CITATION: Scarrow v. Walkey et al, 2024 ONSC 3876
COURT FILE NO.: CV-19-00000476-0000 (Guelph)
DATE: 20240708

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
STEVE SCARROW	)	Meryl Rodrigues and Kathryn Orydzuk, for the Plaintiff
	)	
Plaintiff	)	
	)	
- and -	)	
	)	
JOHN ROBERT WALKEY, RIVERGLEN FARMS LIMITED, GARY FARMS LIMITED, and JAMES WILSON & SONS LIMITED	)	John Robert Walkey, in person
	)	Riverglen Farms Limited, no one appearing for the defendant
	)	
	)	Gary Farms Limited, no one appearing for the defendant
	)	
	)	James Wilson & Sons Limited, no one appearing for the defendant
	)	
	)	
	)	
	)	
Defendants	)	
	)	
	)	
	)	**HEARD:** May 16, 2024

REASONS FOR JUDGMENT

JUSTICE G. D. LEMON

The Issues

[1] Mr. Scarrow has sued the defendants for a variety of remedies based on what he alleges was his wrongful dismissal from his loyal and long-term employment with the defendants. Despite many opportunities to defend the action, none of the defendants filed a defence. The matter then proceeded before me as an undefended trial.

[2] For the following reasons, I find that the defendants, jointly and severally, owe Mr. Scarrow the sum of $434,980.00. I write these reasons for Mr. Scarrow and Mr. Walkey to explain why I am not ordering as much as Mr. Scarrow was hoping but ordering far more than Mr. Walkey might have expected.

The Background

The Defendants

[3] The defendant, Mr. Walkey, attended in court on the morning of the hearing before me. He asked for time to file his defence. I dismissed that request because of the history of the proceedings. This action had come before Justice Petersen at the assignment court on April 30, 2024. At that time, she endorsed:

> [1] This matter was on the docket for Assignment Court today. A. Monardo attended as agent for the Plaintiff's lawyers. The Defendants are all unrepresented. The

personal Defendant, Steve Scarrow, [*sic*] did not appear today. No one appeared on behalf of the three corporate Defendants.

HISTORY OF THE PROCEEDING

[2] The Statement of Claim in this matter was issued on December 31, 2019. It is an action for damages based on wrongful constructive dismissal of the Plaintiff by the Defendants.

[3] The Defendants were served with the Statement of Claim on May 8, 2020 (with acknowledgement of receipt by all Defendants dated May 27, 2020). The Defendants did not serve and file a Statement of Defence, nor did they serve a Notice of Intent to Defend.

[4] On September 21, 2020, the Defendants were put on notice that the Plaintiff intended to take steps to have them noted in default unless they served and filed a Statement of Defence by October 15, 2020.

[5] The Defendants were noted in default on January 22, 2021.

[6] In May, 2023, the Plaintiff served a motion for a default judgment, seeking an order for payment of damages in the amount of $822,500. The personal Defendant attended the motion hearing on June 6, 2023 and requested an adjournment. Justice Wilkinson granted the Defendant leave to bring a motion on August 8, 2023 to seek an Order setting aside the default notice. She also ruled that the motion could not proceed on a short motions list by way of affidavit evidence, given the nature and quantum of the claims made by the Plaintiff. She ordered that the matter proceed by way of a trial with *viva voce* evidence.

[7] Justice Miller heard the Defendants' motion to set aside the default notice on August 8, 2023. The personal

Defendant, John Robert Walkey, appeared self-represented. No one attended on behalf of the corporate Defendants.

[8] Justice Miller ruled that the Defendants would be permitted to defend the action, provided that they complied with certain Orders, including (but not limited to) the following: The corporate Defendants had to be represented by counsel or Mr. Walkey was required to bring a motion to represent them not later than August 20, 2023. The Defendants were required to serve and file a Statement of Defence by no later than September 8, 2023, at which point the noting in default would be set aside. If no Statement of Defence was filed by that date, the noting in default would remain in place for all Defendants and the Plaintiff could then schedule an uncontested trial.

[9] Mr. Walkey did not bring a motion to represent the corporate Defendants and none of the Defendants filed a Statement of Defence.

TODAY'S APPEARANCE

[10] Ms. Monardo attended Assignment Court today on behalf of Plaintiff's counsel, to schedule a one-day uncontested trial of this action.

[11] The trial is scheduled for 10:00 AM on May 16, 2024, to be conducted in person at the Guelph Courthouse (74 Woolwich Street).

[12] The Court does not have contact information on file for the Defendants. Ms. Monardo undertook to serve a copy of this Endorsement on all Defendants, so that they will have notice of the date fixed for the uncontested trial.

[Emphasis in original.]

[4] When Mr. Walkey attended before me, he did not dispute that history. However, he said that he could not afford a lawyer but did have some documents to file with respect to allowing him to act on behalf of the companies. He had not filed those documents nor served them on the plaintiff because he could not pay the costs set out in Miller J.'s order.

[5] As could be expected, Mr. Scarrow wished to proceed as scheduled.

[6] In my view, the determination of Mr. Walkey's involvement had already been made by Miller J. in September of 2023. She provided clear obligations and timelines for the defendants, and they did not comply with them. There was nothing before me to change that result and I allowed the trial to proceed. See also: *Protrans Personnel Services Inc. v. Stevens Resource Group – USA Inc.,* 2024 ONCA 483; *GlycoBioSciences Inc. (Glyco) v. Industria Farmaceutica Andromaco, S.A., de C.V. (Andromaco)*, 2024 ONCA 481.

[7] Mr. Walkey was invited to remain and observe the proceedings. He did so until the lunch break.

The Admissions

[8] Rule 19.02 of Ontario's *Rules of Civil Procedure* sets out that where a defendant is noted in default, it is deemed to admit all the allegations of facts made

in the statement of claim. In this case, Mr. Scarrow submits that the defendants are deemed to have admitted paragraphs 2, 3, 4, 5, 6, 8, 9, 10, 11, 12, 13, 16, 17, 18, 21, 22 and 23 of the statement of claim. Those admissions form the background evidence for this decision, and I find those as facts for my reasons to follow. Those admitted pleadings are as follows.

[9] Some of the admissions are of fact and law. To the extent that they are mixed, I have made my own determinations as set out below. See *Paul's Transport Inc. v. Immediate Logistics Limited*, 2022 ONCA 573, at paras 77and 80.

[10] Some of the dates of events varied between the pleadings and the *viva voce* evidence but nothing turns on those differences.

[11] The plaintiff, Steve Scarrow, resides in the Town of Fergus, in the Province of Ontario. At all material times, the plaintiff was an employee of John Robert Walkey, Riverglen Farms Limited, Gary Farms Limited, and/or James Wilson & Sons Limited (hereinafter "the defendants").

[12] The defendant, John Robert Walkey, is a resident of Ontario. At all materials times, Mr. Walkey was the employer of the plaintiff and a principal and the controlling mind of the defendants, Riverglen Farms Limited, Gary Farms Limited, and James Wilson & Sons Limited.

[13] The defendant, Riverglen Farms Limited, is a corporation duly incorporated pursuant to the laws of the Province of Ontario. At all material times, the defendant, Riverglen Farms Limited, was a common, successive and/or related employer of the plaintiff.

[14] The defendant, Gary Farms Limited, is a corporation duly incorporated pursuant to the laws of the Province of Ontario. At all material times, the defendant, Gary Farms Limited, was a common, successive and/or related employer of the plaintiff.

[15] The defendant, James Wilson & Sons Limited, is a corporation duly incorporated pursuant to the laws of the Province of Ontario. At all materials times, the defendant James Wilson & Sons Limited, was a common, successive and/or related employer of the plaintiff.

[16] The plaintiff commenced working for the defendants in or about 1979.

[17] On or about January 22, 2019, when the plaintiff reported to work, he was advised by the defendants that he was laid off, effectively January 18, 2019 (the prior Friday), without cause and without the provision of any notice of termination or payment in lieu thereof. The plaintiff was told that the lay-off was temporary, with work to resume in or around April 2019. Notwithstanding this, the plaintiff

continued to assist the defendants from time to time as requested with work tasks the defendants needed done. He did so without pay. In fact, after January 18, 2019, he never received any further pay from the defendants.

[18] On or about May 4, 2019, the defendants constructively dismissed the plaintiff when they:

(a) told him, effective immediately, there would be significant and fundamental changes to his job duties;
(b) insisted that he accept improper and illegal payment arrangements as compensation; and
(c) failed to provide him any notice of termination or payment in lieu thereof.

[19] At the time of his dismissal, the plaintiff was fifty-eight (58) years of age and had been continuously employed by the defendants for his entire vocational life of some forty (40) years, during which he was employed as a farm labourer/manager.

[20] As of January 2019, the plaintiff's annual salary was approximately $55,000.

[21] It was an implied term of the plaintiff's employment relationship with the defendants that his employment would continue for an indefinite term and only terminated on the provision of reasonable notice of termination or payment in lieu thereof at common law.

[22] The plaintiff states that in or around 1996, he took a significant pay cut when his residence was no longer provided by the defendants as part of his employment compensation, as it had been previously, while his salary remained virtually unchanged. The plaintiff further states that his annual salary remained virtually unchanged over the course of his last 25 years or so of employment with the defendants.

[23] The plaintiff states that he was nevertheless induced to continue and maintain his employment with the defendants, including working overtime hours, on the assurances and agreement that the defendant John Robert Walkey, on behalf of the defendants, would provide an allowance upon the plaintiff's retirement.

[24] To date, the plaintiff has not received any such allowance as promised. The plaintiff pleads that the defendants breached the terms of the agreement made with respect to the retirement allowance.

[25] Since his termination from employment, the plaintiff has been seeking to mitigate his damages.

[26] The plaintiff has been, and will be, put to out-of-pocket disbursements in attempting to mitigate his damages.

[27] The plaintiff states that, as a result of the defendants' conduct, he has suffered and continues to suffer, *inter alia*, mental distress, frustration, aggravation, the erosion of his self-esteem and confidence. The plaintiff's normal enjoyment and comfort of his family life and friendships are severely impaired. His economic security and plans for future economic stability and comfort in retirement have been irreparably damaged, which is a source of great concern and emotional upset to the plaintiff.

Mr. Scarrow's Evidence

[28] Mr. Scarrow gave evidence at the hearing, and I will refer to that evidence as I deal with the various claims made by him. I found Mr. Scarrow to be a credible witness and, of course, there was no contrary evidence. I have no reason to reject what he told me.

1. Was Mr. Scarrow Constructively Dismissed?

[29] Mr. Scarrow submits that he was constructively dismissed.

The Authorities

[30] The Supreme Court of Canada established the legal framework for a constructive dismissal claim in *Potter v. New Brunswick Legal Aid Services Commission*, 2015 SCC 10, [2015] 1 S.C.R. 500. Constructive dismissal can take

one of two forms. The first can be a single unilateral act by an employer that breaches an essential term of an employment contract or, secondly, a constructive dismissal can arise from a series of acts that, when taken together, show the employer intended to be no longer bound by the employment contract.

[31] The first branch requires a review of specific terms of the contract. First, the employer's unilateral change must be found to objectively constitute a breach of the employment contract, and second, if it does constitute such a breach, it must be found to substantially alter an essential term of the contract. That second step must be in the view of the reasonable person in Mr. Scarrow's situation.

[32] The second branch requires that the evidence must lead a reasonable person to conclude that the employer no longer intended to be bound by the terms of the contract.

[33] The burden rests with the employee to establish that they have been constructively dismissed, and, if successful, they are entitled to damages in lieu of reasonable notice of termination.

[34] In *Pham v. Qualified Metal Fabricators Ltd*., 2023 ONCA 255, the Ontario Court of Appeal confirmed (para.29):

> Absent an express or implied term in an employment agreement to the contrary, a unilateral layoff by an employer is a substantial

> change in the employee's employment contract that constitutes constructive dismissal. This is so, even where the layoff is temporary. [Citations removed]

The Evidence

[35] As set out above, the defendants admit that on or about January 22, 2019, when Mr. Scarrow reported to work, he was advised by Mr. Walkey that he was laid off, effective January 18, 2019 (the prior Friday), without cause and without the provision of any notice of termination or payment in lieu thereof.

[36] Mr. Scarrow was told that the lay-off was temporary, with work to resume in or around April 2019. Notwithstanding this, Mr. Scarrow continued to assist the defendants with work tasks as requested by the defendants. He did so without pay. In fact, after January 18, 2019, he never received any further pay from the defendants.

[37] The defendants have admitted that on or about May 4, 2019, they :

(a) told him, effective immediately, that there would be significant and fundamental changes to his job duties;
(b) insisted that he accept an improper and illegal payment arrangement as compensation; and
(c) failed to provide him any notice of termination or payment in lieu thereof.

[38] Finally, the defendants admitted that it was an implied term of Mr. Scarrow's employment relationship that his employment would continue for an

indefinite term and only terminate on the provision of reasonable notice of termination or payment in lieu thereof at common law.

[39] In his evidence, Mr. Scarrow said that in 2015, he hurt his back lifting a propane tank. He went to the hospital and the doctor told him that he needed to quit heavy lifting. His wife phoned Mr. Walkey the following morning and Mr. Walkey simply said ok. He then hired a student to do the lifting. Mr. Walkey said nothing to him about the injury and that changed their relationship.

[40] Mr. Scarrow also testified that in October of 2018, he asked for a week off in January of 2019 and Mr. Walkey told him that he might be laid off. This surprised Mr. Scarrow but by the end of the discussion, Mr. Walkey told him to pretend that they had not had that discussion.

[41] However, in January of 2019, Mr. Scarrow was called to the office and Mr. Walkey told him that he was laid off effective April 30, 2019. He was then asked to come back to do security work on the farm. The security work was to maintain the furnace in the poultry barn and to check the office and storage areas. He opened and closed the property each day. That went on to the end of April.

[42] On May 4, 2019, Mr. Walkey met with Mr. Scarrow and told him that Mr. Scarrow could come back to work but still collect his employment insurance

benefits and be paid in cash for the balance. However, Mr. Scarrow would not have a student to help with the lifting.

[43] Mr. Scarrow said no to that proposal because it would be illegal, and he would not be able to do the work without a student to assist with the heavy lifting. In effect, he would be doing the same job but not on the same terms as in the past. Mr. Scarrow told Mr. Walkey that he, Mr. Scarrow, needed to speak with his doctor about his health.

[44] Mr. Scarrow felt that he had been taken advantage of and cut out of a promised retirement allowance. He felt “awful.”

The Analysis

[45] I have no difficulty in finding that Mr. Scarrow was constructively dismissed.

[46] Although there was no written contract between the parties, Mr. Scarrow had worked exclusively for Mr. Walkey and his companies between 1978 and 2019, at various farms, for his entire adult working life. Mr. Scarrow reasonably understood his employment was for an indefinite term.

[47] As set out above, the initial “lay-off” was a constructive dismissal but Mr. Scarrow elected to continue to work. The suggestion of an illegal contract for

employment on substantially reduced terms clearly shows that Mr. Walkey and the other defendants did not intend to be bound by the terms of the former contract.

The Result

[48] I find that Mr. Scarrow was constructively dismissed from his employment with the defendants on May 4, 2019.

2. How Much Notice Should Mr. Scarrow have Received?

[49] Mr. Scarrow says that he was entitled to 36 months of pay in lieu of notice.

The Authorities

[50] In *Bardal v. Globe & Mail Ltd.* (1960), 24 D.L.R. (2d) 140 (Ont. H.C.), (p. 145), the Ontario High Court found that:

> 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 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.

[51] In *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701, the Supreme Court of Canada added (para. 82):

> *. . .* I note, however, that *Bardal*, does not state, nor has it been interpreted to imply, that the factors it enumerated were exhaustive. Canadian courts have added several additional factors to the *Bardal* list. The application of these factors to the assessment of a dismissed employee's notice period will depend upon the particular circumstances of the case.
>
> [Citations removed.]

[52] The Court went on to say that the manner of dismissal was among the factors to be considered in determining the correct notice period. At paragraph 98, the court said:

> The obligation of good faith and fair dealing is incapable of precise definition. However, at a minimum, I believe that in the course of dismissal employers ought to be candid, reasonable, honest and forthright with their employees and should refrain from engaging in conduct that is unfair or is in bad faith by being, for example, untruthful, misleading or unduly insensitive.

[53] In *Miranda v. Respiratory Services Limited,* 2022 ONSC 6094*,* the court summarized (paras. 75- 76):

> . . . Determining the period of reasonable notice is an art, not a science, and there is no one "right" figure for reasonable notice. Judges must weigh and balance all relevant factors and no one factor should be given disproportionate weight. I note, however, that the factor of the character of the employment has been found to be a factor of declining relative importance.

> Although there is no absolute upper limit or cap on what constitutes reasonable notice, generally only exceptional circumstances will support a notice period in excess of 24 months.
>
> [Citations removed.]

The Evidence

[54] The admissions set out that, at the time of his dismissal, Mr. Scarrow was fifty-eight (58) years of age and had been continuously employed by the defendants for his entire vocational life of some forty (40) years, during which he was employed as a farm labourer/manager. As of January 2019, his annual salary was approximately $55,000.

[55] If find that it was an implied term of Mr. Scarrow's employment relationship with the defendants that his employment would continue for an indefinite term and only terminate on the provision of reasonable notice of termination or payment in lieu thereof at common law.

[56] Mr. Scarrow testified that, at the time of trial, he was 63 years of age. He has lived in the Fergus area for 55 years.

[57] He has been married for 42 years. He has three boys and 7 grandchildren. He worked for Mr. Walkey for 40 years, starting in 1978 as part-time and 1979 as full-time. He has a grade 12 education. He obtained a real estate license in 1980,

a certificate in welding and a license for pesticide application in 1984. All of those have since lapsed.

[58] Mr. Scarrow started working for James Wilson & Sons in 1978. Mr. Walkey was the president and owner of that company. Mr. Scarrow filed the corporate profile report as an exhibit to confirm that.

[59] James Wilson & Sons operated a feed mill and produced feed for animals and oatmeal for human consumption. He worked there loading, shipping, sweeping, oiling and greasing – whatever was needed.

[60] Mr. Scarrow was paid in cash on an hourly basis to start. However, he was paid by cheque starting in 1979 or 1980. He then was promoted to a salary for the same work. Mr. Scarrow recalled that salary to be in the “20,000 range”.

[61] The work was seasonal, but he worked more than a 9-hour day. The workweek was five days – 7 to 5 and some work on weekends to cover other employees. That situation continued to 1984.

[62] In 1984, he started to work for Gary Farms Ltd. This company was also owned by Mr. Walkey. Mr. Scarrow filed the corporate profile report as an exhibit to confirm that. This farm was an orchard farm along with corn, strawberries, raspberries, and black currents. For this, he was paid $35,000 per year as a farm

manager. He got the fields ready in the spring, planted crops, maintained the crops, and pruned. He and his wife and children lived in the house on the property rent free.

[63] There was no agreement on the number of hours to be worked but during the summer, he might work up to 60 hours a week. He was paid a salary regardless of the hours worked. The winter hours were spent working at Riverglen farms.

[64] Mr. Walkey also owned Riverglen Farms. Mr. Scarrow filed the corporate profile report as an exhibit to confirm that. At Riverglen, Mr. Scarrow managed 1,000 head of cattle, 3,000 pigs, 300,000 chickens and 50,000 turkeys. Muscovy ducks were added in 1998. Mr. Scarrow had also worked at Riverglen as far back as the time he was employed by James Wilson & Sons and Gary Farms.

[65] His role as farm manager at Riverglen was to oversee four farms near Fergus. There were four full-time employees but during the seasonal rush there were three more full-time and ten pickers to supervise.

[66] In 1988, his salary was increased to $45,000.

[67] Mr. Scarrow continued to work at Gary Farms until 1996. At that time, he heard rumours that the farm was sold but only knew for sure when the new owner

met him on the property. Mr. Walkey then told him that the farm was sold, and he had to move out within 6 weeks. He felt fortunate to find a house in Fergus.

[68] Mr. Scarrow took his instructions only from Mr. Walkey.

[69] This work continued to January 22, 2019. He was, by then, paid $54,990 per year for 60 hours a week or more to maintain all of the farms. However, he had lost the benefit of the house at Gary Farms. He also had a company truck, and the use of a phone was added later. He had two weeks of vacation a year but generally took only eight days out of ten. He was not paid for working on vacation time.

[70] Mr. Scarrow produced a letter from Riverglen Farms dated June 25, 2018. That confirmed that he had been employed there since April 1979. Mr. Scarrow filed his Record of Employment which confirmed that he had been employed by Riverglen Farms Ltd. from April 1979 to January 18, 2019. Although that letter says that Mr. Scarrow was paid $54,900 per year, his income tax documentation shows that he was paid $54,990.

[71] Over time, Riverglen had fewer farms and fewer employees, but Mr. Scarrow still had the same job and hours.

[72] Mr. Scarrow has not been employed since 2019. He could not get work because of his age and back issues. He was last paid by the defendants on January 18, 2019.

The Analysis

[73] In my view, there is no case law precedent to support Mr. Scarrow's submission of 36 months severance pay. Indeed, in argument, his counsel conceded that point. None of her many cases had such a long notice period and I could find none. However, given Mr. Scarrow's history of long-standing loyal service to the defendants, he is entitled to notice at the high end of the usual range.

[74] Mr. Scarrow worked for the defendants for his entire working life without complaint from his employer. He was, effectively, senior management in the various workplaces for which he was given responsibility. He continued to work despite being poorly treated in his last few months. He did not complain about a reduction in his remuneration in past years. The manner of his dismissal is shocking.

[75] Given his age, physical health, and training, I do not see that Mr. Scarrow could find other reasonable employment. I find that he has done what he could to mitigate his losses.

[76] In all of the circumstances, I find that he is entitled to 24 months of salary in lieu of working notice which amounts to $109,980.00.

The Result

[77] Mr. Scarrow is entitled to $109,980.00 in damages from the defendants for his wrongful dismissal.

3. Does the Failure to Pay a Retirement Allowance Constitute a Breach of Contract?

[78] Mr. Scarrow submits that he is owed $250,000 for his retirement allowance.

The Authorities

[79] In *Matthews v. Ocean Nutrition Canada Ltd.*, 2020 SCC 26, [2020] 3 S.C.R. 64, at para. 55, the Supreme Court of Canada set out a two-step approach to determine whether an employee dismissed without cause is entitled to damages in respect of a bonus or incentive benefit:

> Courts should accordingly ask two questions when determining whether the appropriate quantum of damages for breach of the implied term to provide reasonable notice includes bonus payments and certain other benefits. Would the employee have been entitled to the bonus or benefit as part of their compensation during the reasonable notice period? If so, do the terms of the employment contract or

bonus plan unambiguously take away or limit that common law right?

[80] This approach set out that:

> (i) when employees sue for damages for wrongful dismissal, they are claiming for damages as compensation for the income, benefits, and bonuses they would have received had the employer not breached the implied term to provide reasonable notice; and
>
> (ii) a contract of employment effectively "remains alive" for the purposes of assessing the employee's damages, in order to determine what compensation the employee would have been entitled to but for the dismissal.

[81] In *Arnone v. Best Theratronics Ltd*., 2015 ONCA 63, leave to appeal to S.C.C. refused, 2015 CanLII 43081 (SCC), Brown J.A. held (paras. 25 - 27):

> The determination of whether a contract of employment entitles an employee to the receipt of a retirement allowance where his employment has been terminated without cause is an inherently-fact specific exercise. In the present case, there was no dispute that it was a term of Arnone's contract of employment with Best Theratronics that he would receive a retirement allowance of one week for each year of service up to 30 weeks. Both parties clearly benefited from that term. From the point of view of Best Theratronics, the term gave employees an incentive to remain with the company for a long time. From an employee's point of view, the term allowed him to accumulate a monetary benefit which grew as his service with Best Theratronics increased over time and which would become available to him upon retirement.
>
> In my view, from that operation of the Best Theratronics retirement allowance comes an implied term that if an employee is terminated without cause, he would be entitled to

> payment of the accumulated retirement allowance in consideration for his long service and fidelity to the company.
>
> In the absence of any written term to the contrary, effect should be given to this implied term of the contract of employment.

The Evidence

[82] The defendants admit that Mr. Scarrow was induced to continue and maintain his employment with the defendants, including working overtime hours, on the assurances of an allowance upon Mr. Scarrow's retirement. However, to date, he has not received any such allowance as promised.

[83] Mr. Scarrow testified that he had continued to work after January 2019, because he was promised a retirement bonus.

[84] In 2006 or 2008, Mr. Scarrow had asked Mr. Walkey what direction the company was going because he was concerned that he did not have a retirement benefit or "safety net." Mr. Walkey told him that he would be well taken care of. Mr. Walkey told him that he would have 8 – 10% of nonvoting shares of Riverglen. Mr. Walkey told him that on the company's sale, "the big money is at the end." Mr. Scarrow took Mr. Walkey's word for that.

[85] Later, Mr. Scarrow heard that the farm was sold in 2008 or 2009. He saw a sale document that suggested that the farm property was sold for $2,200,000.

On the assumption that he would receive approximately $250,000 on retirement, he continued to work on the farm.

[86] Later, when Mr. Scarrow asked about the sale, Mr. Walkey said that the "big dollars [are] coming in the end." However, he received no bonus on termination and work continued as usual. His schedule did not change. It was his plan to continue to work until he received the retirement allowance.

[87] Mr. Scarrow testified that he always did more than was expected on the expectation of such a retirement allowance. He relied on that promise; otherwise, he would have gone into a different trade or would have asked for a raise. He did ask for a raise once but was turned down.

[88] Mr. Scarrow expected to retire whenever the farm operations stopped, or he otherwise parted company with Mr. Walkey. He believed that he had already earned that retirement. That is also why he continued to work even when not paid.

[89] They had never talked about how his employment would end but Mr. Walkey had "always been a man of his word."

The Analysis

[90] Based on the admissions and evidence at the hearing, I am satisfied that Mr. Scarrow was entitled to the retirement allowance as part of his compensation on termination. On the evidence, that bonus was not taken away at any time.

[91] The facts here are virtually the same as in *Arnone* and the same principles should apply.

[92] Mr. Scarrow worked long hours at a reducing income. It would only be reasonable that he would be properly recompensed by the agreed-upon retirement allowance. The defendants benefitted from that employee incentive and contract term.

[93] I have ignored some hearsay evidence on this issue but there is no evidence to suggest that Mr. Scarrow's valuation of the pension was incorrect.

The Result

[94] I find that Mr. Scarrow is entitled to $250,000.00 for his retirement allowance.

4. Is Mr. Scarrow Entitled to Payment of Outstanding Wages?

[95] Mr. Scarrow says that he is owed $5,000 or $6,000 for the time he worked between January 18, 2019, to May 4, 2019.

The Evidence

[96] Mr. Scarrow testified that he worked 7 hours on January 18, 2019, but was not paid. He worked a further 2 hours on Saturday and Sunday and 9 hours on Monday and fewer on Tuesday. He was not paid for those hours of work; however, he was later paid $100 in cash because that was all Mr. Walkey had left over from his sports betting.

[97] The security checks were to maintain the furnace in the poultry barn and to check the office and storage areas. He opened and closed the property each day for about an hour each trip. That went on to the end of April.

[98] As set out above, in April of 2019, when Mr. Walkey suggested that he could come back to work, be paid in cash and still collect employment insurance, his employment with the defendants came to an end.

[99] Mr. Scarrow expected to be called back to work so he kept track of his hours despite not being paid. Besides the security work, he also did work on Mr. Walkey's car and home. Mr. Scarrow's diary of his hours was filed in evidence. It showed that he worked 177 hours from January to the end of April 2019. He considers this close to a month's work and seeks to be paid based on his admitted $55,000 annual salary (divided by 12) or $4,583.33. This is on top of the work that

he did in January for which he was not paid. He agrees that this amount should be reduced by the amount that he was paid in cash.

The Analysis

[100] On this evidence, Mr. Scarrow worked as requested but was not paid for his work. I have no hesitation in granting this request.

The Result

[101] The defendants owe Mr. Scarrow $5,000.00 for unpaid wages.

5. Is Mr. Scarrow Entitled to Aggravated Damages?

[102] Mr. Scarrow says that he is entitled to $50,000 for aggravated damages.

The Authorities

[103] In *Middleton v. Highlands East (Municipality),* 2013 ONSC 763, 5 C.C.E.L. (4th) 289, McNamara J. summarized that (paras. 134 – 139):

> Generally speaking, in an action for breach of contract in the employment context, damages are confined to the loss suffered as a result of the employer's failure to give proper notice, and no damages are available to the employee for the actual loss of the job or distress that may have been suffered as a consequence of being terminated.
>
> As employment law developed, it did become possible in appropriate circumstances to pursue aggravated damages,

which required an “independent actionable wrong” usually founded in a tort that causes injury, as well as damages for bad faith in the manner of dismissal. That is, a breach by the employer of the obligations of good faith and fair dealing in the manner of dismissal.

Before the Supreme Court of Canada’s decision in *Keays v. Honda Canada Inc*., these two heads of damage would have been dealt with separately. The majority decision in *Honda*, however, changed both the nature and calculation of damages, as well as the obligation of good faith in the manner of dismissal such that these two heads of damage are to be dealt with together.

At para. 59 of *Honda*, Bastarache J. for the majority put it as follows:

To be perfectly clear, I will conclude this analysis of our jurisprudence by saying that there is no reason to retain the distinction between “true aggravated damages” resulting from a separate cause of action and moral damages resulting from conduct in the manner of termination. Damages attributable to conduct in the manner of dismissal are always to be awarded under the *Hadley* principle. Moreover, in cases where damages are awarded, no extension of the notice period is to be used to determine the proper amount to be paid. The amount is to be fixed according to the same principles and in the same way as in all other cases dealing with moral damages. Thus, if the employee can prove that the manner of dismissal caused mental distress that was in the contemplation of the parties, those damages will be awarded not through an arbitrary extension of the notice period, but through an award that reflects the actual damages. Examples of conduct in dismissal resulting in compensable damages are attacking the employee’s reputation by declarations made at the time of dismissal, misrepresentation regarding the reason for the decision, or dismissal meant to deprive the employee of a pension benefit or other right, permanent status for instance.

> The key issue in this analysis, then, is whether the Plaintiff has proven on a balance of probabilities that the conduct in the course of dismissal was unfair or in bad faith, and that that conduct caused mental distress that was in the contemplation of the parties.
>
> The first part of the analysis requires a determination of whether the evidence establishes bad faith or unfair dealing in the manner of dismissal.

The Evidence

[104] The defendants have admitted that, because of their conduct, Mr. Scarrow has suffered and continues to suffer, *inter alia*, mental distress, frustration, aggravation, the erosion of his self-esteem and confidence. Mr. Scarrow's normal enjoyment and the comfort of his family life and friendships have been severely impaired. His economic security and plans for future economic stability and comfort in retirement have been irreparably damaged and that is a source of great concern and emotional upset to him.

[105] Mr. Scarrow testified that, because of his termination, he had to sell the family home and move into his parents' basement. He and his wife then lived in a trailer and now live in an apartment. At this point in his evidence, he broke down and we took a break.

[106] He said that the time since termination has been “brutal.” He has not been able to live up to his promises. Although his wife has been supportive, she has been unable to retire.

[107] Mr. Scarrow is now on medications to control his anxiety and stress.

[108] Of significance, he had looked up to Mr. Walkey and now feels betrayed by Mr. Walkey. As Mr. Scarrow said:

> I, I took the man’s word for it and that to me, a man’s word, maybe I live in the old world, but a man’s word is a man’s word and that – when you lose that – my boys know that, when you lose that you lose who you are.
>
> ...
>
> He, he was kind of my, not idol, but you know, kind of a guru type thing, and I looked up to him. I really did. I looked up to him when I worked for him and he meant a lot to me . . .

The Analysis

[109] Only some of Mr. Scarrow’s upset relates to the manner of his termination. However, I find that he is entitled to aggravated damages.

[110] In hindsight, it is clear that Mr. Walkey intended to lay off Mr. Scarrow but would not give him the decency of any notice. Mr. Walkey was able to get what amounted to free work from Mr. Scarrow while he was left in limbo. Mr. Walkey did not even meet the statutory notice requirements.

[111] After all of the work that Mr. Scarrow had done for Mr. Walkey and his company, the offer of an illegal pay structure amounts to bad faith in the termination. While I cannot determine if Mr. Walkey intended to deprive Mr. Scarrow of his retirement allowance, that was the effect of the termination.

[112] The manner of termination left Mr. Scarrow with the embarrassment of having been betrayed and cheated by the man he had trusted for many years. That was clearly devastating to Mr. Scarrow.

[113] From my review of the caselaw in this area, the request of $50,000.00 is reasonable. For instance, in *Middleton,* for far worse conduct by the employer, McNamara J. granted an award of $30,000. However, that judgment was in 2013.

[114] In *Halupa v. Sagemedica Inc.,* 2019 ONSC 7411, O'Brien J. reviewed the case law and came to a determination of $30,000 on similar facts.

[115] Mr. Scarrow relies upon the recent Ontario Court of Appeal decision in *Krmpotic v. Thunder Bay Electronics Limited,* 2024 ONCA 332. There, in similar circumstances, the Court upheld the trial judge's determination of aggravated damages in the amount of $50,000.00.

[116] In all of the circumstances, I find that Mr. Scarrow is owed $50,000.00 in aggravated damages.

The Result

[117] The defendants owe Mr. Scarrow $50,000.00 in aggravated damages.

6. Is Mr. Scarrow Entitled to Punitive Damages?

[118] Mr. Scarrow says that he is entitled to $50,000 for punitive and exemplary damages.

The Authorities

[119] In *Halupa*, O'Brien J. summarized: (paras. 31-32):

> Punitive damages are intended to punish the defendant's behaviour and deter similar misconduct. They are not intended to compensate the plaintiff and should only be awarded in exceptional cases. As set out by the Court of Appeal, "[t]he type of conduct required to attract punitive damages has been described in many ways, such as: malicious, oppressive, arbitrary and high-handed that offends the court's sense of decency." In order to award punitive damages in a contract dispute, such as a wrongful dismissal, an independent, actionable wrong is required. A breach of the duty of good faith constitutes such an independent actionable wrong:
>
> Punitive damages must observe the proportionality principle by remaining rationally connected to the underlying goals of retribution, denunciation and deterrence. In the wrongful dismissal context, it is also necessary to assess the degree of vulnerability of the plaintiff, as well as the harm or potential harm directed to her.
>
> [Citations removed]

[120] In *Pate Estate v. Galway-Cavendish and Harvey (Township),* 2013 ONCA 669, 117 O.R. (3d) 481 (para. 105), I am reminded that any award of punitive damages, when added to compensatory damages must produce a total sum which is rationally required to punish the defendant. The amount must be proportionate to the blameworthiness of the defendant's conduct such that the more reprehensible the conduct, the higher the limit to the award.

[121] At para. 107, the Ontario Court of Appeal said:

> The purpose for an award of aggravated or mental distress damages is different from the purpose for an award of punitive damages. In fixing mental distress damages, the court focuses on compensating the plaintiff for his or her mental distress relating to the manner of dismissal. In fixing punitive damages, the court focuses on punishing the defendant's wrongful acts "that are so malicious and outrageous that they are deserving of punishment on their own"
>
> [Citations removed.]

[122] At paras. 118 – 119, the Court said:

> Conceptually, as the Supreme Court noted at para. 94 of *Whiten*, punitive damages are aimed at punishing the wrongdoing defendant for misconduct, but only where the other awards against the defendant are found to fall short of adequate punishment. The trial judge was therefore obliged to take into account the amounts that he had already awarded in compensatory damages.
>
> Compensatory damages including wrongful dismissal damages have a punitive element, which must be taken into account assessing punitive damages. In the context of a

> wrongful dismissal case, aggravated damages also have a punitive element, even though they are compensatory in nature. In this case, that would include the wrongful dismissal damages even though they were paid outside of the trial process as noted below.
>
> [Citations partly removed.]

The Evidence

[123] Mr. Scarrow relies upon the evidence already summarized above.

The Analysis

[124] In my view, even taking into consideration the amounts already ordered, this is a case for punitive damages.

[125] Mr. Walkey has failed in his duty of good faith and fair dealing and has failed to comply with the provisions of the *Employment Standards Act*. Those constitute independent and actionable wrongs. He has behaved in a heartless and cowardly way. He continued to ask Mr. Scarrow to work for four months but apparently had no intention of paying Mr. Scarrow even this low wage. Mr. Walkey placed his sports betting ahead of his loyal employee's care. His conduct overall drops to the level of being so malicious and outrageous that it is deserving of punishment on its own. That said, taking into account the amounts that the defendants are required to pay in this judgment, a further $20,000 will be adequate punishment for their conduct.

The Result

[126] For those reasons, Mr. Scarrow is awarded $20,000 for punitive damages.

7. Is Mr. Scarrow Entitled to Damages for Unjust Enrichment?

[127] Mr. Scarrow says that he is entitled to $300,000 for unjust enrichment. Although this was pleaded as stand-alone relief, in argument, it was an alternative if Mr. Scarrow were not successful in his claim for a retirement allowance.

The Evidence

[128] Mr. Scarrow relies on the evidence summarized above. That is to say, among other evidence, he took limited vacation time and worked at low wages that were effectively reduced when he lost his free accommodation. He often worked overtime or carried out personal work for his employers. He says that he should be paid those sums for which he was not compensated.

The Authorities

[129] Mr. Scarrow relies upon *Garland v. Consumers' Gas Co*., 2004 SCC 25, [2004] 1 S.C.R. 629 (para. 30), to submit that this cause of action has three

elements: (1) an enrichment of the defendant; (2) a corresponding deprivation of the plaintiff; and (3) an absence of juristic reason for the enrichment.

The Analysis

[130] Given my determination of the retirement allowance, I do not need to spend much time on this alternative aspect of the claim. However, in my view, Mr. Scarrow cannot meet the second and third elements of the unjust enrichment test.

[131] There is no doubt that the defendants have been enriched by Mr. Scarrow's work as their employee. That is the nature of an employee/employer relationship.

[132] However, at this point of the judgment, Mr. Scarrow is now to be paid for his work along with his retirement allowance. As Mr. Scarrow said in his evidence, he continued to work as he had on the basis of the promised retirement allowance. With that determination now made, he cannot be said to have been deprived.

[133] Further, there was no evidence led as to how I could quantify the loss if there was one. In submissions, counsel filed a calculation of cost-of-living adjustments over the years of 1996 to 2019 to show the difference between Mr. Scarrow's unchanging wage and the rising costs of inflation. However, that calculation did not include his vehicle and phone as part of his pay. Mr. Scarrow

testified that his work had decreased somewhat over time. I cannot make a damage calculation on this vague evidence.

[134] Third, on the basis of the agreement submitted by Mr. Scarrow and this judgment, there is a juristic reason for the enrichment. That is the employment contract as agreed by the parties' continued pattern of employment over the many years that Mr. Scarrow was employed. By the end of this judgment, Mr. Scarrow will be paid the amount that he agreed upon.

The Result

[135] For those reasons, Mr. Scarrow's claim for unjust enrichment is dismissed.

8. Are the Defendants including Mr. Walkey Jointly Responsible for the Damages Awarded?

Authorities

[136] In *Scamurra v. Scamurra Contracting,* 2022 ONSC 4222, Petersen J. summarized that (paras. 63 – 65):

> It is well-established in the wrongful dismissal jurisprudence that an employee may simultaneously have more than one employer. If an employer is a member of an interrelated corporate group, one or more other corporations in the group

> may also have liability for the employment obligations. They will only have liability, however, if the evidence establishes an intention by the parties to create an employment relationship between the individual employee and the related corporations.
>
> Determining that corporations are members of a commonly controlled corporate group is a necessary pre-condition to consideration of the common employer doctrine, but the doctrine does not automatically apply based only on the existence of such corporate interrelationships. As this Court noted in *Mazza v. Orange Corporate Services Inc.*:
>
> > [M]ere allegation of corporate affiliation simpliciter is not sufficient to bring the common employer doctrine into play…
> >
> > Any plaintiff invoking the common employer doctrine must be able to demonstrate on the particular facts of the case that he or she held a reasonable expectation in the circumstances that each of the alleged common employers were parties to the employment arrangement governing that particular employee at all relevant times.
>
> There are therefore two prongs to the test used to determine whether the doctrine of common employer applies. First, the Court must determine whether there is a significant degree of interrelationship and common control between the alleged common employers. Second, the Court must assess whether the employee held a reasonable expectation that the other companies were parties to his employment contract.
>
> [Citations removed.]

[137] In *642947 Ontario Ltd. v. Fleischer* (2001), 56 O.R. (3d) 417 (C.A.), at para. 68, Laskin J.A. clarified that:

> Typically, the corporate veil is pierced when the company is incorporated for an illegal, fraudulent or improper purpose. But it can also be pierced if when incorporated "those in control expressly direct a wrongful thing to be done":

> Sharpe J. set out a useful statement of the guiding principle in *Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co. (1996)*, "the courts will disregard the separate legal personality of a corporate entity where it is completely dominated and controlled and being used as a shield for fraudulent or improper conduct."
>
> [Citations removed.]

Evidence

[138] Again, I start with the admissions from the statement of claim. It is admitted that Mr. Walkey was the employer of Mr. Scarrow and a principal and the controlling mind of the defendants, Riverglen Farms Limited, Gary Farms Limited, and James Wilson & Sons Limited. Those corporations each admitted that they were a common, successive and/or related employer of Mr. Scarrow.

[139] From the evidence of Mr. Scarrow, he took his instructions from Mr. Walkey, the principal of all the corporations. There were no other corporate officers involved in the running of the businesses. Mr. Scarrow worked for all the entities at one time and also carried out personal work on Mr. Walkey's cars along with handy man jobs for Mr. Walkey's mother.

Analysis

[140] On this evidence, I am satisfied that there was a significant degree of interrelationship and common control between the three corporations and Mr.

Walkey. Further, Mr. Scarrow had a reasonable expectation that all of the other defendants were parties to his employment contract.

Result

[141] Accordingly, I find that the defendants are jointly and severally liable for Mr. Scarrow's damages as assessed above.

Result

[142] On those reasons, I find that Mr. Scarrow is owed the following by all of the defendants:

(a) $109,980.00 in damages from the defendants for his wrongful dismissal.

(b) $250,000.00 for his retirement allowance.

(c) $5,000.00 for unpaid wages before termination.

(d) $50,000.00 in aggravated damages.

(e) $20,000.00 for punitive damages.

Costs

[143] Rule 57.01 of our *Rules of Civil Procedure* sets out the factors that the court may consider when determining costs. The relevant factors that I should consider here are:

(a) the result in the proceeding,

(b) the experience of the lawyer for the party entitled to the costs as well as the rates charged, and the hours spent by that lawyer;

(c) the amount of costs that an unsuccessful party could reasonably expect to pay in relation to the step in the proceeding for which costs are being fixed;

(d) the amount claimed and the amount recovered in the proceeding;

(e) the complexity of the proceeding;

(f) the importance of the issues;

(g) the conduct of any party that tended to shorten or lengthen unnecessarily the duration of the proceeding.

[144] Modern costs rules are *designed* to foster three fundamental purposes: (1) to partially indemnify successful litigants for the cost of litigation; (2) to encourage settlement; and (3) to discourage and sanction inappropriate behaviour by litigants: *Fong v. Chan* (1999), 46 O.R. (3d) 330 (C.A.), at para. 22.

[145] Costs awards, at the end of the day, should reflect “what the court views as a fair and reasonable *amount* that should be paid by the unsuccessful parties”: see *Boucher v. Public Accountants Council for the Province of Ontario* (2004), 71 O.R. (3d) 291 (C.A), at para. 24.

[146] I have reviewed the Bill of Costs as filed by Mr. Scarrow. He seeks costs fixed in the amount of $75,797.18 on a partial indemnity basis or $112,998.69 on a solicitor and client basis. Both seem high to me.

[147] It must be remembered that the defendants have filed nothing in response so counsel have had to do nothing to respond to the defendants’ case. Although the failings of the defendants have delayed the proceeding, they have not made it more expensive.

[148] The hearing took less than a day but was lengthened by the number of issues to be argued. Mr. Scarrow has not been successful on all of them.

[149] A total of six lawyers have been involved in the file with two appearing in court. A lawyer of 30 years experience has been involved in all stages of the process even though the principal lawyers appear to be quite experienced. The combined hours spent on the file appear to be excessive and the hourly rate is on the high side.

[150] I note that an associate appeared at the Zoom assignment court. It appears that she charged 8.1 hours for that brief attendance.

[151] Counsel properly and candidly advised me that the costs request also includes the work covered by Miller J.'s earlier costs order. The orders should not overlap because the earlier order remains in effect for enforcement. This costs order should not include those amounts.

[152] At the end of the hearing, I advised counsel that I would review the Bill of Costs and ask for submissions if I needed them. In light of the concerns that I have expressed, I ask that counsel provide their costs submissions within the next 15 days. Those submissions shall be no more than five pages.

[153] The costs submissions shall be forwarded to my office in Guelph by electronic transfer to teresa.pearson@ontario.ca or by mail to Guelph Superior Courthouse, 74 Woolwich St., Guelph, N1H 3T9.

Justice G. D. Lemon

Released: July 08, 2024

CITATION: Scarrow v. Walkey et al, 2024 ONSC 3876
COURT FILE NO.: CV-19-00000476-0000 (Guelph)
DATE: 20240708

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

STEVE SCARROW

Plaintiff

- and –

JOHN ROBERT WALKEY, RIVERGLEN FARMS LIMITED, GARY FARMS LIMITED, and JAMES WILSON & SONS LIMITED

Defendants

REASONS FOR JUDGMENT

Justice G. D. Lemon

Released: July 08, 2024