ONSC 3066 where

the plaintiff was providing information technology to Texas Instruments through an independent contractor agreement between a corporation the plaintiff created and the defendant recruiting firm. Further, Ms. Davidson applied directly at Texas Instruments and the defendant played no role in recruiting her. The learned Justice Glustein concluded the defendant "did not place Davidson" with Texas Instruments (at paragraph 97). I also rely on the plain wording of each agreement which clearly describes TechSpirer Inc. as an independent contractor. As a result, I reject the plaintiffs' submission it was an employee of the defendant.

[14] It was noted during submissions and the plaintiffs agreed that the *Employment Standards Act, supra* was amended with regard to prohibiting non-compete clauses but that same applied only to agreements entered into after October 25, 2021. My finding that the relationship between the parties was not an employment relationship obviates a need to analyze the applicability of the first agreement (which predates October 25, 2021) and the second agreement (which is after October 25, 2021).

ISSUE – VALIDITY OF NON-COMPETE CLAUSE

[15] In the alternative, the plaintiffs' position was that the non-competition clause was too restrictive and thus unenforceable. I agree with the submission that a non-competition clause, as a restrictive covenant, "the rigorous 'reasonability test' is as applicable with respect to independent contractor relationships such as this as with employer/employee relationships" *Winnipeg Livestock Sales Ltd. v. Plewman et al,* 2000 MBCA 60 (at paragraph 24).

[16] The parties generally agreed there were three factors to consider:

a) whether the defendant has a proprietary interest entitled to protection;

b) whether the duration, geographical and/or the scope of the covenant is too broad; and

c) whether the covenant prevents competition generally *(IT/NET Ottawa Inc. v. Berthiaume*, 2002 CanLII 42541 (ONSC) at paragraph 92).

[17] Regarding the first factor, the defendant relied on the following:

d) its competing with other Vendors of Record to place qualified persons in Ontario Government positions;

e) it required the non-competition clause to deter individuals such as Kishan Patel from leveraging his skills to obtain a better deal from other Vendors of Record (as appears to have occurred here); and

f) it requires some protection for the efforts it makes and costs it incurs in identifying and properly preparing candidates for the interview or vetting process the proposed candidate undergoes before being offered a position (as occurred here).

[18] These submissions were met with the plaintiffs' submission the non-competition clause lacked any legitimate business purpose and was contrary to public policy. However, it is clear the Branch of The Ministry of Health had decided to utilize Vendors of Record as a means of recruiting the services it requires. I prefer the defendant's submission and conclude there was a valid basis for the non-competition clause on this basis.

[19] Regarding the duration, geographical and/or scope of the covenant being too broad, the plaintiff relied on the length being unreasonable or more than what should be required to protect ITCAD Tech Inc., and that it was neither negotiated or explained to the plaintiff. To the contrary, the defendant noted the non-competition was restricted to only the exact entity or client to whom the plaintiffs had obtained a position. It is not the Ontario Government or even the Ministry of Health as a whole but only The Public Health I&IT Solutions (PHS) Branch of the Ontario Ministry of Health. It is an attempt to provide some protection to the defendant from the plaintiff or another agency taking over the position without any recourse for the defendant. Kishan Patel was at liberty to seek a position, without restriction anywhere except within the specific Branch of The Minisrty of Health. That position was obtained with the assistance of the defendant. I find the non-competition clause was not void on this basis. Regarding its length, the use of 12 months would appear at the limit for what is enforceable. In this regard, I am mindful of other decisions where 12 months has been upheld, such as *IT/Net Ottawa Inc. v. Berthiaume, supra* (at paragraph 92).

[20] Regarding whether the covenant prevented competition generally, I agree with the defendants' submissions that the plaintiffs were only restricted with regard to a position held at that Branch of The Ministry of Health. He was free to use his skill and ability to obtain a position and work anywhere else. On that basis, it was reasonable and is enforceable.

ISSUE – REPUDIATION OR FRUSTRATION

[21] The plaintiffs' position that the contract was frustrated relied on the definition of frustration being "Frustration occurs when a situation has arisen for which the parties made no provision the contract and performance of the contract becomes "a thing radically different from that which was undertaken by the contract" (*Naylor Group Inc. v. Ellis-Don Construction Ltd*., 2001 SCC 58 at paragraph 53).

[22] However, as submitted by the defendant, the plaintiffs were unable to refer to any similar situation where the court concluded the parties ought to be relieved of their obligations under the contract. Further, and to the contrary, not only did the defendant devise a solution to the unexpected suspension of it being a Vendor of Record (by directing its independent contractors to another Vendor of Record) but the plaintiff also utilized this method to continue working at this Branch of The Ministry of Health. He did not miss a day of work. He made a higher rate of pay.

As a result, I reject the plaintiff's position of the contract being frustrated by the events which occurred.

[23] As a result, it is not necessary to deal with the defendants' objection that this line of argument ought to be rejected on the basis it was not specifically pleaded.

[24] Regarding repudiation, the plaintiffs relied on the statement in *Globex Foreign Exchange Preparation v. Kelcher*, 2011 ABCA 240 (at paragraph 46) "repudiation occurs by words or conduct evincing an intention not to be bound by the contract. If the non-repudiating party accepts the repudiation, the contract is terminated and the parties are discharged from future obligations". From that the plaintiffs submitted that the defendant's request to enroll with another Vendor of Record was the repudiation which the plaintiffs were free to accept (and did so). I disagree. I prefer the reasons contained in *Kerzner v. American Iron & Metal Company Inc.,* 2017 ONSC 4352 (at paragraph 132) that "it would make no commercial, let alone common sense, if every time a dispute arose about the contractual and statutory obligations of the parties to an employment contract, either party could simply take the position that non-compliance with post-termination responsibilities amounts to a repudiation of the contract".

[25] Regarding a lack of consideration, the plaintiff's relied on the existence of the second agreement and its "additional terms" for which consideration was not provided. Again, I disagree. The second agreement, aside from the period of time covered, is identical with respect to all substantial provisions. The plaintiff's relied on comments in *The Travel Company Ltd. v. Keeling*, 2009 ABQB 399 (at paragraph 58) regarding the addition of a restrictive covenant after the original terms of employment had been agreed upon. That is not what occurred with Kishan Patel at the end of October, 2021. Rather, he continued at the same position, a position that he was unable to continue at on his own but only through the Vendor of Record. As a result, this submission fails.

ISSUE – ITCAD TECH INC.'S DAMAGES

[26] The defendant calculated its loss based on the deal Kishan Patel's preferred Vendor of Record made with the Branch of The Ontario Ministry of Health of payment of $903 per day. It also relied on the plaintiff's agreement with the defendant to be paid $93 per hour. The plaintiff submitted the defendant suffered no damages based on the fact that it was not on a position to place the plaintiff (having been suspended from the approved list as of February, 2023 and not reinstated until March 27, 2024). I am prepared and accept the plaintiff's successful effort in finding an alternative Vendor of Record willing to share a portion of what the Branch of The Ministry of Health was willing to pay for TechSpirer Inc. for services is not the proper measure of damages. This reduces the defendant's claim to what it negotiated with the alternative Vendor of Record it put forward, being Sky Software Solutions Ltd. That agreement (Affidavit of Linda Zhao sworn December 16, 2024, Exhibit N) sets out a loss of $70 per day. I accept the number of days involved to be 250 or damages of $17,500.

ISSUE – PUNITIVE DAMAGES

[27] I agree with the plaintiff's position that it was untenable for the defendant to withhold compensation earned and payable to the plaintiff. This is whether it was based on its position of entitlement to damages (and thus a set-off) or as a part of litigation strategy. I find such conduct was unacceptable. The law is clear in the field of employment law that the employer has an implied duty of good faith and fair dealing. This was established *Wallace v. United Grain Grower Ltd.*, [1997] 3 SCR 701.

[28] The law in this area was further developed as the concept of moral damages in *Keays v. Honda Canada Inc.*, 2008 SCC 39. I accept the defendant's position that punitive or exemplary damages are the exception and reserved for matters which follow within those factors enumerated in *Whiten v. Pilot Insurance Co.*, 2002 SCC 18 (at paragraph 94).

[29] I find the withholding of funds acknowledged to be due and owing to the plaintiff in this situation to fall within the factors cited in *Whiten v. Pilot Insurance Co., supra* and particularly to "deter the defendant and others from similar misconduct in the future". Mindful of the final factor stated in *Whiten v. Pilot Insurance Co., supra* (at paragraph 94) "that moderate awards of punitive damages, which inevitably carry a stigma in the broader community, are generally sufficient". I find the plaintiff's demand for $75,000 to be excessive. I also find the defendant's assessment, if awarded, at $3,000, to be insufficient. Mindful of the quantum of funds unreasonably withheld, I find and award the plaintiffs **$15,750**. This is more than 50% of the amount withheld.

CONCLUSION

[30] The plaintiffs shall receive and are awarded **$31,238.01** the parties acknowledge is owed from the work performed and invoices rendered in February and March, 2023. In addition, the plaintiffs shall recover punitive and/or aggravated damages in the amount of $15,750.

[31] The defendant's counter-application is allowed in the amount of **$17,500**.

[32] Regarding pre-judgment interest, for simplicity, the plaintiffs are entitled to and awarded same on the $31,238.01 from when it was due, being April 15, 2023 to the date of the release of these Reasons or $4.1052 per day. Interest shall be awarded at the rate of 4.8% being the applicable rate for when this application was issued. To June 2, 2025, I calculate the 779 days to be and award **$3,197.95**.

COSTS

[33] As required under Rule 51.01(6) the defendant upload its Bill of Costs setting out a claim for $21,306.15 in partial indemnity fees, inclusive of HST and disbursements of $482.20, again inclusive of HST.

[34] The plaintiff advised that it was seeking $22,921.91 for partial indemnity fees, inclusive of HST and incurred disbursements of $1,287.94, again inclusive of HST. I was advised that no Rule 49 Offers to Settle required consideration.

[35] I urge the parties to agree on costs. I would note there appears to be divided success which raises whether the parties ought to each bear their own costs.

[36] If the party's cannot agree on costs, the plaintiffs shall forward its position to me in writing, not to exceed five typed written pages in compliance with Rule 4.01 on or before **July 8, 2025**. The page number shall exclude any essential attachments being relied on. The defendant shall have until **August 7, 2025** to respond, identically limited.

Mr. Justice G. Dow

Released: June 2, 2025

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– and –

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Defendant

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A N D B E T W E E N:

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Plaintiff by Counterclaim

-and-

KISHAN PATEL and TECHSPIRER INC.

Defendants by Counterclaim

REASONS FOR DECISION

Mr. Justice G. Dow

Released: June 2, 2025