

CITATION: Timmins v. Artisan Cells, 2024 ONSC 7123
COURT FILE NO.: CV-23-00700180-0000
DATE: 20250107

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:)
)
Nicholas Timmins) *Marc W. Kitay*, for the Plaintiff
)
Plaintiff)
)
– and –)
)
Artisan Cell Labs Inc. and Artisan) No One Appearing for the Defendants
Development Labs, Inc.)
)
Defendants)
)
) **HEARD:** November 4, 2024

2025 CanLII 2387 (ON SC)

REASONS FOR JUDGMENT

CALLAGHAN J.

[1] This is a trial relating to the without cause dismissal of the Plaintiff, Nicholas Timmins. The Plaintiff claims he was terminated without sufficient notice. He seeks several remedies by way of damages.

[2] The action was initially defended and proceeded through discovery. On October 15, 2024, some 19 days prior to trial, the defendants withdrew their statement of defence to this action. Thereafter, this was an undefended claim. The trial proceeded on the affidavit of the Plaintiff and the discovery transcript of the Defendants’ representative.

[3] For the reasons that follow, I find that the Plaintiff is owed common law damages in lieu of notice and costs.

Background

[4] The Plaintiff, Dr. Nicholas Timmins (“Timmins”), is a former employee of the Defendant, Artisan Development Labs Inc. (“ADL”). Timmins commenced employment with ADL on November 11, 2019, as its Vice-President, Cell Technologies, and Entrepreneur in Residence, responsible for identification and proposition of new therapeutic product and spin-out opportunities, by deploying ADL genome editing technologies.

[5] In March 2021, ADL promoted Timmins to Executive Vice-President, wherein he initiated the company's Toronto-based team and built out their Canadian operation, which resulted in the formation of Artisan Cell Labs Inc. ("ACL"), a subsidiary of ADL.

[6] In August 2021, ADL promoted Timmins to Chief Development Officer, responsible for the Defendants' Canadian operation. Timmins was responsible for the entire office of 19 employees and served as the face of their Canadian business. He also served as the representative of the US-business as it pertained to their technology for clinical use.

[7] The Defendants remunerated Timmins with a compensation package comprising a \$357,731.19 USD base salary per annum payable in Canadian dollars at an exchange rate of 1.33 (\$475,782.48 CDN per annum), stock options, an annual bonus, employer contributions to his RRSP equal to 4% of his base salary, \$89.27 in monthly cell phone reimbursement, and group benefit and insurance coverage.

[8] Timmins was employed pursuant to an employment agreement dated September 27, 2019 (the "Employment Agreement"). The termination provision, being clause 9 in the Employment Agreement, provides for termination with and without cause. For termination without cause, Timmins was entitled to severance equal to the greater of three months' pay, or his minimum entitlement under the *Employment Standards Act, 2000*, S.O. 2000, c. 41 ("ESA"). At the time of his dismissal, given his years of service, the ESA mandated three weeks' notice/termination pay.

[9] The termination clause reads as follows:

9. Termination:

- a) Termination of Employment for Cause: The Company has the right, at any time, to terminate your employment:
 - (i) without notice or severance pay under the Ontario Employment Standards Act, 2000 (the "ESA"); or
 - (ii) without notice or any other notice or payment in lieu of notice over and above the ESA, if your conduct is such as to constitute just cause for summary dismissal. Should any part of this clause provide entitlements to you that are less than your entitlements under the ESA, the minimum entitlements under the ESA shall prevail.
- b) Termination of Employment Without Cause: The Company may terminate your employment without cause by providing you with only the minimum entitlement to notice of termination or pay in lieu thereof (or any combination thereof at the Company's sole discretion), benefits continuation, minimum severance pay (if applicable), vacation pay on termination pay (if applicable), and any other minimum entitlements required by the ESA, and any accrued salary and vacation pay up to and including the date of termination; or
- c) 3 months notice or pay in lieu of notice, whichever is greater.

d) Should any part of this clause provide entitlements to you that are less than your entitlements under the ESA, the minimum requirements under the ESA shall prevail. You understand and agree that the entitlements set out in the clauses above will constitute your full, exclusive and final entitlements to notice or pay in lieu of notice, severance pay (if applicable), and benefits continuation and including any entitlements to common law notice and by your acceptance of this offer, you waive any further other claim at common law relating to such termination.

[10] Timmins' employment was terminated on March 3, 2023, on a without cause basis. Notwithstanding he was continuously employed for more than three years, the termination letter provided for only one week of ESA termination pay, rather than 3 weeks which would be the statutory entitlement or the remainder of the contractual 3 months. The termination letter further purported to withhold the balance of the severance unless Timmins signed a full and final release.

[11] Timmins retained counsel who advised the Defendants that he was treating the employment contract as being repudiated.

[12] In addition, Timmins also states that he had been in discussions with the Defendants whereby he attempted to negotiate a licence from the Defendants for their gene editing technology, in exchange for 5% of a new company to be formed and owned by Timmins. These negotiations continued after termination, as it was suggested that this may assist Timmins in mitigating any losses due to being terminated. However, negotiations stalled, and no licence agreement was ever agreed upon.

[13] It is submitted by Timmins that the Defendants refused to negotiate the licence agreement unless Timmins signed a full and final release in exchange for the Defendants' severance offer. It is asserted that the Defendants then offered an inferior licence which Timmins objected to. There were no further negotiations and the severance issues remained unresolved.

Issues

[14] Timmins states that the following issues are in dispute:

- a. Does Timmins' employment agreement violate the ESA such that it is void and therefore Timmins is entitled to common law notice?
- b. Alternatively, did the Defendants repudiate the employment agreement, thereby entitling Timmins to reasonable notice?
- c. What is the length of the common law notice period?
- d. How should Timmins' damages be calculated?

e. Are the Defendants jointly and severally liable for Timmins' damages under the common employer doctrine?

f. Is Timmins entitled to punitive damages for the Defendants withholding his minimum statutory entitlements under the ESA and/or for leveraging a deficient severance offer against the licensing rights?

Does the Employment Agreement Violate the ESA?

[15] Timmins asserts that the Employment Agreement violates section 96(1) of the ESA. It is argued that clause 12 of the Employment Agreement ousts the complaint process in the ESA. Clause 12 reads, in part:

You and the Company submit to the exclusive jurisdiction of the courts located in the Province of Ontario in connection with any Dispute or any claim related to any Dispute, and waive any right to a jury with respect to such Dispute.

[16] This clause is said to violate section 96(1) of the ESA which provides:

96 (1) A person alleging that this Act has been or is being contravened may file a complaint with the Ministry in a written or electronic form approved by the Director. 2000, c. 41, s. 96

[17] Relying on *Wood v. Fred Deeley Imports Ltd.*, 2017 ONCA 158 (“*Wood*”), it is submitted that clause 12 violates section 96(1) as it ousts the Ministry from resolving disputes. It is argued that *Wood* ushered in a new era whereby employment contracts that violate employment standards legislated in the ESA are to be considered void. This is particularly so where the offending provision involves termination. Once the employment agreement is held to be void, it is argued that the contractual notice provision no longer applies and the employee is entitled to common law notice: see also *Waksdale v. Swegon North America Inc.*, 2020 ONCA 391; *Henderson v. Slavkin et al.*, 2022 ONSC 2964 (Sup. Ct. J.); *Dufault v. Ignace (Township)*, 2024 ONCA 915.

[18] In this case, Timmins asserts that because clause 12 ousts the jurisdiction of the Ministry to address complaints, it would prevent Timmins from seeking a remedy from the Ministry in the future. The example given was that because the termination clause caps notice at 3 months and ousts the complaint process to the Ministry, any termination after 7 years could not be resolved by the complaint process provided in section 96(1) but would need to proceed before the courts, at greater cost and inconvenience to the employee.

[19] It is argued that “forcing [employees] to take their grievances to court therefore disincentivizes employees from seeking to enforce their rights under the ESA, and consequently shields employers from liability”. It is conceded that this conflict between clause 12 and section 96(1) does not impact Timmins' current situation. Nonetheless, it is submitted that because section

96(1) may impact whether the court or the Ministry determines the validity of the employee's termination rights in the future, all termination provisions in the contract are void: *Waksdale*, at paras. 9-14; *Dufault*, at para. 23. Because the termination provisions are said to be void due to this alleged inherent violation of section 96(1), it is submitted that Timmins may claim common law damages in lieu of notice, rather than the 3 months' notice under the Employment Agreement.

[20] It is urged upon me by Timmins' counsel that this case has "far-reaching consequences across the province." The argument advanced was described as "a novel ground for invalidating termination clauses." I am told that this is an opportunity to further advance the law for the benefit of employees who are at a disadvantage when it comes to protecting their interest in negotiating employment contracts.

[21] In our adversarial system, cases with far-reaching consequences are best resolved when the matter is fully argued with the assistance of opposing counsel. In an article co-authored by Justice Rowe, the value of an adversarial decision-making process was described this way: "... the common law is rooted in the idea that the law is best developed in the face of full submissions, a robust record, and interested parties motivated to put the best arguments before the court": Malcolm Rowe, J. & Shnier, D. (2022). "The Limits of the Declaratory Judgment". *McGill Law Journal / Revue de droit de McGill*, 67(3), 295–328. That is not this case here. I do not have the benefit of an opposing view. This is a nuanced area of the law where views will differ.

[22] By way of example only, Timmins relies on the Court of Appeal's decision in *Heller v. Uber Technologies Inc.*, 2019 ONCA 1 at paras. 36-37 to establish that section 96 is an employment standard which is a precondition to his argument. In *Heller*, the court was considering the propriety of an arbitration clause impacting Uber drivers. Like this case, the plaintiff argued that the requirement to proceed to arbitration was a violation of section 96(1). The Court of Appeal accepted that section 96 is an "employment standard": at para. 37. The *Heller* case was appealed to the Supreme Court of Canada: *Uber Technologies Inc. v. Heller*, 2020 SCC 16 (CanLII), [2020] 2 SCR 118. The majority did not address whether section 96 was an employment standard. In her decision, Justice Côté addressed section 96 (1). She expressly held that the "ability to file a complaint under s. 96 of that Act is not an employment standard": at para. 299. Obviously, Justice Côté took a different view than the Court of Appeal. I raise this distinction because it illustrates that issues in this area may give rise to more than one view of how the legislation may be interpreted. To be clear, I am not addressing the precedential import of the Court of Appeal's decision: *Nohdomi v. Callidus Capital Corporation*, 2023 ONSC 4469 (CanLII), at para 11 but simply illustrating that this area of the law is somewhat nuanced and is not without debate.

[23] Given the "far-reaching consequences" of this "novel ground for invalidating termination clauses", in my view, it would be wiser to make such a determination in circumstances where the matter is fully argued and where the court has the benefit of opposing views. That is not available in this case.

[24] However, as discussed below, this case can easily be resolved by addressing the other issues raised by Timmins and, as such, it is not necessary to decide this novel issue to resolve this

case. Courts have been cautioned not to decide issues of law that are not necessary to resolve the matter in dispute *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 S.C.R. 97, 124 D.L.R. (4th) 129, at paras. 6-8. Accordingly, I leave to another court, on another occasion, to resolve this first issue.

Did the Defendants Repudiate the Employment Agreement?

[25] Timmins argues that in failing to remit the full three months owed under the Employment Agreement (or even the three weeks owed pursuant to the ESA), the Defendants have repudiated the Employment Agreement. If that is so, the Employment Agreement is at an end and Timmins is now entitled to common law notice in respect of his dismissal.

[26] The Court of Appeal in *Remedy Drug Store Co. Inc. v. Farnham*, 2015 ONCA 576 (CanLII), at para. 42, described repudiation as follows:

[42] Repudiation occurs by the words or conduct of one party to a contract that show an intention not to be bound by the contract: *Guarantee Co. of North America v. Gordon Capital Corp.*, 1999 CanLII 664 (SCC), [1999] 3 S.C.R. 423, at para. 40. Anticipatory repudiation is essentially the same as repudiation simpliciter – the only difference is timing. In her treatise, *Canadian Contract Law*, 3d ed. (Markham: LexisNexis Canada, 2012), at p. 618, Angela Swan begins her discussion of anticipatory repudiation by helpfully outlining the circumstances in which this issue typically arises:

The phrases “anticipatory breach” or “anticipatory repudiation” refer to the situation created when, before the time of performance has arrived, one party to a contract tells the other, either explicitly or as an inference from something said or done by the party, that, despite having no justification for its position, it is no longer prepared to perform its obligations under the contract. The statement may be made in a letter by one party’s solicitor to the other, by an oral statement by a party himself or herself to the other, or in any form of communication. [Emphasis added. Citations omitted.]

[27] The court went on to note that “[t]he test for anticipatory repudiation is an objective one” which examines the intention of the breaching party. To establish an intention to repudiate requires “an investigation into the nature of the contract, the attendant circumstances, and the motives which prompted the breach”: *Remedy Drug Store Co. Inc. v. Farnham*, at paras. 45-46.

[28] In *Perretta v. Rand A Technology Corporation*, 2021 ONSC 2111, Justice Sanfilippo addressed a very similar circumstance to the case before me. The parties signed an employment

contract that provided the employee with two weeks' notice, in addition to her minimum entitlements under the ESA. The employer remitted the employee's ESA entitlements but withheld the remaining two weeks unless she signed a release, which the defendant repeatedly requested from the plaintiff.

[29] Sanfilippo J. held that the failure to remit the entire amount owing constituted a repudiation of that plaintiff's employment contract, and that the plaintiff was therefore entitled to common law reasonable notice. In doing so, he opined:

I am satisfied that a reasonable person assessing the Defendant's conduct would conclude that in demanding that its employee execute a Full and Final Release and comply with the terms of an "Enhanced Severance" offer as preconditions to receiving the two weeks' pay to which the employee was contractually entitled, Rand no longer intended to be bound by the 2018 Employment Contract. I reach this conclusion accepting Rand's admission that it made a mistake. Even if Rand's mistake was innocent and resulted from a simple lack of understanding of the very employment contract that it had drawn, and even if I accept Rand's evidence that it did not understand its obligations at law until so advised by counsel for its employee, that does not exhaust the analysis. My assessment is whether the Defendant's conduct evidenced an intention not to be bound by the 2018 Employment Contract, assessed objectively. It does.

[30] Having withheld the contractual severance, Justice Sanfilippo found that the defendant had denied the plaintiff the only remaining benefit of the employment contract. His Honour noted that in circumstances where employees are terminated, they must have some certainty of their entitlements. His Honour quoted from *Wallace v. United Grain Growers Ltd.*, 1997 CanLII 332 (SCC), [1997] 3 SCR 701, at para. 95, wherein the Supreme Court stated that: "The point at which the employment relationship ruptures is the time when the employee is most vulnerable and hence, most in need of protection."

[31] Like *Perratta*, Timmins was not provided with his contractual severance entitlements as provided for in the Employment Agreement. Rather than receiving three months' salary and benefits, he received one week and was told he would receive no more until he signed a full and final release. Like *Perretta*, the Defendants sought an overly broad release, including a release of other claims beyond the severance payment, a non-disclosure clause and non-disparagement clause. Counsel for Timmins wrote the Defendants' counsel objecting and stating that there has been a "gross underpayment of our client's purported contractual termination pay" and that the "attempt to withhold contractually owing sums in exchange for a release, constitute repudiations of his employment contract and entitle him to common law reasonable notice". In response, the Defendants' counsel stated that the amounts offered exceeded both the statutory and common law notice periods. In response, Timmins' counsel responded that the employment contract and the termination clause contained therein had been repudiated, and that Timmins would be pursuing damages, including for common law reasonable notice. This was seven weeks after termination. There was no response to this correspondence. Timmins swore that as far as he can tell he did not

receive even the three weeks of ESA severance, and certainly not the three months. When examined, the representative of the Defendants accepted that Timmins was entitled to three months contractual severance on termination but could not explain why it was not provided.

[32] Having reviewed the evidence objectively, I am satisfied that a reasonable person would conclude that the Defendants did not intend to be bound by the severance provisions in the Employment Agreement. While the witness on discovery could not answer why Timmins was not given three months severance, the correspondence from the Defendants' counsel makes it clear that not paying the contractual severance was not a slip or other error but a point of leverage to receive the proposed release. The release sought was not a condition for receiving the severance payment under the Employment Agreement and, even if a release was an implied term to receipt of the severance payment, the release went beyond any release for severance amounts as it included a release from any other claim, a non-disclosure provision and non-disparagement provision. The Defendants sought a benefit from the release which it was not entitled to under the Employment Agreement. I am satisfied that the Defendants, by their correspondence and actions, repudiated the Employment Agreement: *Perretta* at paras. 32-34.

[33] In doing so, the Defendants deprived Timmins of the only remaining benefit to his Employment Agreement: *Perretta*, at paras. 35-36; *Remedy Drug Store*, at para. 50.

[34] In the circumstances, by failing to pay the three months severance or even the three-week ESA severance and by insisting on a broad release, I conclude that the Defendants repudiated the Employment Agreement when it terminated Timmins and failed to meet its obligation to pay Timmins the contractual severance. As such, in the absence of a governing contractual termination provision, the plaintiff is entitled to common law notice.

What is the length of the common law notice period?

[35] Reasonable notice is intended to reflect an adequate period for the dismissed employee to find other comparable employment. In considering what a reasonable notice period is for an employee, the courts have taken into consideration the employee's age, tenure of employment, character of employment and the ability to find similar employment. For example, senior employees receive longer notice on the theory that it would be more difficult for them to find reasonable replacement employment. Older employees also receive a longer notice period because the workforce tends to prefer younger employees. Courts have also held that where the employee earned substantial annual compensation, the ability to find comparable employment at the same rate of remuneration would be more difficult and thus a longer notice period is appropriate. (see *Paquette v. TeraGo Networks Inc.* 2015 ONSC 4189 at paras. 21-31; *Milwid v. IBM Ltd.*, 2023 ONSC 490.

[36] However, each case must be decided on its facts. The Ontario Court of Appeal in *Love v. Acuity Investment Management Inc.*, 2011 ONCA 130, at para. 14, cited the oft-quoted case of *Badal v. The Globe & Mail Ltd.* (1960), 24 D.L.R. (2d) 140 (O.H.C.) at p.145 where Chief Justice McRuer observed:

There can be no catalogue laid down as to what is reasonable notice in particular classes of cases. The reasonableness of the notice must be decided with reference to each particular case, having regard to the character of the employment, the length of service of the servant, the age of the servant and the availability of similar employment, having regard to the experience, training, and qualifications of the servant.

[37] While there may be several factors to be considered, no one factor is to be given disproportionate weight over the other factors ; *Arnone v. Best Theratronics Ltd.*, 2015 ONCA 63, 329 O.A.C. 284, para. 11. To arrive at an appropriate notice period, all the above factors must be considered in relation to Timmins’s personal circumstances, to ascertain an appropriate period of time that Timmins would need to find comparable employment. In this regard, arriving at the appropriate notice has aptly been described more as an art than a science: *Minott v. O’Shanter Development Co.* (1999), 168 D.L.R. (4th) 270 (Ont. C.A.), at para. 62.

[38] At the time of his dismissal, Timmins was 44 years old, and had been employed for 3.5 years with the Defendants. Timmins was amongst the most senior employees working for the Defendants. The gene therapy world, being the industry in which Timmins worked for many years, was small. There are only a handful of companies doing gene therapy work in Canada. Of the five other companies, Timmins has already worked at two of them. Employment opportunities within his field are not anticipated to grow as funding for new gene therapy companies is limited. While he is not old at 44, his opportunity for employment in his field of expertise is limited.

[39] His remuneration is at the high end of compensation. With bonus and benefits, Timmins made more than \$450,000 a year. As noted by the Court of Appeal, in *Love v. Acuity Investment Management Inc.*, an employee who receives a significant salary, bonus and equity will presumably have a harder time finding similar employment opportunities. This factor “clearly points to a longer period of reasonable notice”: at para. 22.

[40] Timmins submits that given the factors to be considered, he is entitled to a 9-month notice period. He has provided a chart of 17 cases where employees aged 39-47 worked 1-4 years, were mid-to-senior management and damages were awarded based on notice periods of 8-12 months. Of course, each case turns on its own facts, but the law looks to ensure consistency such that individuals with similar characteristics are treated in a similar manner.

[41] Given that Timmins is a senior employee in a niche market who has earned a sizable income, I am satisfied that the proposed notice period of 9 months is a reasonable period of notice which is consistent with the case law.

Damage Calculation

[42] In *Matthews v. Ocean Nutrition Canada Ltd.*, 2020 SCC 26, [2020] 3 S.C.R. 64, the Supreme Court of Canada confirmed that the damages for failure to provide reasonable notice are

those damages that reflect what the employee would have earned during the notice period: at para. 53. This includes salary, benefits, and bonuses.

[43] Timmins earned a salary of \$475,782, being the equivalent amount of his US dollar salary converted at the agreed upon rate of exchange. Based on nine months' notice, this amounts to \$356,836.

[44] He also received phone reimbursement of \$89.27 per month. Based on nine months this amounts to \$803.43.

[45] He was entitled to receive 4% of his base salary as a contribution to his RRSP. Based on nine months' notice, this amounts to \$14,273.47.

[46] He is entitled to health and dental benefits which is calculated as being 10% of his base salary. Based on nine months' salary of \$356,836, this amounts to \$35,683.69.

[47] In addition, he was eligible for a yearly bonus. During the last two years, he received an average of \$59,376 in bonus money. The bonus provision in the Employment Agreement referred to Timmins having "to be actively employed" to be eligible. However, this language is too ambiguous to exclude a bonus during the notice period. As stated in *Matthews*, to exclude a bonus, the language "must be absolutely clear and unambiguous" and "language requiring an employee to be 'full-time' or 'active'.... will not suffice to remove an employee's common law right to damages", at para. 56.

[48] Given the time of year when Timmins was terminated, he had already earned several months towards his yearly bonus. With the nine months' notice and his service in the previous months, I accept that Timmins is entitled to the full yearly bonus. I accept the average of the last two years to be a reasonable assessment of the lost bonus and accordingly I award \$59, 376 for his bonus.

[49] Timmins received one week termination pay and benefits amounting to \$10,064. After deducting that amount, the total award of damages in lieu of nine months' notice is \$456,908.82.

[50] The issue of mitigation was raised for consideration by Timmins. The uncontradicted evidence is that Timmins has searched for employment since being terminated, including seeking lesser roles than he had with the Defendants. He has been unsuccessful. I am satisfied that he has met his obligation to take reasonable steps to mitigate his loss. Of course, the onus is on the Defendants to establish that Timmins both failed i) to take reasonable steps to search for a job and ii) that a job comparable to the job lost by the employee could have been found: *Evans v. Teamsters Local Union No. 31*, 2008 SCC 20 (CanLII), [2008] 1 SCR 661, at para. 30. The Defendants have not attended this trial and therefore have not met the onus to challenge Timmins' mitigation efforts. Accordingly, there is no basis for a deduction from the awarded amount.

Does the Common Employer Doctrine Apply?

[51] The common employer doctrine recognizes that an employee may have more than one employer. This often happens where the employer is part of a larger corporate enterprise. If the evidence establishes that there was an intention to establish an employer/employee relationship that additional company may be liable for damages arising from the termination of a joint employee: *O'Reilly v. ClearMRI Solutions Ltd.*, 2021 ONCA 385, at para. 2.

[52] Timmins asserts that ACL is his common employer, along with ADL. When Timmins signed his Employment Agreement, he was contracting with and being hired by ADL. Subsequently, ACL was created. Timmins asserts both he and the others who worked for ADL and ACL dealt with the two companies interchangeably and he asserts that ACL treated him as an employee, just as ADL treated him as an employee.

[53] In addressing whether an entity is a common employer, the court examines the objective facts to determine if there was an intention to create an employer/employee relationship with the joint employer. There may be any number of factors that may be considered but the concept of effective control over the employee is a significant factor which must be weighed with any other factors, including any written employment agreement. Justice Zarnett in *O'Reilly v. ClearMRI Solutions Ltd.* described it this way:

[54] The conduct most germane to showing an intention that there was an employment relationship with two or more members of an interrelated corporate group is conduct which reveals that effective control over the employee resided with those members[4] : *Downtown Eatery*, at paras. 32-33. This is consistent with how the law distinguishes employment from other types of relationships. Control over such matters as the selection of employees, payment of wages or other remuneration, method of work, and ability to dismiss, can be important indicators of an employer/employee relationship: *Baldwin v. Erin District High School Board*, 1961 CanLII 213 (ON CA), 1961 O.R. 687, at para 11, aff'd 1962 CanLII 527 (SCC), 36 D.L.R. (2d) 244 (SCC); see also *Bagby v. Gustavson International Drilling Co. Ltd.*, 1980 ABCA 227, 24 A.R. 181, at paras. 48-50.

[55] A written agreement that specifies an employer other than the corporation(s) alleged to be the common employers may also be relevant. The extent of its relevance depends on how the existence and terms of the written agreement, in light of the facts, informs the question of whether there was an intention that others were also employers.

[54] The mere existence of a corporate relationship between two entities does not amount to a common employer. As stated by Justice Zarnett: “Whether the related corporations actually undertook to perform those obligations is a question of contractual formation – did the parties objectively act in a way that shows they intended to be parties to an employment contract with each other, on the terms alleged?”, at para. 65.

[55] In considering whether ACL is a common employer, it is acknowledged that the Employment Agreement was with ADL. However, ACL was not created until after Timmins signed the Employment Agreement with ADL. In my view, on its own, the written agreement with ADL is a neutral consideration given that ACL was not yet in existence. The ordering of responsibility between ADL and ACL and their employees only became a consideration after Timmins signed the Employment Agreement and ACL was created.

[56] Timmins testified that following ACL's incorporation he "continued receiving direction and instruction from ADL's upper management" but he "understood both companies to be the beneficiaries of [his] efforts." He testified that senior management at both companies conflated their roles and made little distinction between the two companies. The deponent on discovery for the Defendants indicated that executives of ADL and ACL referred to themselves as executives for "Artisan". The deponent went on to say: "ACL and ADL were not distinctions commonly used within the Artisan organization when talking about team members, products, what we were trying to accomplish as a company." In other words, the employees of ACL and ADL were working towards a common objective as one team and were treated as such by both entities.

[57] The fact that the entities made no distinction as to their roles is apparent on the notice of termination given to Timmins. Even though Timmins was hired by ADL, the termination letter advised that "we are terminating your employment with Artisan Cell Labs, Inc. (hereinafter referred to as the "Company") effective immediately". The accompanying proposed release provided that Timmins was to "hereby release and forever discharge Artisan Cell Labs, Inc. (hereinafter referred to as the "Employer"), which includes its related subsidiary....". Indeed, when addressing Timmins' claim for damages, counsel responded they acted for Artisans which they defined as "Artisan Cell Labs, Inc. ("Artisan")".

[58] In my view, the evidence points to the fact that both ADL and ACL operated a common enterprise and acted interchangeably toward Timmins. Most significantly, ACL believed it had the right to terminate Timmins, requested a release and then had its lawyers negotiate on its behalf, even though the Employment Agreement was with ADL. I find that ADL and ACL both thought of themselves and acted as if they were the employer of Timmins. Accordingly, I find both ADL and ACL jointly responsible for the damages arising from Timmins termination.

Should Punitive Damages be awarded?

[59] Timmins claims punitive damages. Punitive damages are only awarded in exceptional circumstances. Not only must there be an independent actionable wrong, but there must be conduct that is "harsh, vindictive, reprehensible and malicious", which, by any reasonable standard, is "deserving of full condemnation and punishment": *Honda Canada Inc. v. Keays*, 2008 SCC 39, [2008] 2 SCR 362, at para. 68. In considering whether an award of punitive damages is warranted, the court must also consider whether any compensatory damage awarded already carries an element of deterrence, such that punitive damages may not be warranted: *Honda Canada Inc. v. Keays*, at para. 69. This is particularly so where the conduct giving rise to the claim for punitive damage is the same conduct that was central to awarding the compensatory damages.

[60] Timmins claims \$50,000 in punitive damages. The basis for his claim is that the defendants “delivered a termination letter overtly stating that he would receive one-third (one out of three) of his minimum entitlements under the ESA” and that they did so “while simultaneously refusing to remit the three months’ severance provided in his contract unless he signed an all-encompassing full and final release”.

[61] This is the very conduct that resulted in this court setting aside the termination provision in the Employment Agreement which resulted in an award of nine months of common law notice. The award is three times the contractual notice. In my view, the compensatory award is a sufficient deterrence such that punitive damages are unwarranted.

[62] It is further submitted that “the Defendants further confounded Timmins’ financial strain and ability to mitigate by leveraging an inferior licensing agreement against his refusal to sign their full and final release, by leveraging an inferior licensing agreement against his refusal to sign their full and final release.”

[63] In my view, there is insufficient evidence to suggest that the intention of the defendants was to leverage the licence agreement in the fashion suggested. In fact, the communication from the Defendants to Timmins after the notice of termination was given was that the Defendants did not seek to tie the severance discussions with the licence. In correspondence, the Defendants specifically stated that they had no “need or desire to connect [Timmins] separation and any licence” rather their “desire is the opposite, to make sure the two items are not connected and staged”.

[64] It is also argued that the Defendants “wound down their business and left Timmins with nothing”. The implication is that the Defendants took steps to close their businesses to deny Timmins any recovery on a judgment. There is little evidence in this regard. I am pointed to Timmins’ affidavit that merely states that the Defendants have “wound up” with no details as to what is meant by “wound up” or the circumstances. The evidence is far too vague to consider an award of punitive damages on this basis.

[65] In the circumstances, I decline to award punitive damages.

Costs

[66] Timmins seeks costs to be assessed on a substantial indemnity scale. Substantial indemnity costs are the exception, not the rule. There are no submissions accompanying the request. In the absence of any submissions, costs are assessed on a partial indemnity scale.

[67] Partial indemnity hourly rates are generally compensated in the range of 55-60% of the client hourly rates, assuming the client hourly rates are reasonable: *Inter-Leasing Inc. v. Ontario*, 2014 ONCA 683, at para. 5. In this case, I accept the hourly rates charged by the lawyer by Timmins are reasonable. Having reviewed the bill of costs, I also accept the hours spent by counsel were reasonable. On the basis that the fees to the client were \$40,050, I assess fees on a partial scale to be \$23,000, using the mid-point of the rate approved in *Inter-Leasing*. To this, there is to

be added taxes of \$3,000 and disbursements of \$1,900. The total amount of costs owing from the defendants to the plaintiff is \$27,900.

[68] There is still a consideration as to whether the overall amount is reasonable in the circumstances. I find the amounts to be proportionate to the matters in issue in this proceeding and commensurate with the level of complexity involved in this action. In my view, the fee is well within the range of what an unsuccessful party in actions of this magnitude should reasonably expect to pay. Accordingly, I find the amount of \$27,900 to be fair and reasonable partial indemnity costs owing from the Defendants to the Plaintiff: *Boucher v. Public Accountants Council for the Province of Ontario*, 2004 CanLII 14579 (ON CA).

Disposition

[69] The Plaintiff is awarded damages in the amount of \$456,908.82 plus pre- and post-judgment interest in accordance with the *Court of Justice Act*.

[70] The Plaintiff is also awarded costs of \$27,900 plus post-judgment interest in accordance with the *Courts of Justice Act*.

[71] The Defendants are jointly and severely responsible for the payments of the above awarded damages, costs, and interest.

[72] Counsel for the Plaintiff may provide a draft judgment for my review by forwarding the draft to my judicial assistant.

Callaghan J.

Released: January 7, 2025

CITATION: Timmins v. Artisan Cells, 2024 ONSC 7123
COURT FILE NO.: CV-23-00700180-0000
DATE: 20250107

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

Nicholas Timmins

Plaintiff

– and –

Artisan Cell Labs Inc. and Artisan Development Labs,
Inc.

Defendants

REASONS FOR JUDGMENT

Callaghan J.

Released: January 7, 2025