

to Stephen J. Kovacic, who is a director of 6HARMONICS INC. It appears that the Defendant did not respond because the Plaintiff has submitted this motion in writing. The better practice would be to provide affidavit evidence attesting to the fact that the Defendant did not respond. Given that the Defendant was noted in default, I will proceed to hear this motion for default judgment in writing.

Decision

[7] For the reasons that follow I am granting the Plaintiff judgment in the amount of \$184,166.69.

The Issues

[8] The main issues are:

- Issue 1: Do the materials provide a basis for a finding of liability?
- Issue 2: If so, what are the damages to which the Plaintiff is entitled?

Analysis

Issue 1: Do the materials provide a basis for a finding of liability?

Consequences of noting in default

[9] Pursuant to r. 19.02, having not defended the proceeding, a defendant is deemed to admit the truth of all allegations of fact made in the Statement of Claim.

[10] However, pursuant to r. 19.06 a plaintiff is not entitled to judgment on a motion for judgment or at a trial merely because the facts alleged in the statement of claim are deemed to be admitted, unless the facts entitle the plaintiff to judgment.

[11] In particular, r. 19.05 provides that a motion for judgment which involves unliquidated damages shall be supported by evidence given by affidavit.

The test on a motion for default judgment

[12] The test on a motion for default judgement is: A. What deemed admissions of fact flow from the facts pleaded in the Statement of Claim? B. Do those deemed admissions of fact entitle the plaintiff, as a matter of law, to judgement on the claim? C. If they do not, has the plaintiff adduced admissible evidence which, when combined with the deemed admissions, entitle it to judgement on the pleaded claim? *Elekta Ltd. v. Rodkin*, 2012 ONSC 2062 at para. 14.

[13] I am satisfied that the Plaintiff has established liability based upon the following deemed admissions from the Statement of Claim, together with the evidence from the affidavit of the Plaintiff Robert Barlow (“Mr. Barlow”).

[14] On September 14, 2021, the Defendant offered the Plaintiff employment as its Chief Executive Officer ("CEO"). The terms of the Plaintiff's employment were set out in a written employment agreement (the "Employment Agreement") which provided, in part:

"In the absence of Cause, the Company may, at its sole discretion and for any reason whatsoever, terminate your employment by providing you with only:

[...]

...six (6) months, plus an additional three (3) months after two years of employment with the Company, and an additional three (3) months after four years of employment with the Company, subject to a combined maximum of twelve (12) months (as applicable, the "Severance Period"), of either working notice or pay in lieu of notice (or a combination of both, at the Company's sole discretion).

[15] The Employment Agreement does not impose a duty on the Plaintiff's in respect of mitigation.

[16] On May 17, 2024, the Defendant advised the Plaintiff that:

...your employment with 6Harmonics Inc. (the “Company”) is being terminated effective as of the end of day on May 31, 2024 (the “Termination Date”) in accordance with your employment agreement dated September 14, 2021 (the “Employment Agreement”). The Employment Agreement, together with the Company’s 2020 Stock Option Plan, as amended to date (the “Option Plan”) and the terms of the options granted to you, entitle you to the following in connection with such end of employment:

- pay until the Termination Date in the ordinary course in accordance with the Company’s normal payroll practices and, thereafter, pay in lieu of notice through salary continuance in accordance with the Company’s normal payroll practices for the period from the Termination Date until the date which is nine months after the date of this letter (such period, the “Severance Period”);

[...]

You are expected to work only until the Termination Date.

[17] The Plaintiff worked until May 31, 2024 and was paid for the work he performed up until that date.

[18] The Defendant did not pay the Plaintiff the remaining eight and one half months' salary that he was to have been paid pursuant to his Employment Agreement.

Issue 2: What are the damages to which the plaintiff is entitled?

[19] The Plaintiff is entitled to be compensated for the loss of bargain which means he is entitled to be placed in the same position he would have been in if the breach had not occurred, or in other words as though the contract had been performed without any breach.

[20] The Defendant breached the Employment Agreement by paying the Plaintiff only two weeks' pay and failing to pay the Plaintiff the full nine months' pay to which he is entitled.

[21] As of May 31, 2024, the Defendant had been paying the Plaintiff at a monthly rate of \$21,666.67, such that eight and one half months of pay was the equivalent of \$184,166.69.

[22] An employment contract that stipulates a fixed term of notice or payment in lieu is to be treated as fixing liquidated damages or a contractual amount and, in such cases, there is no obligation on the employee to mitigate his damages: *Bowes v. Goss Power Products Ltd.*, 2012 ONCA 425 at paras. 61 and 62.

[23] The Plaintiff submits that 6Harmonics' ongoing post-dismissal conduct - including its refusal to honour its post-dismissal obligations, even though it continues to operate and to pay its other employees their wages owing - has caused the Plaintiff both financial hardship and mental anguish.

[24] The Plaintiff relies on *Wallace v. United Grain Growers Ltd.*, 1997 CanLII 332 (SCC) and *Honda Canada Inc. v. Keays*, 2008 SCC 39. These cases are distinguishable.

[25] In *Wallace* the employer summarily discharged without explanation. In its statement of defence, the employer alleged that the employee had been dismissed for cause and maintained the cause allegation until the trial commenced. The termination of employment and the allegations of cause created emotional difficulties for the employee and he was sought psychiatric help. The employee's attempts to find similar employment were largely unsuccessful. Prior to his dismissal, the employee made a voluntary assignment into personal bankruptcy, and remained an undischarged bankrupt when he commenced his lawsuit.

[26] In *Honda Canada Inc.* the court held that, generally, damages are not available for the actual loss of a job or for pain and distress suffered as a consequence of being terminated. However, in cases where parties have contemplated at the time of the contract that a breach in certain circumstances would cause the plaintiff mental distress, the plaintiff is entitled to recover. The court said that where the employer engages in conduct during the course of dismissal that is "unfair or is in bad faith by being, for example, untruthful, misleading or unduly insensitive". These damages should be awarded through an award that reflects actual damages.

[27] In this case the Defendant has not alleged cause. The Plaintiff has not alleged that the Defendant did anything wrong other than fail to pay him pursuant to the Employment Agreement and fail to respond to the action. The Plaintiff has not submitted any particulars or evidence of any specific financial hardship or mental anguish other than the bald statement in his affidavit. The Plaintiff here did find alternate employment on January 2, 2025 albeit at a lower salary.

Costs

[28] The plaintiff requests costs on a substantial indemnity basis in the amount of \$76,009.54 inclusive of disbursements.

[29] Costs on an elevated scale may be warranted where they are explicitly authorized under r. 49 as a result of a failure to accept an offer to settle. Costs on an elevated scale may also be warranted where the unsuccessful party has engaged in behaviour worthy of sanction: *Clots v. Rennie*, 2024 ONSC 1012 at para 7

[30] Costs on a substantial indemnity scale may be warranted where the unsuccessful party has engaged in behaviour that is reprehensible, scandalous, or outrageous, and worthy of sanction: *Davies v. Clarington (Municipality)*, 2009 ONCA 722, at para. 28; *Young v. Young*, 1993 CanLII 34 (SCC), [1993] 4 S.C.R. 3, at p. 134. Substantial indemnity costs are to be awarded “in rare and exceptional cases to mark the court’s disapproval of the conduct of the party in the litigation”: *Hunt v. TD Securities Inc.* (2003), 2003 CanLII 3649 (ON CA), 66 O.R. (3d) 481 (Ont. C.A.), at para. 123.

[31] Conduct worthy of sanction may include the circumstances giving rise to the litigation as well as the conduct in the proceedings: *Mars Canada Inc. v. Bemco Cash & Carry Inc.*, 2018 ONCA 239, at para. 43 citing *Mortimer v. Cameron* (1994), 1994 CanLII 10998 (ON CA), 17 O.R. (3d) 1 (C.A.), at p. 23.

[32] The Plaintiff is entitled to costs on a partial indemnity basis. In this case there are no offers to settle. The Defendant has not engaged in any behaviour either before or during the litigation that is worthy of sanction.

[33] The Plaintiff’s costs demand appears to be based on the contingency fee retainer between the Plaintiff and his own Counsel.

[34] The Plaintiff has not provided any authority for the proposition that the costs awarded against the Defendant should be based on the contingency fee agreement.

[35] The \$395 actual hourly rate of Counsel for the Plaintiff is reasonable. An appropriate hourly rate for partial indemnity costs would be \$240. I have reviewed the 20.5 hours spent working on the file and the time spent is fair and reasonable. I also find that such costs were within the reasonable contemplation of the defendant.

[36] The Defendant shall pay costs to the Plaintiff, on a partial indemnity basis. in the amount of \$4,920 plus HST of \$639.60 and disbursements of \$676.20

Interest

[37] The Plaintiff is entitled to pre-judgment interest at the rate of 5.3%.

[38] The Plaintiff may submit a draft order which reflects my decision by way of email to my Judicial Assistant.

Merritt J.

Released: June 18, 2025

CITATION: Barlow v. 6HARMONICS INC., 2025 ONSC 3610
COURT FILE NO.: CV-24-00730079-0000
DATE: 20250618

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

ROBERT BARLOW.

PLAINTIFF

– and –

6HARMONICS INC.

DEFENDANT

REASONS FOR JUDGMENT

Merritt, J

Released: June 18, 2025