

CITATION: Lee v ITW Canada Inc. 2026 ONSC 1407
COURT FILE NO.: CV-14-00516187
MOTION HEARD: 20260304

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Christina (Shu-Shen) Lee, Plaintiff

AND:

ITW Canada Inc. c/a ITW Construction Products and Tim Dunning, Defendants

BEFORE: Associate Justice Jolley

COUNSEL: David Stamp and Madeline Worndl, counsel for the moving party defendants

Kaley Pulfer, counsel for the responding party plaintiff

HEARD: 4 March 2026

REASONS FOR DECISION

Overview

- [1] This wrongful dismissal action was ready for trial in April 2021. However, the plaintiff then decided to amend her claim, which caused the action to be struck from the trial list in 2022. The pleadings amendment motion was dealt with in 2024 and the action should have been ready for trial again, but the plaintiff then advised she intended to bring a motion to disqualify counsel for the defendants.
- [2] She did not take steps to bring that motion or to bring a motion to restore the action to the trial list and the matter was at a standstill. When the defendants could not obtain the plaintiff's cooperation to complete the joint trial certification form and file the necessary materials to secure a to-be-spoken-to court attendance, they sought a case conference for a "timetable for scheduling trial".
- [3] When a judge heard the case conference on 24 April 2025, he declined to order a timetable as plaintiff's then counsel was bringing a motion to remove herself from the record, due to a disagreement with her client concerning the motion to remove defence counsel. Given the flux of both parties' counsel, the presiding judge indicated, on his own accord, that a motion to dismiss for delay was an option, although I do not find in his endorsement that he indicated such a motion should be brought. Having heard the court raise a motion to dismiss for delay as a potential remedy, the defendants served this motion seeking that relief shortly after that case conference.

The test on a motion to dismiss for delay

- [4] The parties are agreed that *Langenecker v Sauve* 2011 ONCA 803 sets out the governing principles on a motion to dismiss for delay: the moving defendant must establish that the plaintiff is responsible for delay that is both inordinate and inexcusable. If the defendant meets that hurdle, it must also demonstrate that the delay gives rise to a substantial risk that a fair trial of the issues in the litigation would no longer be possible.
- [5] Having reviewed the evidence before me, I am not prepared to dismiss the action.

The delay has been inordinate

- [6] I am satisfied that the delay has been inordinate. While the allegations of discrimination and intentional infliction of emotional suffering have no doubt complicated this action, at its heart it is a wrongful dismissal claim concerning a one year employee, where cause is not alleged. Even considering the various pleadings amendments which predated the further amendment in 2024, it should not have taken eleven years for this matter to be ready for trial.

The delay has been adequately explained

- [7] However, I do not find the delay to be inexcusable. There has certainly been a repeating turnover of plaintiff's counsel, but she has explained each instance and her efforts to retain new counsel. She has explained the variety of reasons why her motion to amend her claim was not heard until March 2024, although it was filed in May 2022.
- [8] The defendants argued on the amendment motion that leave to amend should not be granted as there was a presumption of prejudice in their ability to respond to new allegations, due to delay. McAfee, A.J. addressed this issue at paragraph 13 of her endorsement of 31 May 2024, and I agree with her conclusion, that:

The plaintiff has provided adequate explanation for the delay. There has been a protracted oral and written examination for discovery process, the timeline of which was exacerbated by the pandemic and the satisfaction of the parties' undertakings obligations, which included motions and cross-motions compelling answer of undertakings and production of further affidavits of documents. The timing of seeking leave to amend was also delayed due to the lack of availability of plaintiff's then counsel in the fall and early winter of 2021 due to a family tragedy.

The delay has not prejudiced the defendants' right to a fair trial

- [9] Even if I were satisfied that the delay was inexcusable, I am not satisfied that the defendants' ability to put forward their defence has been prejudiced by the delay. Despite the health and potential cognitive challenges of Mr. Dunning, who is both a personal defendant and the representative of the corporate defendant, his evidence is available through the discovery transcript, which was taken in September 2019.

- [10] The defendants complain that they have no contemporaneous notes to assist them in defending themselves after such a delay. There are two response to this argument. First, the absence of contemporaneous notes was not caused by the plaintiff's delay. The plaintiff's employment was terminated in November 2013 and this action commenced in November 2014. Had the defendants been concerned about any loss of memory, they could have obtained memos or notes from the principal players when the action was commenced, and while the events were relatively fresh and before Mr. Dunning's Parkinson's diagnosis, or interviewed those individuals to preserve their recollections. Further, while I appreciate that Mr. Dunning's health may be declining, I note that he was diagnosed with Parkinsons in 2016. He likely would have experienced the same cognitive issues in 2023 or 2024, when the action would likely have been reached for trial, had it not been struck from the trial list in 2022.
- [11] Second, the court found that the parties have already examined or been examined on all issues raised by the plaintiff. Both parties were examined for discovery on all the allegations raised by the plaintiff in her pleading and asked about their recollections concerning the plaintiff's claims of negligent misrepresentation, discrimination, toxic work environment and her suggestion that she was terminated for raising a potential risk of fraud, all of which were referenced in the original pleading.
- [12] Associate Justice McAfee found that the amendments granted in 2024 did not raise new issues but were "further particulars of existing pleadings and/or arose from production of documentation" (paragraph 17 of her endorsement). She held that "the defendants have had an opportunity to interview witnesses relating to the matters in issue. The proposed impugned amendments do not materially amend the nature of the claims being asserted or the relief being sought" (per paragraph 2 of McAfee, A.J.'s endorsement).
- [13] To the extent the defendants were of the view that they needed further discovery of the plaintiff on the amendments, that relief was granted by A.J. McAfee as a term of granting the amendments, and the defendants have chosen not to conduct a further examination.
- [14] Associate Justice McAfee also rejected the defendants' claim of prejudicial delay, finding that the plaintiff had rebutted any presumption of prejudice. She stated at paragraphs 12 and 14 of her reasons:

I am satisfied that the plaintiff has rebutted any presumption of prejudice [para 12].... The plaintiff has deposed that she is not aware of any prejudice the defendants would suffer as a result of granting the proposed amendments. Examinations for discovery have taken place. Affidavits of documents have been served. The defendants have already been obligated to locate and preserve all relevant documentation relating to the plaintiff's employment and termination of her employment having regard to the existing fresh as amended statement of claim. The defendants have had an opportunity to interview witnesses relating to the matters in issue. The proposed impugned amendments do not materially amend the nature of the claims being asserted or the relief being sought [para 14].

- [15] Having found the plaintiff rebutted the presumption of prejudice, McAfee, A.J. then found no evidence of actual prejudice to the defendants. The defendants have not led evidence before me of specific prejudice that they have suffered since the decision of A.J. McAfee.
- [16] As a concluding point, I find that the defendants' request in January 2025 to schedule this matter for trial is inconsistent with any reasonably held belief they might have had that a fair trial would not be possible as a result of the delay.
- [17] I am not satisfied that the defendants have demonstrated that a fair trial will not be possible because of the delay in this action.

The plaintiff's cross motion to restore her action to the trial list is granted

- [18] The defendants advised that they would not oppose the plaintiff's motion to restore her action to the trial list, should they not succeed on their motion to dismiss. The plaintiff's motion is granted, but the delay must stop today. The plaintiff must understand that she cannot continue to change course with various new amendments and threatened motions with impunity. This action is now 12 years old.
- [19] I accept that, for the last period of time, it is the defendants that have attempted to move this matter forward. They should not have to consistently be the party pressing for a trial.
- [20] To ensure that the action now proceeds expeditiously, I am imposing the timetable attached hereto as Schedule "A", preemptory on the plaintiff – and binding on her whether or not she has counsel. The timetable does not provide for any further amendment to the statement of claim and none shall be made. Should the plaintiff not comply with the timetable, the defendants may bring a motion to strike the action due to her failure to comply with a court order.
- [21] As a condition of this order restoring the action to the trial list, I also order, on the plaintiff's consent, that her motion to disqualify defendants' counsel is withdrawn with prejudice.
- [22] The parties requested time to address costs. While the defendants did not succeed on the motion, the plaintiff should be mindful that the need to bring the motion was driven entirely by her late threat of a motion to remove defendants' counsel and her failure to either bring that motion or bring a motion to restore her own action to the trial list. I expect that the parties may be able to resolve costs, with that proviso in mind.
- [23] However, if they are unable to do so, the defendants may submit a costs outline and submissions of no more than three pages by 27 March 2026. The plaintiff may submit her costs outline and submissions of no more than three pages by 10 April 2026. Materials may be sent to my assistant trial coordinator at Christine.Meditskos@ontario.ca.

Associate Justice Jolley

Date: 9 March 2026